



## Screen Australia Bill 2008

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## Screen Australia Bill 2008

**Date introduced:** 12 February 2008

**House:** House of Representatives

**Portfolio:** Environment, Heritage and the Arts

**Commencement:** Sections 1 and 2 commence upon Royal Assent. Sections 3-45 commence on a date to be fixed by proclamation, or six months after Royal Assent, whichever is the earliest.

**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 Bill seeks to establish a new statutory authority, to be called Screen Australia, merging the functions of the existing Australian Film Commission, the Film Finance Corporation Australia and Film Australia Limited.

## Background

Ever since David Gonski's 1997 report *Review of Commonwealth Assistance to the Film Industry* found significant functional duplication between the Commonwealth funded film agencies, some form of structural simplification of the film support sector has seemed a possible policy option – and indeed, since 1997 the film support options had broadened still further with the advent of piloted Film Licence Investment Corporations (FLICS) and a Refundable Film Tax Offset Scheme (RFTO).

In the last six years there has also been some debate over the degree to which Commonwealth film production support mechanisms should reflect cultural or purely economic imperatives.<sup>1</sup>

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1. See for example The Australian Film Commission, [Foreign film and Television drama production in Australia: a research report](#), June 2002; The Australian Film Commission, [A study of Australian and international funding and practice in the feature film industry](#), 2000; Malcolm Long Associates, *Policy Options for a More Competitive International Film & Television Production Industry in Australia*, Report for AusFILM International Inc. Nov. 2000; and, expressing concern that the pendulum had swung too far away from cultural

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The tension between the cultural and the economic could be seen in the different eligibility criteria for the tax concessions under section 10BA of the *Income Tax Assessment Act 1936* (the ITAA) or direct grants/loans from the Australian Film Financing Corporation and those for accessing the RFTO. With respect to the former, a film needs to be certified (first provisionally and then finally) as an 'Australian film' with the Minister, when assessing a film's Australian content, being obliged by Section 124ZAD of the ITAA to consider:

- (a) the subject matter of the film or proposed film;
- (b) the place or places where the film was, or the proposed film will be made;
- (c) the nationalities and places of residence of:
  - (i) the persons who took part, or who will take part, in the making of the film or proposed film (including authors, composers, actors, script writers, editors, producers, directors and technicians);
  - (ii) the persons who are, or who will be, the beneficial owners of the of shares in any company concerned in the making of the film or proposed film; and
  - (iii) the persons who are, or who will be, the beneficial owners of the copyright in the film or proposed film;
- (d) the source from which moneys that were used in the making of the film were, or that are to be used in the making of the proposed film will be, derived;
- (e) the details of the production expenditure incurred in respect of the film or the budgeted production expenditure to be incurred in respect of the proposed film; ...

The Refundable Film Tax Offset Scheme introduced in 2001, on the other hand tied benefits to production expenditure in Australia. If a film's Australian production expenditure was between A\$15 million and A\$50 million, the producers had to spend a minimum of 70 per cent of the film's total production expenditure on film production activity in Australia to qualify for the offset. If a film's Australian production expenditure was A\$50 million or more, the producer qualified for the offset regardless of the ratio of Australian expenditure to the film's overall budget.

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imperatives, Nick Herd, *Chasing the Runaways: Foreign film production and film studio development in Australia 1988-2002*, A Currency House monograph, May 2004.

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Responding to a perceived need to both simplify support mechanisms and clarify cultural and economic imperatives and rationale behind programs, major structural changes were announced in the May 2007 Budget Statement and backed with a pledge of \$282.9 million, to be provided over four years.

The package of measures included the amalgamation of the Australian Film Commission (AFC), Film Finance Corporation Australia (FFC) and Film Australia Limited into a new single agency, the Australian Screen Authority (ASA). The research and statistic functions of the AFC were going to find a home in the Australian Film, Television and Radio School, also in Sydney, and the latter would receive funds to support the transfer.

The newly established ASA was going to be given a budget far in excess of the sum of the budgets of the three agencies it would replace. The package of measures also introduced a new producer tax rebate, administered by the ASA, for which both Australian and overseas producers could be eligible.

- An Australian producer would be eligible for a 40 per cent refundable rebate on feature films and 20 per cent refundable rebate on other media productions – so long as the production meets Australian creative control criteria and minimum expenditure thresholds.
- An overseas producer would be eligible for a 15 per cent rebate (as opposed to 12.5 per cent under the RFTO that would be discontinued) on eligible expenditure, where that expenditure exceeds \$5m – and the definition of such expenditure is going to be broadened from that in the RFTO to include expenditure on post, digital and visual effects production in Australia even if the film is not made in Australia.

