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## **NATIONAL CULTURAL POLICY SUBMISSION**

This submission relates to “Ensure that government support reflects the diversity of Australia.”

The relevant pillar is “Strong Institutions”

This submission deals with the practical operation of the tax offset for Australian film production in Division 376 of the Income Tax Assessment 1997 (“**Producer Offset**”).

This submission is my own personal submission, and may not reflect the views of my instructing solicitors or clients.

### **A Proposal**

The Producer Offset should be amended

- the Producer Offset decisions should be independent and separate from Screen Australia that makes decisions about film financing;
- any appeals from the Producer Offset decisions should first be referred to an ad hoc industry panel, before the AAT.

Further, there should be a financing fund available for low budget films with early-stage production teams.

### **B Context**

I am currently a barrister at the NSW Bar. My professional experience includes providing legal advice relating to the tax effective financing of Australian film and television production.

I was a lawyer in private practice at Mallesons Stephen Jaques (now King Wood Mallesons). My practice included providing advice relating to Division 10B and Division 10BA of the Income Tax Assessment 1936 (“**Division 10BA**”), and later providing advice relating to the Film Licensed Investment Scheme (“**FLICS**”). Since going to the NSW Bar, I have provided advice relating to the Producer Offset, including appeals to the AAT relating to Screen Australia’s decisions about the Producer Offset.

### **C Provisional Certificate and Final Certificate**

Division 10BA and the Producer Offset both involve the producer applying for a “provisional certificate” before the film is made. Generally speaking, the provisional certificate certifies that, based on the information provided, if the film is made in accordance with the information provided, the film will meet the eligibility requirements of the Producer Offset regime.

The provisional certificate is the lynchpin in film financing. Generally speaking, the producer will only receive cash at the end – the producer will not be able to “sell” the film and be paid licence fees until the film is delivered, but the producer needs cash at the beginning – to pay for the rights, and to pay for the cast and crew and equipment and stock. Therefore, generally

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speaking, financiers or low risk investors will cash flow the production and lend to the producer based on the provisional certificate.

This is particularly important for early stage producers or independent producers, who do not apply to or are otherwise not eligible to apply to Screen Australia for direct funding.

When the film is ultimately completed, the producer applies to for a final certificate. In Division 10BA, the final film certificate entitled the investor to a tax deduction, and in the Producer Offset it triggers the tax offset.

The purpose of the tax expenditure has always been to stimulate and encourage production. The tax expenditure is to stimulate all production, from a diverse range of producers, for a diverse range of stories, not just producers who apply for and are eligible to apply to Screen Australia for direct funding.

### **D Independent Decision Making**

Historically, in Division 10BA, the producer applied to the Department of Communications, Industry and the Arts for a provisional certificate. [REDACTED]

[REDACTED] The issue of the provisional certificate and ultimately the final certificate was completely independent from the federal statutory agencies who financed and invested in films - Film Australia, Australian Film Commission and Film Finance Corporation.

However, with the Producer Offset, the producer applies to Screen Australia. Screen Australia is not only the statutory agency that administers the Producer Offset, but is also the statutory agency that invests in films – the consolidated successor to Film Australia, Australian Film Commission and Film Finance Corporation.

This concentrates power within Screen Australia.

There is a clear potential conflict of interest that Screen Australia may favour films that it wants to invest in and that it has invested in.

There is also a risk that there is a “seepage” of Screen Australia’s investment priorities and preferences into its administration of the Producer Offset.

The Producer Offset decision making process should be independent from Screen Australia.

### **E AAT appeals**

If a producer does not agree with Screen Australia’s decision, the producer must appeal to the AAT.

The appeal is an appeal on the merits, the AAT makes the decision as a fresh decision. This has several consequences.

First, there is no forum for complaining about the *decision-making process*, and in particular inconsistent decision making. Screen Australia may have allowed similar production expenditure

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or similar structures for other films for other producers, but deny it to this particular producer for this particular film. Screen Australia may have issued a provisional certificate for a particular film, and then refuse to issue the final certificate even though the information has not materially changed.

This can be devastating for an individual producer. The individual producer and their advisers receive a provisional certificate, and are aware that Screen Australia has allowed similar production expenditure and similar structures for other producers, and in reliance of the provisional certificate and previous Screen Australia decisions, they incur significant financial commitments and produce a film. After they have incurred the costs and produced the film, Screen Australia then appear to change their position. In some egregious cases, Screen Australia appears to have continued to allow expenditure for certain producers on certain films but not for other producers on other films.

Some film financiers are now questioning whether they will leave the Australian market because they can no longer rely on the provisional certificate as the basis for providing finance.

This disproportionately affects early stage producers and independent producers, who rely on private financing rather than Screen Australia investment.

Second, the appeal opens up the whole decision, not just the expenditure in dispute. Screen Australia may allow certain expenditure in their initial decision, but when the producer appeals, Screen Australia puts in issue *all* of the expenditure and argues against all of the expenditure being allowed. This effectively and practically discourages appeal - if the producer continues with the appeal then all of the expenditure is in issue, whereas if they drop the appeal then Screen Australia will continue to allow some of the expenditure.

Third, the costs of the appeal are punitive and disproportionate to the amounts involved. The amount in issue may only be \$30,000 to \$50,000, but will necessarily involve at least a 2 day hearing because of the expert and factual evidence involved. Again, this disproportionately affects early stage producers who cannot afford to appeal.

Fourth, the AAT has no industry expertise. Generally speaking, parties to the AAT are entitled to file expert evidence. However, it is difficult for a producer to secure an expert in circumstances where the expert is required to give evidence against the statutory agency that administers the Producer Offset AND the statutory agency that is the main source of government funding and investment in Australian film. I have been involved in cases where the producer requested that the name of the expert is kept confidential to the legal representatives and the internal lawyer, and is not otherwise disclosed, but this was absolutely rejected. In addition, the experts may require to be paid, which again may be disproportionate to the amounts involved.

#### **F Potential Solutions**

Before an appeal to the AAT, there should be a review by an independent industry panel made up of relevant domain experts.

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It may be that this is a permanent body with limited terms of 6 months to 1 year. Alternatively, it may be an ad hoc body that is specially constituted for the particular review, with each party entitled to nominate a relevant domain expert, or Screen Australia and the relevant peak industry body (SPA, DGA, etc) entitled to nominate a relevant domain expert.

The independent industry panel's remit can consider the merits of the review, and also consider consistency in decision making.



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