

23 December 2008

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Level 4, 150 William Street,
Woolloomooloo NSW 2011

Dear Dr Harley

SCREEN AUSTRALIA TERMS OF TRADE

ASTRA writes to you with regard to the terms of trade recently published by Screen Australia ('**Terms of Trade**'). ASTRA appreciates the opportunity to provide its comments.

ASTRA represents the interests of subscription television platforms and channel providers. A list of ASTRA's members can be found at www.astra.org.au/members.asp.

Background

ASTRA's members have a crucial role to play in the development of both film and television production. Subscription television:

- promotes and makes available to Australian audiences a diverse range of broadcasting services through a variety of genres;
- facilitates the development of the Australian broadcasting and production industry through its own investment and productions (both 'commissioned' and 'in-house'); and
- continues to develop and reflect the Australian identity, character and the broad diversity of Australian culture like no other medium through its targeted niche programming.

Subscription television exceeds in delivering key objectives of the Broadcasting Services Act 1992 ('**BSA**') with regard to developing and reflecting a sense of Australian identity, character and cultural diversity and providing a diverse range of high quality and innovative services while remaining efficient, competitive and responsive to subscribers' needs who decide via their monthly subscriptions what they want and what they are willing to pay for.

ASTRA's members are responsible for a broad range of television production covering genres such as sports and news coverage, magazine style shows, reality programming, documentaries, films and dramas.



In particular subscription television has been responsible for:

- generating high end award winning television productions including dramas (ie *Love My Way*, *Stupid Stupid Man*, *Chandon Pictures*, *Satisfaction*, *Dangerous*, *Yakkity Yak*); telemovies (*The King*, *Make or Break*); documentaries (*Crime Investigation Australia*, *The History of Australian Sport*, *He's Coming South [The Attack on Sydney Harbour]*; *The Battle of Long Tan*) and reality television (*Australia's Next Top Model*, *Project Runway Australia*, *Football Superstar*, *Project Greenlight*).
- supporting investments in television series premiering on other mediums (ie *Seachange*, *Changi*, *Crash Palace*, *Head Start*, *McLeod's Daughters*, *Secret Life of Us*, *False Witness*); and
- making significant investments in Australian Films and exported dramatic works (ie *Two Hands*, *Looking for Alibrandi*, *The Castle*, *The Proposition*, *Japanese Story*, *Oscar & Lucinda*, *The Sound of One Hand Clapping*, *The Wiggles*, *Innocence*, *Babe 2: Pig in the City*, *Rabbit-Proof Fence*, *The Dish*, *The Man Who Sued God*).

It is widely acknowledged that subscription television takes risks in developing new genres and Australian stories that are regularly overlooked in other more risk adverse environments. The edgy and highly applauded drama *Love My Way* would not have been produced but for the willingness of subscription television to invest. Similarly the celebrated comedy *Stupid Stupid Man* was seen as a successful return to screens for the Australian sitcom – a genre that was widely overlooked in the then conservative production climate. This production is now licenced to ABC allowing for the production to have its first window on subscription television and the second window on the national broadcaster (free to air). Similarly, the documentary series *Crime Investigation Australia* which first airs on the subscription television channel CI Network has been licensed to the Nine Network.

For many people the first time that they view an Australian film is via subscription television. Box Office, Showtime/Showcase and Movie Networks broadcast almost all Australian films for the first time on Australian television. With the multiple opportunities for viewing films offered by subscription television, these films are given far greater exposure to audiences than they would during a film's theatrical run or initial video release. In many cases the audience viewing the film on subscription television will far exceed the audience the film realizes through theatrical release. For government investments made either directly or through rebates or offsets, delivering an audience to view that investment is significant.

Investments

ASTRA notes its members' substantial commitment to Australian content as evidenced in their investment in, and production and transmission of, a significant amount of Australian drama and non-drama content above and beyond any legislated requirement.

ASTRA's members invest hundreds of millions of dollars annually in the film and television production sector, creating all forms of Australian content.

Film Tax Offset

ASTRA's members have begun to embrace the new Film Tax Offset¹ scheme evidenced in the range of television productions created or being created using the new scheme. These are listed in the Appendix to this correspondence.

General Comment Concerning Consultation

ASTRA notes the very short timeline industry has had to respond to the release of the Terms of Trade. This follows a pattern of consultation that Screen Australia has adopted throughout 2008 covering the agency's Statement of Intent, Program Guidelines and now Terms of Trade. In all these cases papers are issued; comments are sought in a very short time frame; minimum if any changes are made to the original policy instrument; and the instrument is re-issued. It is consultation in the most minimalist sense without any direct or individual follow up or considered dialogue with singular businesses or peak representative bodies such as ASTRA regarding their concerns or comments.

Specific Comments on the Terms of Trade

1. Australian Content

ASTRA notes section 1.6 of the Terms of Trade titled: "*How much 'Australian content' must a project have in order to attract Screen Australia production investment?*"²

It has been a long held concern of ASTRA that both Screen Australia and the Australian Communications and Media Authority ('ACMA') currently have different eligibility tests to determine what is considered an 'Australian' program or production.