This new two stream mechanism would replace not only the above mentioned RFTO, but also the current investor tax incentives available through Division 10BA and Division 10B of the ITAA (no new applications accepted after 30 June 2007), and the Film Licensed Investment Company (FLIC—which would not be renewed beyond its current expiry date of 30 June 2007). Responsibility for raising money and creating successful films would henceforth rest mostly with the producer— not the investment consortium as in the FLICs model, and unlike under the 10BA ITAA scheme it was to be the producer (or production house), rather than an individual film, that private investors would be backing.

On 7 September 2007 Senator the Hon. George Brandis, the then Minister for the Arts and Sport, issued a Media Release entitled [Consultation on Australian Government legislation to create a new screen agency - Screen Australia](#) announcing the release for public comment of an Exposure Draft:

Screen Australia will herald in a new era in film and television production in Australia, in which the Australian Government will invest an additional \$300 million over four years. The draft legislation outlines the proposed functions and powers of the new body, together with the proposed governance and accountability arrangements.

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The functions largely reflect the combined functions of the existing agencies but also emphasise the Government's desire to see the agency promote an improved commercial focus in the sector, and the development of areas of particular public interest, such as documentaries and children's programs.

Statutory acknowledgement of a National Film and Sound Archive is also provided for in the draft legislation.

The release of the draft legislation sets a framework for Screen Australia but there will be much discussion in coming months on detailed policies, priorities, programs and organisational arrangements within Screen Australia.

I am keen that the public and the industry have the ability to consider these very important issues. A high level committee has been examining implementation issues associated with the merger.

The committee, comprising the CEOs of the affected agencies and the Department of Communications, Information Technology and the Arts, will shortly be commencing detailed consultations on these issues, now that the draft legislative framework has been made available.

Comment on the draft legislative provisions was sought by 14 September 2007, but no report on the consultation process was released before the Federal election was called in October 2007.

The Australian Labor Party committed to establishing Screen Australia in its 2007 Election Policy *New Directions for the Arts* and on 8 February 2008 the Minister for Environment, Heritage, and the Arts, Hon. Peter Garrett, released a [Screen Australia Bill Exposure Draft](#) that was nearly identical to that released by the previous government and in a [Media release](#) 'Call for public comment on Film Agency Legislation' said:

The new Screen Australia, which will commence work on 1 July, will have a strong cultural focus as well as supporting development of a sustainable Australian screen industry by strengthening screen businesses. It will bring together the main functions of the Australian Film Commission, the Film Finance Corporation Australia and Film Australia Limited. The new agency will continue the work of these three agencies, such as supporting productions of national significance and public interest and providing practitioner and industry development, access programs and promotional activities. Under consequential legislation, Screen Australia will administer the new Producer Offset.

The new Bill under its Part 1 Clause 3 Definitions, offers a definition of "Australian program" to mean a program, which in the opinion of Screen Australia has or will have 'significant Australian content' (necessary to be eligible for the new Australian producers' rebate – more generous than that for overseas producers) which is almost identical to that legislated for the 10BA certification process. Public debate has continued, however, on the specific weight that is appropriate to different criteria, and whether to be eligible for the

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Australian producers' rebate there should be a specified minimum expectation with respect to the Australian nationality of key creative personnel.<sup>2</sup>

## Financial implications

The Explanatory Memorandum states that a no significant financial impact is anticipated.

## Main provisions

### Part 1—Introduction

#### Clause 3 - Definitions

**Clause 3** provides a list of the definition of key terms used in the Bill. A few of the significant terms in this list are:

- **Australian Program:** refers to a program which in the opinion of Screen Australia (hereafter 'SA'), has or will have, a significant Australian content. According the Explanatory Memorandum<sup>3</sup>, the determination of whether a program has significant Australian content will be made by having reference to considerations such as:
  - The subject matter of the film;
  - The place where the film is made;
  - The nationalities and places of residence of the persons who took part in the making of the film (including producers, directors, authors, scriptwriters, composers, actors, editors, directors of photography, production designers and other film technicians);
  - The details of production expenditure incurred in respect of the film; and
  - Other matters that Screen Australia considers relevant.

