



RESPONSE TO SCREEN AUSTRALIA TERMS OF TRADE

Australian Directors Guild (ADG) DECEMBER 19th 2008.

OVERVIEW:

The ADG appreciate the requirements to meet deadlines set for delivering a workable set of guidelines and Terms of Trade for the screen industry as requested by the Minister, however we must register our frustrations at the time-scale, which has negated the potential to comprehensively address the issues we face as an industry as a result of the major overhaul of our financing and support system. For example, we would like to include research from our international colleagues, who have dealt with similar issues in their own screen industries. Research of this type is vital for us to analyse the far-reaching and long term effects these policies may have. It takes time to do this effectively and is simply not possible in the time allocated here. We recommend that Screen Australia keep the avenues of communication open, and be amenable to making adjustments quickly and decisively to both the guidelines and the Terms of Trade to build a support system that works efficiently for the industry.

As a general comment we would ask that Screen Australia cross reference the Terms of Trade with the legislation, ministerial expectations, Policy, and Guidelines to ensure they are consistent and fair. At the moment there is some confusion among the various levels of accountability and responsibility. This leaves gaps in application and interpretation of policy and too much accumulation of power and influence in one body. Previously DCITA administered legislation while the AFC and FFC fed into policy.

We think that a more appropriate and effective method of reviewing terms of trade is to address your draft PIA. This would then be a more realistic and useful way of ensuring an understanding and agreement among the various interest holders.

RESPONSES TO THE DRAFT TERMS OF TRADE:

1.1 Fees. We note that fees are proposed to be introduced across the board for production investment for all Screen Australia production investments, including documentary, short animation and low budget/non-offset projects. While a relatively small percentage, this effectively reduces the amount of funds available for production, or if you like, raises the budget by that same amount. We do not see this as helping projects working on already very tight margins, nor do we believe it is consistent policy to impose fees on projects that are assessed for cultural value or developing creative talent. We note the AFC did not charge such legal and administrative fees before.

We recommend that Screen Australia do not charge fees, particularly not for non-offset programs. If fees are to be charged we recommend that all non-offset projects are sanctioned from fees, or budget limits set under which no fees would be payable.

1.2 We would like further clarification on applicants '*having substantial creative control of the project*'. Is this subject to additional agreements between creative participants? We also would like to confirm the discussions the ADG had during consultation on the guidelines, that appropriately experienced directors and writer/directors will be eligible to apply to these programs. Could you please let us know how Screen Australia will interpret the word '*substantial*' and phrase '*creative control*'. These terms were understood under the earlier Division 10BA arrangements but you have not specified how you will interpret these.

1.3 We note the low threshold for definition of an Australian resident, and question why the definition of an Australian resident is less stringent than in point 1.4 for Australian production companies, and far less stringent than in the Division 10BA interpretation?

1.4 We note the definition here is more stringent than outlined in the Significant Australian Content (SAC) test, and would ask for consistency across all Screen Australia guidelines.

1.5 We commend Screen Australia for requiring recipients of Screen Australia funding to deal in good faith with third parties. We feel this should be spelt out more clearly to identify to whom this might refer - fellow creative participants, or others?

We also recommend that the wording include:

(a) *paying market rates for all work performed by third parties on their project as recommended by the relevant industry bodies, ie: ADG, AWG. AND*

(b) *respecting creative rights of third parties as recommended by the relevant industry bodies in their codes of practice and recommended standard contracts.*

1.6 We would like to clarify the Policy intentions of the SAC test, and when this will be reviewed. One way of posing this question is: Do we want an Australian film industry, or do we want a film industry in Australia? What measures will Screen Australia take to distinguish this?

Could you please explain the meaning to the second paragraph to item 1.6? (regarding the Minister's Statement of Expectation to provide supplementary funding to Offset projects of cultural merit only). The issue of Australian content is very important, and we expect this definition to be absolutely clear in the Terms of Trade.

2.4 We commend Screen Australia on it not requiring a copyright interest in developed works. We would like further clarification on how it works for developed works over \$100k and recommend that there is an automatic reversion to the rights holder when the development investment has been repaid.

3.1 We suggest that animation is included here - rather than as "some other types of production"; and the ADG would like further clarification of 'some other types of production'.

3.6 We appreciate that Screen Australia should hold an interest in copyright, however we believe holding on for the life of the copyright seems inconsistent with Screen Australia's intention to support and encourage sustainable careers and businesses. We recommend that the copyright revert to the originator/creator after its commercial life has expired ie: revert back after 5 - 7 years. What public policy imperative is being achieved by holding an interest 70 years after the death of the author, or publication of the film?