Having multiple tests for what is considered 'Australian' is not helpful or practical given that a large number of television productions are likely to need to meet tests established by Screen Australia and also by ACMA. The scenario could arise that the 'Australian' test is met for the broadcast but not for the production of the program and vice versa.

ASTRA is of the view that once a production meets one test, it should automatically meet the other – thereby avoiding any potential for an inconsistent finding.

2. The Australian Content Standard

The Terms of Trade refer to ACMA's Australian Content Standard:

*"Television projects must also be quota-eligible programs in relation to commercial broadcasters' compliance with the Australian Content Standard, as detailed on the ACMA website."*³

There are legislative provisions that require subscription television drama channels to spend 10 per cent of their total program expenditure on new eligible drama programs. What is

¹ Referred to the Terms of Trade as Producer Offset and relating to Division 376 of the Income Tax Assessment Act 1997

² Screen Australia Terms of Trade, page 3

³ Screen Australia Terms of Trade, page 4

considered an eligible drama program is guided by definitions contained in the Australian Content Standard. ASTRA is therefore puzzled by the reference only to commercial broadcasters' compliance.

ASTRA seeks clarification from Screen Australia that subscription television projects are not to be excluded from Screen Australia's industry support programs given the language in the Terms of Trade and in turn that subscription television projects are not required to meet additional (not required by legislation) aspects of the Australian Content Standard in order to be eligible.

ASTRA also seeks clarification as to whether potential investments to projects being developed by National Broadcasters are likewise potentially excluded from Screen Australia programs.

3. Television vs Film: Screen Australia Funding

ASTRA particularly supports efforts from Screen Australia to nurture all screen projects, particularly new media and content that appeals to cross media platforms. Subscription television's business is ultimately about delivering screen content on multiple platforms (television, internet, mobile phone, aircraft etc) and it is crucial that preferences and advantages provided to content delivered to (usually low audiences via) cinema screens are balanced against other platforms for content delivery to permit all forms of content to receive an appropriate level of respect and emphasis by the agency.

It is in this area that traditional programs and priorities of former agencies should be carefully re-thought to allow Screen Australia to be forward thinking and in step with current patterns of content consumption. In order to achieve this, it is important that Screen Australia adopt a flexible approach to financing arrangements and avoid prioritizing bureaucratic rules over sensible funding decisions.

Past funding priority models from government agencies suggest an historical imbalance against television content and this has been perpetuated in the release of Screen Australia's Program Guidelines which cover development support, production financing and Indigenous programs ('**Program Guidelines**'). In both the Film Tax Offset and direct funding mechanisms, television production appears to be undervalued.

Television production is the core element of the production industry which provides skills, businesses and training for all aspects of the industry. Both film and television remain open to fluctuating trends of success and failures and a long term strategic approach to funding should acknowledge this. Further, the disparity between the film and television industries fails to acknowledge the emerging reality of an increasingly shared number of key elements above and below the line, intertwining the two 'industries' such that they effectively form a single sector within the production industry. In past decades, the quality of Australian cinema, both from a production and artistic standpoint, exceeded that of television. However, in part because of the risks taken by subscription television in commissioning productions such as *Love My Way*, the quality of Australian television production is now at least on par and in many cases exceeds that of theatrical releases, which are now becoming more the domain of smaller, independent films made on tight budgets.

As a result of the risks taken by broadcasters, television drama is currently being celebrated and perceived as ‘strong’ and in the midst of a renaissance, whereas the film sector is seen to be relatively ‘unsuccessful’ when compared to television. However in the past during a wave of local and international hits, the film sector has been perceived to be flourishing.

The point is that no part of the film and television production industry is necessarily assured and that a long term, even handed approach to support for all the industry is recommended.

ASTRA is therefore disappointed to discover that the Terms of Trade continues to perpetuate the inequities in funding and support with stark results.

For example, the development investment outlined in the Terms of Trade, mentions support for feature films and documentary, but not television series drama.⁴ Australian drama that is screened on television should not be excluded from development investment.

Similarly, the Terms of Trade detail the investment cap as a proportion of budget total that Screen Australia will adhere to for various projects. The significantly large percentage differences between film and television drama (75% vs 40% respectively) again amplify (without merit) the impact of policy preferences for film support over television.⁵

Coupled with the large difference in the percentage offset offered to television productions when compared to theatrical film productions, the overall impact upon television production is significant.

ASTRA’s view is that the imbalance of indirect funding should be addressed through direct funding from funding agencies such as Screen Australia.

4. Screen Australia’s ‘Preferences’

The Terms of Trade are worded to permit Screen Australia various flexibilities while flagging what can be characterised as ‘preference’ positions. ASTRA is concerned that some of the positions outlined as preferences will in effect become ‘default’ and consequently carry the impact of more rigid policy positions. This means that many of the preferences expressed in the Terms of Trade must be carefully considered and consequences fully understood.

