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THE PARLIAMENT OF THE COMMONWEALTH OF AUSTRALIA

HOUSE OF REPRESENTATIVES

NATIONAL FILM AND SOUND ARCHIVE BILL 2008

EXPLANATORY MEMORANDUM

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

NATIONAL FILM AND SOUND ARCHIVE BILL 2008

OUTLINE

The National Film and Sound Archive Bill ('the Bill') provides for the establishment of the National Film and Sound Archive ('NFSA'). The NFSA functions are to be separated from the Australian Film Commission ('AFC') at the same time the AFC is being merged into a new agency, Screen Australia, with the Film Finance Corporation Australia Limited and Film Australia Limited.

The Bill establishes the NFSA as a body corporate with a Board consisting of a Chair, a Deputy Chair and between three and seven other members. The NFSA's staff will comprise a Chief Executive Officer (who is not to be a member of the Board) and persons engaged under the *Public Service Act 1999*.

The NFSA will be subject to the *Commonwealth Authorities and Companies Act 1997* (the CAC Act).

FINANCIAL IMPACT STATEMENT

The National Film and Sound Archive Bill 2008 is not expected to have a significant impact on Commonwealth expenditure.

ABBREVIATIONS

The following abbreviations are used in this explanatory memorandum:

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| AFC | Australian Film Commission |
| AFC Act | <i>Australian Film Commission Act 1975</i> |
| Bill | National Film and Sound Archive Bill 2008 |
| CAC Act | <i>Commonwealth Authorities and Companies Act 1997</i> |
| CEO | Chief Executive Officer |
| Minister | Minister for the Environment, Heritage and the Arts |
| NFSA | National Film and Sound Archive |

NOTES ON CLAUSES

Part 1 - Introduction

Clause 1 – Short title

The Bill, when enacted, should be cited as the *National Film and Sound Archive Act 2008*.

Clause 2 – Commencement

Item 1 of the table in subclause 2(1) provides that clause 1 (Short title), clause 2 (Commencement) and any other clause of the Bill not provided for is to commence on Royal Assent.

Item 2 of the table provides that clauses 3 to 43 are to commence at the same time as subsection 5(1) of the *Screen Australia Act 2008* commences.

Clause 3 - Definitions

Clause 3 sets out definitions of key terms used in the Bill. Some of the more significant definitions are:

- “Program”, which is intended to have a broad meaning. The term ‘screen production’ in paragraph (a) is also defined and explained below. Paragraph (b) includes radio recordings and historical recordings, such as speeches. The word ‘distribution’ in paragraph (c) is intended to take on a broad meaning and includes dissemination of films and other programs for public release.
- “Screen production”, which is intended to have a broad meaning and encompass all programs capable of being displayed on a screen. It includes audiovisual films and television productions as well as audiovisual productions for the internet and other digital media.

Clause 4 – Extended geographic application of this Act

The Bill will extend to every external territory. The Bill would also apply outside Australia in order to allow the NFSA to engage in activities overseas. For example, in performing its function of providing access to the national collection (paragraph 6(1)(a)) the NFSA might use facilities at an overseas film festival.

Part 2 – National Film and Sound Archive

Clause 5 – Establishment

The NFSA is established as a body corporate with a seal. The CAC Act applies to the NFSA.

Clause 6 – Functions

This clause sets out the NFSA's functions and how it may perform them. The NFSA's most important activities will be those related to the national collection in its custody. However, the NFSA will also be able to undertake activities relating to programs and related material that are not in the national collection. Within Australia it has a role in promoting greater understanding and awareness of film and sound media.

Where, in subclause 6(1), the NFSA has a function of 'promoting' an activity, this includes both directly engaging in that activity itself and also providing support to another entity in the conduct of that activity.

The functions of the NFSA include:

- developing, preserving, maintaining, promoting and providing access to a national collection of programs and related material (subparagraph 6(1)(a)). Access to the national collection can be provided both inside and outside Australia.

The AFC currently holds a collection, associated with the NFSA and to be transferred to it, which includes items in a wide range of audiovisual formats relating to Australia's screen and sound heritage. This current collection includes films, television programs, audio and video recordings in all formats, materials in new and emerging audiovisual formats, broadcast materials and oral histories. It is intended that the NFSA would build on this collection. Related material would include posters, scripts, costumes, publicity material, vintage equipment and manuscript records of notable screen and sound identities etc.