The breadth of the expression 'will have a significant Australian content' is intended to capture programs which have not been completed, including incomplete programs which do not as yet have significant Australian content, but which SA anticipates will have significant Australian content in the future.

- **Program:** has a broad meaning referring to a screen production in the form of films for cinema release, television productions and other platforms including the internet

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2. E.g. Michael Bodey, 'Shoot and we'll cough up', *The Australian*, February 27, 2008

3. Explanatory Memorandum, p.3.

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and other digital media. The definition of program also captures a soundtrack for a silent movie or the production of new sound for an old film. It does not include sound recordings that have no relation to the screen productions as mentioned above.

Significantly, the terms also includes direct support for live productions simply because they are being filmed. The Explanatory Memorandum indicates that the term ‘distributed’ in paragraph (c) of the definitions section is similarly broad and includes the dissemination of films and other programs for public release.

- **Screen production:** is meant to be generous in its capture and includes all programs that are capable of being displayed on screen.

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

The Act applies both within and outside Australia. This will permit SA to pursue relevant activities overseas.

### Part 2—Screen Australia

#### **Clause 6 – Functions of Screen Australia**

The functions of SA and the way in which they will be carried out are set out by **paragraphs 6(1) (a), (b), (c) and (d)**.

SA will ‘support and promote the development of a highly creative, innovative and commercially sustainable’ Australian production industry; this may obviously involve assisting with the development of filmmakers’ skills. Achieving its goals will necessarily also require SA to support or engage in the ‘development, production, promotion and distribution’ of Australian programs, and provision of access to those programs. SA’s ‘support and promotion of the development of a screen culture’ in Australia will be an integral part of this, as will SA’s marketing of Australian films outside Australia in venues such as film festivals and trade shows.

**Paragraphs 6(2)(a), (b), (c) and (d)** provide a non-exhaustive list of the ways in which SA may achieve these supportive functions, such as.

- providing financial assistance (through a loan, grant, investment or otherwise);
- providing financial guarantees ;
- commissioning a person to sponsor or support programs or other activities;
- providing services, facilities, programs or equipment to producers of Australian films and recordings.

**Subclause 6(3)** specifies that as far as is practicable, certain strategic areas of consideration and focus should guide SA in its activities. These are:

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- Ensuring the development of a diverse range of Australian programs that deal with matters of national interest or importance to Australians, or that convey aspects of Australia or the Australian way of life; and
- An emphasis on documentaries, programs of interest or relevance to children, and programs with a high level of cultural or artistic merit.
- The promotion of engagement with the private sector as the primary means of support for projects with commercial potential -- especially in light of the recent introduction of Producer Offset<sup>4</sup>.

**Subclause 6(4)** provides that in performing its functions, SA may charge fees. SA may also perform its functions alone or together with other persons (**subclause 6(5)**).

### **Clause 7 – Powers of Screen Australia**

This clause makes it explicit and seeks to remove doubt that SA will have the power to do all things necessary or convenient in connection with performing its functions. **Subclause 7(2)** provides a non-exhaustive list of such powers. Examples include the power to:

- Accept gifts; bequests etc.
- Act as a trustee of money, programs or other property vested in SA on trust;
- Only with the written approval of the Minister for Environment, Heritage and the Arts, to form or participate with others in forming a company; or to acquire, hold or dispose of capital in companies;
- To do anything else incidental to any of its functions.

## Part 3—The Board of Screen Australia

### Division 1 – The Board

#### **Clause 9 – the role of the board**

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4. A producer offset is a new Australian Screen Production Incentive which was introduced as part of the 2007-08 Federal Budget. It provides a tax offset of 40 per cent of eligible Australian expenditure to producers of qualifying feature films, and a 20 per cent rate for qualifying television productions, including TV series, documentaries, mini-series. The offset is delivered through the taxation system and is not capped. An overseas producer is eligible for a 15 per cent rebate on eligible expenditure, where that expenditure exceeds \$5m.  
Source: < [http://www.afc.gov.au/filminginaustralia/taxfins/federal/fiapage\\_56.aspx](http://www.afc.gov.au/filminginaustralia/taxfins/federal/fiapage_56.aspx) >  
Accessed 7 March 2008.

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**Subclauses 9(1), (2), (3) and (4)** collectively define the role of the board through which the SA acts.

The Board is responsible for the proper and efficient performance of SA's functions. As such, the board is bestowed with the power to do all things necessary or convenient for or in connection with the performance of its duties.