In particular:

- Screen Australia prefers that the producer have equity in the production and that their contribution be no less than the value of the Film Tax Offset.⁶
- Screen Australia prefers that further revenue (once all equity investment is repaid) be shared between the producer and investors on a 50/50 basis.⁷
- Screen Australia prefers that all producers have a recoupment entitlement of 35%, ranking equally with other equity investors.⁸

⁴ Screen Australia Terms of Trade, page 5

⁵ Screen Australia Terms of Trade, page 7

⁶ Screen Australia Terms of Trade, page 9

⁷ Screen Australia Terms of Trade, page 9

⁸ Screen Australia Terms of Trade, page 10

These are significant statements. The effect is to give privilege to projects:

- with producer investments set at specific levels over and above all other projects which may be funded through independent, private or other means; and
- which treat all forms of investment money the same irrespective of whether that money is attached to greater risk.

Additionally, producers' investments and therefore producers themselves are provided a rare and advantaged position by Screen Australia in the context of a film and television funding framework.

Important questions must be asked:

- Is it an intended or unintended outcome that funding from the private sector be discouraged?
- If an overall outcome from any of Screen Australia's activities is to achieve an output of quality Australian film and television productions, why are various funding streams into those productions given preference by Screen Australia, in turn affecting the financial viability of other productions and the ability for investors to recoup funding investments?
- Why is Screen Australia using funding mechanisms to attempt to achieve a very narrow solution to a much broader industry problem?

ASTRA has significant concerns that the Terms of Trade do not appropriately acknowledge the current investment funding environment post the advent of the Film Tax Offset and the ending of 10B and 10BA. Additionally, the imbalance between funding film and television that are maintained in the Terms of Trade will not necessarily provide for an overall stronger screen industry.

5. Screenrights

With regards to Screenrights, ASTRA notes that the Terms of Trade contains the following statement:

*"It is the policy of Screen Australia that Screenrights' revenue should flow to the original creators of the work. For all production investment made after 1 January 2009, Screen Australia will cease the practice of requiring that Screenrights' revenue form part of gross receipts."*⁹

ASTRA's position is that revenues from Screenrights should flow to the owners of the works rather than the creators. This is how the copyright legislative scheme is designed.

ASTRA also believes that the exploitation of copyright should be able to be treated as a gross receipt and shared by all investing parties. Anytime money is diverted from gross receipts it becomes more difficult to attract private investment to a production. It is important that Screen Australia explain the policy basis for changing its practice of requiring

⁹ Screen Australia Terms of Trade, page 10

the revenue to form part of gross receipts as this will effect the arrangements between investing parties knowing that secondary income streams are or are not accessible.

Conclusions

Subscription television has been and will continue to be a crucial contributor to the commercial viability of the Australian film and television industry.

Ways in which this contribution could be further enhanced and extended include:

- addressing the inequity of film over television in Screen Australia's released Program Guidelines and in the Film Tax Offset returns;
- allowing productions that meet either ACMA's Australian Content Standard or the Film Tax Offset 'Australian' test to automatically meet the other;
- consideration being given to the funding of television and film production in a holistic sense and issues created currently by regulation 'silos'; and
- reform in relation to the flexibility of access to the Film Tax Offset to avoid production 'bunching'.

With regard to the Terms of Trade, more thought needs to be given to the consequences of Screen Australia's 'preferences' for the types of projects that it would seek to invest in as these will directly impact the film and television financing market. Many positions stated in the Terms of Trade will have the effect of becoming Screen Australia policy positions. In turn these positions directly and indirectly affect the viability of subscription television projects and the ability for investments to be obtained. The bias against television production in favour of film and unreasonable regulatory overlap with other agencies will further compound the difficulties faced by ASTRA's members. Further, it will not achieve a stronger screen industry.

ASTRA supports Terms of Trade that are less prescriptive, less narrow in their focus and develop and encourage contributions from the entire screen industry.

We look forward to discussing our thoughts with you and your staff and providing further information where possible.

Yours sincerely



Debra Richards
CEO

Appendix

Subscription Television Productions using or proposing to use the Film Tax Offset as at November 2008

| Subscription Television Program Provider | Production Title | Type of Production | Producer | Broadcast date (past or anticipated) | Film Offset Year |
|--|-------------------------------|----------------------------|--|--------------------------------------|------------------|
| UKTV | Make or Break | Telemovie | FOX World | December 08 / January 09 | 2007/08 |
| UKTV | False Witness | Drama Series 2 x 90min | Screentime | TBC | 2008/09 |
| Premium Movie Partnership (Showtime) | Satisfaction Series 2 | Drama Series 10 x 60min | Lonehand (Roger Simpson / Andy Walker) | December 08 | 2008/09 |
| Premium Movie Partnership (Showtime) | Tangle | Drama Series 10 x 60min | John Edwards / Southern Star | TBC | 2009/10 |
| History Channel (FOXTEL) | Stamp of Australia | Documentary | Hammer Klavier | TBC | 2008/09 |
| Movie Network | Chandon Pictures Series 2 | Drama Series 8 x 30min | Shadowfax | 2009 | 2008/09 |
| The Comedy Channel (FOXTEL) | Whatever Happened to That Guy | Drama series 8 x 30min | Ruby Entertainment | 2009 | 2008/2009 |