- supporting or promoting the collection of programs by others in Australia (subparagraph 6(1)(b)), for instance through publishing a directory of other significant collections;
- supporting, promoting or engaging in the proper preservation and maintenance of programs not in the national collection and the provision of access to such programs (subparagraph 6(1)(c)). The provision of access to such programs is expected to focus on Australian audiences, for instance through screenings of historic films, in keeping with the intent of subparagraph 6(1)(d) below. Where screenings outside Australia are arranged, it is expected that these would focus on items in the national collection (which may not necessarily be Australian items, for instance rare prints of foreign films). Where screenings are arranged (outside Australia) comprising non-

Australian films which are not in the national collection, this should be done in a way which promotes the national collection;

- supporting or promoting greater understanding and awareness in Australia of programs (subparagraph 6(1)(d)). This is intended to encompass the encouragement of greater public engagement within Australia with film and sound media; and
- any other function conferred on it by any other law of the Commonwealth (subparagraph 6(1)(e)).

Examples of ways the NFSA could provide support in subsection 6(1) include:

- providing financial assistance by way of grant or otherwise, on commercial terms or otherwise, but not by way of guarantee (subparagraph 6(2)(a)). This could include funding for visiting experts or for the exhibition of films and other programs;
- commissioning or sponsoring programs or other activities (subparagraph 6(2)(b)), such as compilations of material in the NFSA's collection;
- providing services, facilities, programs or equipment (subparagraph 6(2)(c)), including undertaking restoration or conservation work on material held by others.

Subclause 6(3) provides that the NFSA is to, as far as practicable:

- Place an emphasis on the historical and cultural significance of programs and related material (subparagraph 6(3)(a)).
- Use every endeavour to make the most advantageous use of the national collection in the national interest (subparagraph 6(3)(b)). Most of the major Australian collecting institutions, for example, the National Museum of Australia and the National Gallery of Australia, have a corresponding statutory obligation.
- Apply the highest curatorial standards in performing its functions (subparagraph 6(3)(c)). This requirement will not only ensure that the national collection is developed, preserved and maintained to a high standard but that the same standards are encouraged to be applied by others collecting or dealing in programs and in relation to the NFSA's other collections, if any.
- Promote the efficient, effective and ethical use of public resources (subparagraph 6(3)(d)). This provision recognises that the NFSA is funded by the Commonwealth and hence public financial and other resources must be used in an appropriate manner.

The NFSA will be the Commonwealth's primary agency for supporting a national collection of programs. Therefore, it is important to ensure that in acquiring and maintaining the national collection the NFSA will have the appropriate obligation to the nation for that national collection.

Subclause 6(4) provides for the NFSA to charge fees, for example for admission to public exhibitions of programs or for undertaking preservation or other technical services work on material.

Subclause 6(5) provides for the NFSA to enter into joint ventures or other arrangements directed towards the performance of the functions of the NFSA. In particular it is expected that the NFSA will collaborate closely and effectively, avoiding duplication of activity, with other Government film agencies such as Screen Australia or the Australian Film, Television and Radio School, as well as with other collecting institutions such as the National Library of Australia or the National Museum of Australia.

Subclause 6(6) invokes certain heads of Commonwealth constitutional power in relation to the NFSA's powers and functions to ensure the legislation would continue to have effect if the powers and functions of the NFSA were confined to those constitutional powers.

Clause 7 – Powers

The NFSA will have the power to do all things necessary or convenient to be done for or in connection with the performance of its functions as described in clause 6. This would extend to the purchasing, hiring and accepting deposits, loans or gifts of programs or related material or making programs and related material available by hire, loan, sale or otherwise.

For the avoidance of doubt, subclause 7(2) contains a non-exhaustive list of specific powers of the NFSA. These include the power to:

- accept various forms of gifts, whether on trust or otherwise. This recognises the NFSA's role as a national collecting institution will involve it receiving gifts from time to time (paragraph 7(2)(a));
- act as trustee of various forms of property vested in the NFSA on trust (paragraph 7(2)(b));
- act on behalf of the Commonwealth or an authority of the Commonwealth in the administration of a trust relating to programs or matters connected with programs (paragraph 7(2)(c)). This and paragraph 7(2)(b) recognise that some programs or matters connected with programs may be created or administered through trust arrangements;
- do anything incidental to the performance of any of its functions (paragraph 7(2)(d)).