3.7 We recommend revising the additional rights Screen Australia are requesting. There are several issues here, and as these additional rights relate to the full range of projects financed by Screen Australia (e.g: feature, doco, new media) we suggest further clarification is needed. In the case of rights to use for corporate, promotional and educational purposes, we are concerned about any conflicts with third party rights and unrealistic expectations on the producer to obtain those rights. An example could be that an Actor might not give permission for their work or image to be represented in cross promotional areas, and such rights may conflict with the rights agreements/licenses negotiated. We are also concerned there are conflicts with the NDP and the rights required to sub-license and on-license educational rights and this needs to be appropriately addressed.

We suggest, to make both Screen Australia and the filmmakers happy, simply include wording that Screen Australia would seek appropriate permissions where these additional rights are sought. This is most apposite in the new media and technology age.

We would like to see the Approval rights requested defined here, as the Terms of Trade would seem to be the most appropriate place for this. A referral to the PIA is not satisfactory.

Requiring rights to participate in revenues generated by further exploitation is inconsistent with Screen Australia's intentions (as stated in the guidelines) to support and encourage sustainable careers and businesses. We recommend that these rights revert to the applicant/production company once the Screen Australia investment has been recouped.

3.8 Requiring the producer to have all underlying rights is onerous for some productions, and arguably unnecessary. We recommend that these rights be requested where possible, and that Screen Australia define which underlying rights are mandatory and why, and which are negotiable.

3.10 We appreciate that a minimum percentage of equity going to the producer would be ideal, however we question how realistic this is given the current climate with issues circling financing of the Producer Offset. We would like to see a minimum level of producer equity set, that the producer can trade with.

Further, we would expect the producer's obligations to share part of that equity with creators/originators and key creatives to be clearly stated in the Terms of Trade.

3.13 We commend the preference of the recoupment entitlement as suggested here. With regard to Screen Australia deferring part of its recoupment to the benefit of the producer, are we to understand this is on the same conditions as the previous FFC corridor?

3.14 We commend Screen Australia for allowing Screenrights revenue to flow to the original creators. We urge that the Terms of Trade state that all creators and entitled recipients, as defined by Screenrights now and in the future, must be recognised as such as entitled to Screenrights royalties, regardless of whether they are employed or contracted for the original work.

3.15 We commend Screen Australia for allowing EMDG receipts to flow on to the producer. There will need to be redrafting of the PIA to accommodate the policy intention here particularly as to the characterisation of producer/interest holders and entities and relating to agency versus sub licence.

3.17 Regarding Screen Australia not providing any cashflow facility for the Producer Offset, we would like some further indication in the Terms of Trade as to how Screen Australia will advise, inform and aide producers to cashflow the Offset to reach the equity levels as in 3.10.

3.19 We support Screen Australia's drive to encourage producers to seek out the best market attachments for their target audiences. However in some cases the best market attachments for projects to reach the broadest possible audiences will not be found in advance of production investment funding and indeed may not be found until after completion. We commend the reference to low budget projects not requiring market participation, however we would like greater clarity as to what defines low budget. As stated in the guidelines it seems this refers to non-offset productions, some documentary and some television.

We question the requirement for maximum market participation where minimum requirements for market attachments have been reached. One area of concern is for Offset features in the \$1-3M budget range. Arguably this is the greatest area of potential growth for the Australian film industry and also the most vulnerable to arguments of cultural concern. Are we to assume that cultural concerns are only to be addressed in non-offset features? If the Producer Offset is to achieve its objectives to (a) provide funding directly and efficiently to filmmakers, and (b) help build sustainable screen production businesses; then surely a flexible and open process to evaluating

market attachments and private investment levels is crucial to allow Australian producers the maximum benefits and incentive to make the Offset work and build their equity in a range of projects - large and small budgets.

3.21 As was the practice with the AFC, where the production company is having to service sales and distribution, the production company should be entitled to have its necessary expenses repaid and a small administrative charge applied for the time expended which can be considerable.

3.23 We encourage the flexible approach to attaching a completion guarantor. We recommend that where possible when other investors have not required a completion guarantor to be attached, Screen Australia does not do so either.

3.24 As in point 1.5 we recommend that the wording be adjusted to include:

Screen Australia requires that all crew and actors be paid fees not less than relevant MEAA minimum rates. In the case of feature films, fees should be paid in accordance with the MEAA feature film award. Screen Australia requires key creatives (ie: director, writer) to be paid market rates for all work performed as recommended by the relevant industry bodies, ie: ADG, AWG.