**Subclause 9(4)** allows all things done in the name of, or on behalf of, SA by the Board, or with the authority of the Board, may be done on the basis of the opinion, belief or state of mind of the person or body acting on behalf of SA.

### **Clauses 10 and 11 - Board membership and appointment of members**

The board is to be comprised of the Chair, Deputy Chair and between three and seven other members (**clause 10**).

A board member shall be appointed on a part-time basis (**subclause 11(2)**) for a period of up to 3 years (**subclause 11(3)**), with the total period of appointment (made up of consecutive or non-consecutive periods) not being greater than 9 years (**subclause 11(4)**).

Interestingly, the Bill is silent on the criteria used to select and appoint board members. The companion Bill to this SA Bill 2008 - the National film and Sound Archives Bill 2008 - is also silent on this issue. This seems to represent a departure from a more prescriptive accountability trend in relation to the appointment of board members under the previous government, which amended a number of Acts in relation to statutory bodies following the findings and recommendations of the Uhrig Review.<sup>5</sup>

### **Clause 12 – Acting in Positions**

This clause simply states that in the Chair's absence, the Deputy Chair will act as the Chair with all the powers of the Chair.

### **Clause 13 - Remuneration of members**

This clause provides that remuneration of SA members is to be determined by the Remuneration Tribunal, and where no such determination is in operation, remuneration is to be prescribed by regulations.

### **Clause 14 – Leave of Members**

This clause provides that the Minister may grant a Chair leave of absence on the terms and conditions that the Minister determines. Also, that the Chair may grant leave of absence to

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5. For example, *Primary Industries and Energy Research and Development Amendment Act 2007*; *Agricultural and Veterinary Chemicals (Administration) Amendment Act 2007*; *Australian Wine and Brandy Corporation Amendment Act (No.1) 2007*.

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any other member on the terms and conditions that that Chair determines. However, where the Chair grants leave of absence to a member for a period of greater than 6 months, then they must notify the Minister of that decision.

### **Clause 15 – Resignation of Members**

This clause provides that a member may resign from their position by giving notice in writing to the minister, and that resignation takes effect from the date that it is received or at a later date if so specified in the letter of resignation.

### **Clause 16 – Termination of Appointment**

This clause lists the grounds under which the Minister may terminate the appointment of a Board member. The grounds are:

- By reason of misbehaviour or physical or mental incapacity; or
- If the member becomes bankrupt; or applies to take the benefit of any law for the relief of bankrupt or insolvent debtors; or compounds with his or her creditors; or makes an assignment of his or her remuneration for the benefit of his or her creditors; or
- If the member fails, without reasonable excuse, to comply with an obligation imposed on him or her by section 27F or 27J of the *Commonwealth Authorities and Companies Act 1997*; or
- If the member is absent, except on leave of absence, from 3 consecutive meetings of the Board.

## **Division 2 – Board Procedures**

### **Clause 18 - Meetings**

This clause sets out the operative requirements for meetings dealing with matters including:

The requirement that meetings must be convened by the Chair

The quorum requirement set as the majority of current members except where there is a conflict of interest that requires a member not to be present during deliberations or to take part in a decision in relation to a matter and this member's absence takes the meeting below quorum, the remaining members constitute quorum in relation to that matter (**subclause 18(2)**).

A question taken will be answered by a majority of members (**subclause 18(4)**) and the person presiding at a meeting will have the deliberative vote, and in the event of equality of votes, will have the deciding vote (**subclause 18(8)**).

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While the Board is not required to keep a record of all meetings, it is required to keep a record of all decisions (**subclause 18(9)**).

Subject to the Bill and the *Commonwealth Authorities and Companies Act 1997* (CAC Act), SA may regulate proceedings as it thinks fit (**subclause 18(10)**).

#### **Clause 19 – Decisions without meetings**

This clause allows the Board to determine that decisions can be made without a meeting and how agreement to this is to be indicated. Of course, records must be kept of any such decisions.

### Part 4 – Chief Executive Officer, Staff and consultants

#### **Division 1 – Chief Executive Officer**

**Clause 21** defines the **role of the CEO** as being responsible for the daily administration of the SA, with the power to do all things necessary or convenient to in connection with the performance of those duties. The CEO must act in conformity with policies and directions provided by the Board in writing, except in relation to the CEO's powers under the *Public Service Act 1999*.

All acts and things done by the CEO in the name of or on behalf of SA by the CEO, or with the authority of the CEO, are taken to have been done by SA (**subclause 21(4)**).