Subclause 7(3) provides that despite anything contained in the Bill or the CAC Act, any money, programs or other property held by the NFSA on trust must be dealt with in accordance with the obligations of the NFSA as trustee of the trust.

Part 3 – The Board of the National Film and Sound Archive

Division 1 – The Board

Clause 8 – Establishment

This clause establishes the Board of the NFSA.

Clause 9 – Role

This clause sets out the role of the Board. Subclause 9(1) provides that the Board is responsible for the proper and efficient performance of the NFSA's functions. The NFSA acts through the Board which has the capacity to conduct the ordinary business of a board, including setting policies, procedures and directions for the agency.

Subclause 9(2) provides that the Board has power to do all things necessary or convenient to be done for or in connection with the performance of its duties. In this regard, the Board is also able to authorise the CEO or other staff of the NFSA to carry out specified activities in relation to the day to day administration under the direction of the Board. A formal delegation power is not necessary, as the fundamental role of the Board to be responsible for the proper and efficient performance of the NFSA's functions should not be delegated.

Subclause 9(3) provides that all acts and things done in the name of, or on behalf of, the NFSA by the Board, or with the authority of the Board, are taken to have been done by the NFSA. An authorisation given by the Board under subclause 9(3) is not a legislative instrument under section 5 of the *Legislative Instruments Act 2003*, as it is not legislative in character.

Subclause 9(4) allows all things done in the name of, or on behalf of, the NFSA by the Board, or with the authority of the Board, to be done on the basis of the subjective opinion, belief or state of mind of the person or body doing them.

Clause 10 – Membership

This clause provides that the Board shall consist of the Chair, the Deputy Chair and between three and seven other members.

Clause 11 – Appointment of Members

Subclause 11(1) provides for the appointment of members including the Chair. An instrument of appointment 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*.

Subclause 11(2) provides that a member holds office on a part-time basis. Subclause 11(3) provides that a member may be appointed for up to 3 years, and subclause 11(4) provides that a person's total period of appointment as a member (whether made up of consecutive or non-consecutive periods) may not exceed 9 years. It is the intention that a member would usually only hold office for up to 6 years with the 9 year period of appointment for special circumstances only.

Subclause 11(5) provides that the performance of the functions or the exercise of the powers of the Board is not affected by reason only of the number of members falling below 5 (which is the minimum allowed by clause 10) for a period of not more than six months.

Clause 12 – Acting in Positions

This clause provides that:

- The Deputy Chair is to act as the Chair when there is no Chair or the Chair is unavailable (subclause 12(1)), and when so acting may exercise all the Chair's powers and perform all the Chair's functions (paragraph 12(2)(a)). While the Deputy Chair is acting as the Chair, this Bill and any Act apply to the Deputy Chair as if he or she were the Chair (paragraph 12(2)(b));
- Anything done by the Deputy Chair when acting as the Chair is not invalid merely because the occasion for the Deputy Chair to act as the Chair had not arisen or had ceased (subclause 12(3));
- The Minister may appoint a member to act as the Deputy Chair when there is no Deputy Chair or the Deputy Chair is unavailable or acting as Chair (subclause 12(4)); and
- The Minister may appoint a person to act as a member when there is a vacancy in the office of a member or the member is unavailable or acting as Chair or Deputy Chair (subclause 12(5)).

Anything done by or in relation to a person acting as Deputy Chair or a member is not invalid merely because of technical problems in the appointment (subclause 12(6)).

Instruments of appointment made under this clause would not be legislative instruments, by virtue of the existing exemption under item 9 of Part 1 of Schedule 1 to the *Legislative Instruments Regulations 2004*.

Clause 13 – Remuneration of members

Subclause 13(1) provides that a member is to be paid such remuneration as is determined by the Remuneration Tribunal or, if no determination of that remuneration is in operation, the member is to be paid such remuneration as is prescribed in the regulations. Subclause 13(2) provides that a member is to be paid such allowances as are prescribed in the regulations.

Clause 13 has effect subject to the *Remuneration Tribunal Act 1973* which provides for the Remuneration Tribunal to conduct inquiries and make determinations on the remuneration of certain office holders.

Whether a determination of the Remuneration Tribunal is a legislative instrument would be determined under the *Remuneration Tribunal Act 1973*.

Clause 14 – Leave of members

The Minister may grant the Chair leave of absence on such terms and conditions as to remuneration or otherwise as the Minister determines (subclause 14(1)). The Chair may grant another member leave of absence on such terms and conditions as the Chair determines (subclause 14(2)). A grant of leave would not be a legislative instrument, by virtue of the existing exemption under item 11 of Part 1 of Schedule 1 to the *Legislative Instruments Regulations 2004*.

The Chair must notify the Minister if he or she grants to a member leave of absence for a period exceeding 6 months (subclause 14(3)). Such a notification would not be a legislative instrument, by virtue of the existing exemption under item 20(a) of Part 1 of Schedule 1 to the *Legislative Instruments Regulations 2004*.

Clause 15 – Resignation of members

A member may resign by giving the Minister a written notice. Such a notice would not be a legislative instrument, by virtue of the existing exemption under item 10 of Part 1 of Schedule 1 to the *Legislative Instruments Regulations 2004*.

Clause 16 - Termination of appointment

This clause sets out the grounds upon which the Minister may terminate the appointment of a member.

The Minister may terminate the appointment of an individual member for misbehaviour, physical or mental incapacity (subclause 16(1)).

The Minister must terminate the appointment of a member under subclause 16(2) if:

- the member becomes bankrupt, applies for relief from bankruptcy, enters into an arrangement with creditors regarding the payment of his or her debts, or assigns all or part of his or her remuneration for the benefit of creditors (paragraph 16(2)(a));
- the member fails without reasonable excuse to comply with section 27F or 27J of the CAC Act. Section 27F requires a director of a Commonwealth authority to give other directors notice of any material personal interest in a matter which relates to the affairs of the authority, with certain exceptions. Section 27J prevents a director who has a material personal interest in a matter which is being considered at a directors'

meeting from being present when that matter is being considered or voting on it, with certain exceptions (paragraph 16(2)(b)); or

- the member is absent without leave from three consecutive meetings of the Board (paragraph 16(2)(c)).

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

Clause 17 – Other terms and conditions of members

The terms and conditions on which a member holds office are to be as determined by the Minister except where provided for in the Bill.

An instrument specifying terms and conditions of appointment would not be a legislative instrument, by virtue of the existing exemption under item 11 of Part 1 of Schedule 1 to the *Legislative Instruments Regulations 2004*.

Division 2 – Board Procedures

Clause 18 – Meetings

Subclause 18(1) requires the Chair to convene meetings of the Board as necessary for the efficient conduct of the NFSA's affairs.

The quorum for a meeting as provided by subclause 18(2) is a majority of the current members appointed at the time. However, subclause 18(3) provides that if section 27J of the CAC Act (which deals with conflicts of interest and is referred to by subclause 16(2) of the Bill) 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 a quorum in relation to that matter.

Under subclause 18(4), a question arising at a Board meeting is to be decided by a majority of members present and voting.

The Chair is to preside at all meetings at which he or she is present (subclause 18(5)). In the absence of the Chair, the Deputy Chair is to preside (subclause 18(6)). In the absence of both the Chair and the Deputy Chair, the members present are to elect one of their number to preside (subclause 18(7)).

Subclause 18(8) provides that the person presiding at a meeting will have a deliberative vote and, in the event of an equality of votes, also have a casting vote (i.e. the deciding vote).

Subclause 18(9) provides the Board must keep a record of any decisions made at a meeting. It is not required to keep a record of all proceedings.

Subject to the Bill and the CAC Act, the NFSA may regulate proceedings at its meetings as it thinks fit (subclause 18(10)).

Clause 19 – Decisions without meetings

Clause 19 allows the Board to determine that decisions can be made without a meeting and also the method by which Board members are to indicate agreement with proposed decisions.

Subclauses 19(1) and 19(2) provide that if the Board determines that clause 19 applies in relation to a particular matter or particular matters and also determines the method by which members are to indicate agreement to a proposed decision, a resolution in relation to the matter or matters will be taken to have been passed at a meeting of the Board if:

- without meeting, a majority of members entitled to vote on the proposed decision indicate their agreement in accordance with the method determined by the Board (paragraphs 19(1)(b) and (c)); and
- all members were informed of the proposed decision, or reasonable efforts had been made to inform them of it (paragraph 19(1)(a)).