**Clause 22** and the associated subclauses deal with the **appointment of the CEO**. The CEO, who must not be a Board member, is appointed by the Board following consultation with the Minister, and that the office of CEO is a full-time position held for a period not exceeding five years.

**Clause 24** provides that a CEO must not engage in other paid employment outside the duties of the CEO's position without the Chair's approval, which if given, must also be notified to the Minister.

**Clause 25** deals with the **CEO's remuneration** and provides that it shall be determined by the Remuneration Tribunal, or where there is no such determination, remuneration is as prescribed in the regulations.

**Clause 26** deals with the CEO's **recreation leave entitlements**, providing that they are determined by the Remuneration Tribunal. And in addition to this, the Chair may grant leave of absence to the CEO.

**Clause 27** provides that the CEO must disclose to the Minister and Chair all direct and indirect pecuniary interests that the CEO has or acquires which conflict or could conflict with the proper performance of the CEO's duties.

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**Clause 28** provides that the CEO may resign by giving written notice to both the Chair of the Board and the Minister. **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.

## **Division 2 – Staff and Consultants**

**Clause 31** deals with the conditions of engagement of the employment of staff of the SA. Staff of SA will generally be employed under the *Public Service Act 1999*. However, some persons occupying specialist industry jobs not readily accommodate under the Public Service framework, may be employed on the terms and conditions that Screen Australia determines (**subclause 31(2)**).

**Clauses 32** provides non-APS employees of SA with the same maternity leave entitlements as those provided to employees under the Public Service Framework. **Clause 33** provides non-APS employees of SA with the same long service leave entitlements as those provided to employees under the Public Service Framework.

**Clause 34** provides that SA may engage consultants to assist in the performance of its functions.

## Part 5 – Planning

Clause 35 requires the Board to prepare a corporate plan for the NFSA at least once a year, covering a period of at least 3 years.

Under **subclause 35(3)** the Minister may provide the Board with written instructions with which the Board must comply in preparing the plan and any variations to the plan. Though the Explanatory Memorandum indicates that the subclause contemplates the Minister instructing the Board as to the time when a plan must be submitted for approval, the ambit of the instructions which the Minister could potentially give is broad enough to extend to the contents of the corporate plan itself. **Subclause 36(1)** lends support for this supposition, requiring the Board to comply with ‘such other matters as the Minister directs. Furthermore, **subclause 37(1)** provides that the plan must be given to the Minister for approval before the start of the period to which it relates, and that the Minister may direct a revision of the plan, which must be complied with (**subclause 37(3)**).

**Subclauses 36(1) and 37(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 36** provides that the corporate plan must include the following:

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

## Part 6 – Finance

SA is funded by an appropriation by the Parliament: **subclause 39(1)**<sup>6</sup>. **Clause 40** limits the application of that money to payment of costs incurred in the performance of SA's functions and the exercise of its powers; and payment of relevant remuneration and allowances.

**Clause 41** provides that SA 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 SA which is for an amount exceeding an amount prescribed by regulation.

**Subclause 41(4)** 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.

**Clause 42** provides that SA is not subject to taxation under any law of the Commonwealth or State or Territory, unless the regulations provide that taxation under a specified law applies.

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6. However, note that SA is also potentially also funded through gifts etc and fees for service.

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## Part 7 – Other Matters

### **Proposed clause 43 - Annual Reports**

This proposed clause makes a requirement for the inclusion in the Annual Report of guarantees given by screen Australia during that financial year.

**Clause 44** deals with **Ministerial directions**. The Minister may, by way of legislative instrument, give written directions to the Board in relation to the performance of the functions of and exercise of the powers of the SA (**paragraph 44(1)(a)**). And the Minister may also, by way of legislative instrument, mandate the provision of a report or advice on any matter relating to the functions and powers of the SA (**paragraph 44(1)(b)**). However, the Minister must not give a direction in relation to a decision by the Board to provide support to a particular person or for a particular program (**subclause 44(2)**).

Two noteworthy things about the operation of this clause are: Legislative instruments made under this clause are not subject to disallowance, and clause 44 does not operate to oust section 16 of the CAC Act (which requires keeping the Minister informed of certain things).

### **Proposed clause 45 - Regulations**

This proposed clause provides that the Governor-General may make regulations in relation to matters:

- Required or permitted by this Act to be prescribed; or
- Necessary or convenient to be prescribed for carrying out or giving effect to the Act.

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