A member may not vote on a proposed decision if they would not be entitled to vote on the proposed decision if the matter had been considered at a meeting of the Board (subclause 19(3)).

The Board must keep a record of decisions made in accordance with clause 19 (subclause 19(4)).

Part 4 – Chief Executive Officer, staff and consultants

Division 1 – Chief Executive Officer

Clause 20 – Establishment

There is to be a Chief Executive Officer ('CEO') of the NFSA.

Clause 21 – Role

The CEO is responsible for the day-to-day administration of the NFSA (subclause 21(1)), and has the power to do all things necessary or convenient to be done for or in connection with the performance of his or her duties (subclause 21(2)). The CEO must act in accordance with any policies and directions given by the Board in writing (subclause

21(3)), except in relation to the CEO's powers under the *Public Service Act 1999*. Such policies and directions, should they be in writing, are administrative, not legislative in character and hence subclause 21(6) confirms they are not legislative instruments.

All acts and things done in the name of or on behalf of the NFSA by the CEO, or with the authority of the CEO, are taken to have been done by the NFSA (subclause 21(4)). An authority given by the CEO is not a legislative instrument under section 5 of the *Legislative Instruments Act 2003*, as it is not legislative in character.

If a function or power of the NFSA is dependent on the opinion, belief or state of mind of the NFSA in relation to a matter, the function or power may be exercised upon the opinion, belief or state of mind of the CEO or a person acting on the authority of the CEO (subclause 21(5)).

Clause 22 – Appointment

The Board appoints the CEO after consulting with the Minister (subclause 22(1)), for a period not to exceed five years (subclause 22(3)). The CEO holds office on a full-time basis (subclause 22(2)) and must not be a member of the Board (subclause 22(4)). An instrument of appointment as CEO would not be a legislative instrument, by virtue of the existing exemption under item 9 of Part 1 of Schedule 1 to the *Legislative Instruments Regulations 2004*.

Clause 23 – Acting appointments

The Board may, after consulting the Minister, appoint an acting CEO during a vacancy in the office of CEO or while the CEO is absent or unavailable (subclause 23(1)). An instrument of appointment as acting CEO would not be a legislative instrument, by virtue of the existing exemption under item 9 of Part 1 of Schedule 1 to the *Legislative Instruments Regulations 2004*.

It is envisaged that the consultation process could encompass possible standing arrangements to cover short periods of absence or situations where urgent acting appointments are required.

Anything done by a person purporting to act under such an appointment is not invalid merely because of technical problems with the appointment of the acting CEO (subclause 23(2)).

Clause 24 – Other employment

The CEO must not engage in paid employment outside the duties of the CEO's office without the Chair's approval (subclause 24(1)). The Chair must notify the Minister of any such approval (subclause 24(2)). Such approval would not be a legislative instrument, by virtue of the existing exemption under item 2 of Part 1 of Schedule 1 to the *Legislative Instruments Regulations 2004*.

Clause 25 – Remuneration

The CEO is to be paid such remuneration as is determined by the Remuneration Tribunal or, if no determination of that remuneration is in operation, the CEO is to be paid such remuneration as is prescribed in the regulations (subclause 25(1)). The Chief CEO is to be paid such allowances as are prescribed in the regulations (subclause 25(2)).

Clause 25 would have effect subject to the *Remuneration Tribunal Act 1973*, which provides for the Remuneration Tribunal to conduct inquiries and make determinations on the remuneration of certain office holders (subclause 25(3)).

Whether a determination of the Remuneration Tribunal is a legislative instrument would be determined under the *Remuneration Tribunal Act 1973*.

Clause 26 – Leave

The CEO will have such recreation leave entitlements as are determined by the Remuneration Tribunal (subclause 26(1)).

The Chair may grant the CEO leave of absence, other than recreation leave, on such terms and conditions as to remuneration or otherwise as the Chair determines (subclause 26(2)). The granting of leave would not be a legislative instrument, by virtue of the existing exemption under item 11 of Part 1 of Schedule 1 to the *Legislative Instrument Regulations 2004*.

The Chair must notify the Minister if the Chair grants to the CEO leave for a period exceeding one month (subclause 26(3)). Such a notification would not be a legislative instrument, by virtue of the existing exemption under item 20(a) of Part 1 of Schedule 1 to the *Legislative Instruments Regulations 2004*.

Clause 27 – Disclosure

Clause 27 provides that the CEO must disclose to the Minister and the Chair all direct or indirect pecuniary interests that the Chief Executive Officer has or acquires which conflict or could conflict with the proper performance of the CEO's duties. Such a disclosure given by the CEO is not a legislative instrument under section 5 of the *Legislative Instruments Act 2003*, as it is not legislative in character.

Clause 28 - Resignation

The CEO may resign by giving a written resignation to the Chair (subclause 28(1)). Such a written resignation would not be a legislative instrument, by virtue of the existing exemption under item 10 of Part 1 of Schedule 1 to the *Legislative Instruments Regulations 2004*.

The Chair must notify the Minister if the CEO resigns (subclause 28(3)).

Clause 29 – Termination

This clause sets out the grounds upon which the Board may terminate the appointment of the CEO.

The Board may terminate the appointment of the CEO for misbehaviour, physical or mental incapacity (paragraph 29(1)(a)). The Board may also terminate the appointment if in their opinion there has been a significant period of unsatisfactory performance by the CEO (paragraph 29(1)(b)).

In addition, the Board must terminate the appointment of the CEO under subclause 29(2) if:

- the CEO becomes bankrupt, applies for relief from bankruptcy, enters into an arrangement with creditors regarding the payment of his or her debts, or assigns all or part of his or her remuneration for the benefit of creditors (paragraph 29(2)(a));
- the CEO is absent without leave for 14 consecutive days or for 28 days in any 12 months (paragraph 29(2)(b));
- the CEO fails without reasonable excuse to comply with clause 27 of the Bill, which deals with disclosure of conflicts of interest and possible conflicts of interest (paragraph 29(2)(c)); or
- without the approval of the Chair under clause 24 of the Bill, the CEO engages in paid employment outside of the duties of his or her office (paragraph 29(2)(d)).

If the Board terminates the appointment of the CEO, the Board must notify the Minister of the termination (subclause 29(3)).

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

Clause 30 – Other terms and conditions

Where not covered by this Bill, the terms and conditions on which the CEO holds office are to be as determined by the Board.

An instrument specifying terms and conditions of appointment would not be a legislative instrument, by virtue of the existing exemption under item 11 of Part 1 of Schedule 1 to the *Legislative Instruments Regulations 2004*.

Division 2 – Staff and consultants

Clause 31 – Staff

Subclause 31(1) provides that the staff of the NFSA must be people engaged under the *Public Service Act 1999* for the purposes of the NFSA.

Instruments of employment are not legislative instruments, by virtue of the existing exemption under item 9 of Part 1 of Schedule 1 to the *Legislative Instruments Regulations 2004*. Instruments determining conditions of employment are not legislative instruments, by virtue of the existing exemption under item 11 of Part 1 of Schedule 1 to the *Legislative Instruments Regulations 2004*.

For the purposes of the *Public Service Act 1999*, the CEO and the staff of the NFSA together constitute a Statutory Agency with the CEO as the Head of that Statutory Agency (subclause 31(2)).

Clause 32 – Consultants

The NFSA may engage consultants to assist in the performance of its functions. Such a provision is not intended to affect the operation of clause 7.

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

Part 5 – Planning

Clause 33 – Corporate plan

The Board must prepare a corporate plan for NFSA at least once a year (subclause 33(1)). This plan is a rolling plan and must cover a period of at least three years from the time it is made (subclause 33(2)). Although corporate plans will cover at least 3 financial years they will be prepared on an annual rolling basis so they will be updated annually with the previous year deleted and a further out year added on.

Subclause 33(3) provides that the Minister may give the Board written instructions with which the Board must comply when preparing the plan and any variations to it. For example, this subclause would contemplate the Minister instructing the Board as to the time when a plan must be submitted for approval. It is intended that the first corporate plan be prepared by 30 September 2008 and the Minister may instruct the NFSA in this regard.

These instructions are administrative in effect and not legislative in character, therefore not a legislative instrument under section 5 of the *Legislative Instruments Act 2003*. For

the avoidance of doubt, subclause 33(4) provides that these instructions are not legislative instruments.

A corporate plan would not be a legislative instrument, by virtue of the existing exemption under item 34 of Part 1 of Schedule 1 to the *Legislative Instruments Regulations 2004*.

For the purposes of this Clause, in line with usual practice for corporate plans, a year is a financial year covering a period from 1 July in any year until 30 June in the following year.

Clause 34 – Contents of corporate plan

Subclause 34(1) provides that the plan must include:

- a statement of the objectives that the NFSA will pursue in the performance of its functions under clause 6 (paragraph 34(1)(a));
- the strategies and policies that the NFSA will adopt in order to achieve those objectives (paragraph 34(1)(b));
- performance indicators for the assessment of the NFSA's performance of its functions. It is expected that these indicators will relate to other aspects of the NFSA's corporate plan (paragraph 34(1)(c));
- financial targets and projections for the NFSA (paragraph 34(1)(d));
- an analysis of factors likely to affect achievement of targets or create significant financial risk for the NFSA or for the Commonwealth (paragraph 34(1)(e));
- a review of recent performance measured against the most recent relevant plan (paragraph 34(1)(f)). For example, a corporate plan prepared for 2008/09 for the years 2009/10 and beyond, would include a review of performance of 2007/08 and that part of 2008/09 to date; and
- such other matters as the Minister directs, if any (paragraph 34(1)(g)). A direction made in writing under paragraph 34(1)(g) would not be a legislative instrument, because such a direction is included in the exemption at item 5 of the table in section 7 of the *Legislative Instruments Act 2003*. Subclause 34(3) confirms that such a direction is not a legislative instrument.

The plan may also include any other matters (subclause 34(2)).

Clause 35 – Approval of corporate plan by Minister

The plan must be given to the Minister for approval before the start of the period to which it relates (subclause 35(1)). The Minister may, by written notice to the Board, approve the plan or request the Board to revise it for the reasons set out in the written notice (subclause 35(2)). Such a notice from the Minister is not a legislative instrument by virtue of the exemptions in item 21 of the table in section 7 of the *Legislative Instruments Act 2003* and item 3 of Part 1 of Schedule 1 to the *Legislative Instruments Regulations 2004*. Additionally, the notice is administrative in effect and therefore not a legislative instrument under section 5 of the *Legislative Instruments Act 2003*. Subclause 35(5) confirms this.

If the Minister requests that the Board revise the plan, the Board must revise it and give the revised plan to the Minister for approval (subclause 35(3)).

The plan comes into force on the day on which it is approved by the Minister or the first day of the period to which it relates, whichever comes first (subclause 35(4)).

Clause 36 – Variation of corporate plan

The Board may at any time vary a corporate plan, whether or not it is in force (subclause 36(1)).

An instrument that varies an instrument that is not itself a legislative instrument would not be a legislative instrument, by virtue of the existing exemption under item 33 of Part 1 of Schedule 1 to the *Legislative Instruments Regulations 2004*.

The Minister may at any time request the Board to vary a corporate plan, whether or not it is in force. The Board must comply with any such request (subclause 36(2)). Such a request is not a legislative instrument by virtue of the exemptions in item 21 of the table in section 7 of the *Legislative Instruments Act 2003* and item 24 of Part 1 of Schedule 1 to the *Legislative Instruments Regulations 2004*. Additionally, the notice is administrative in effect and therefore not a legislative instrument under section 5 of the *Legislative Instruments Act 2003*. Subclause 36(6) confirms this

A variation must be given to the Minister for approval (subclause 36(3)), and comes into force on the day on which it is approved by the Minister (subclause 36(4)). If the plan is already in force when a variation to it is approved by the Minister, the plan continues in force on and after the day on which it is varied (subclause 36(5)). An approval by the Minister is not a legislative instrument by virtue of the exemptions in item 21 of the table in section 7 of the *Legislative Instruments Act 2003* and item 3 of Part 1 of Schedule 1 to the *Legislative Instruments Regulations 2004*. Additionally, the notice is administrative in effect and therefore not a legislative instrument under section 5 of the *Legislative Instruments Act 2003*. Subclause 36(6) confirms this.

Part 6 – Finance

Clause 37 – Money payable to the National Film and Sound Archive

Money appropriated by the Parliament for the purposes of the NFSA is payable to the NFSA (subclause 37(1)).

The Finance Minister, or the Minister administering the *Financial Management and Accountability Act 1997*, may give directions about the amount and timing of payments made to the NFSA under this clause (subclause 37(2)). A direction by the Finance Minister is administrative, not legislative in character and therefore is not a legislative instrument under section 5 of the *Legislative Instruments Act 2003*. Subclause 37(3) confirms this.

Clause 38 – Application of money by the National Film and Sound Archive

The money of the NFSA is to be applied only in payment or discharge of the costs expenses and other obligations incurred or undertaken by the NFSA in the performance of its functions and the exercise of its powers, and in payment of any remuneration or allowances payable under this Bill (subclause 38(1)).

Subclause 38(1) does not prevent the NFSA investing surplus money under section 18 of the CAC Act (subclause 38(2)).

Clause 39 – Restrictions on financial transactions

Subject to certain exceptions set out in subsection 39(2), the NFSA must not, without the approval of the Minister:

- acquire any property, right or privilege for a consideration exceeding in amount or value the amount prescribed by the regulations (paragraph 39(1)(a));
- dispose of any property, right or privilege if the amount or value of the consideration for the disposal, or the value of the property, right or privilege, exceeds the amount prescribed by the regulations (paragraph 39(1)(b));
- enter into a contract for the construction of a building for the NFSA, being a contract under which the NFSA is to pay an amount exceeding the amount prescribed by the regulations (paragraph 39(1)(c)); or
- enter into a lease of land for a period exceeding 10 years (paragraph 39(1)(d)).

Paragraphs 39(1)(a) and 39(1)(b) do not apply to the investment of money by the NFSA under section 18 of the CAC Act (subclause 39(2)).

An approval given by the Minister under subclause 39(1) is not a legislative instrument by virtue of the exemption in item 3 of Part 1 of Schedule 1 to the *Legislative Instruments Regulations 2004*. Additionally, the notice is administrative in effect and therefore not a legislative instrument under section 5 of the *Legislative Instruments Act 2003*. Subclause 39(4) confirms this.

Clause 40 – Taxation

The NFSA is not subject to taxation under any law of the Commonwealth or of a State or Territory (subclause 40(1)) unless the regulations provide that taxation under a specified law applies (subclause 40(2)). This provision is in line with subsection 41(1) of the AFC Act and hence the NFSA will have the same tax arrangements as currently exist for the AFC. The result is that the NFSA would be exempt from tax but still subject to special taxes such as the Goods and Services Tax. In this regard the note to this clause explains that despite subclause 40(1) the NFSA may be subject to taxation under certain laws, for example section 177-5 of the *A New Tax System (Goods and Services Tax) Act 1999* and section 66 of the *Fringe Benefits Tax Assessment Act 1986*.

Part 7 – Other matters

Clause 41 – Annual reports

Under section 9 of the CAC Act, the NFSA must prepare an annual report to be tabled in Parliament by the Minister. Clause 41 provides that the report must, for the period covered by the report, include particulars of all disposals of items in the national collection that the NFSA considers were significant items in the national collection.

Clause 42 – Ministerial direction

The Minister may, by legislative instrument, give written directions to the Board in relation to the performance of the functions of and the exercise of the powers of the NFSA (paragraph 42(1)(a)).

The Minister may also, by legislative instrument, require the provision of a report or advice on matters relating to any of the NFSA's functions or powers (paragraph 42(1)(b)).

Section 42 of the *Legislative Instruments Act 2003*, which provides for disallowance, does not apply to directions given under subclause 42(1) by virtue of the existing exemption under item 41 of the table in subsection 44(2) of that Act. The sunset provision in Part 6 of the *Legislative Instruments Act 2003* do not apply to a direction given under subclause 42(1), by virtue of section 54 of that Act.

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 42(2)). The types of

support the NFSA may provide are given in subclause 6(1). ‘Program’ is a term defined in clause 3.

The Board must ensure that any direction given by the Minister under subclause 42(1) is complied with (subclause 41(3)).

Clause 42 does not operate to oust section 16 of the CAC Act (subclause 42(4)). Paragraph 42(1)(b) includes directions in relation to specific matters and not just the general operations of the authority.

Clause 43 – 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.

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