INFORMATION SHEET

FILM FINANCING

This information sheet looks at Australian and international sources of funding for film, television and games developers including both funding by way of grants or an investment in the project.

Australian filmmakers can access funding from Federal, State and Territory funding bodies. Free-to-air broadcasters and pay television channels may provide partial funding for film and television programming. Film distributors may assist in the financing of feature films and distributors and publishers of computer games are possible sources of financing for computer games. While a number public/government funding options exist, including the Producer Offset scheme, many filmmakers elect to seek funding through private avenues such as crowd funding. Each of these funding options is explored in more detail below.

1. Screen Australia

Screen Australia is funded by the Federal Government and provides development and production funding for film, television and digital media projects.

Screen Australia's Terms of Trade including the general eligibility for Screen Australia funding, limits on funding and copyright interests in projects funded by it are published on the Screen Australia website. Each funding program operated by Screen has guidelines that describe the specific eligibility for the program and the deadlines for filing of applications.

The legal department of Screen Australia is responsible for the contracting with producers who receive development and production funding including the preparation of the production and investment agreement (PIA).

Some funding programs are designed to assist new filmmakers while other programs are designed for experienced filmmakers. Screen Australia's 'A-Z Budget' sets out the standard budgeting format for feature films, short films, documentaries, animation and digital media that is required by Screen Australia and usually required by State and Territory funding bodies.

Aboriginal and Torres Strait Islander filmmakers can apply to any Screen Australia program as well as the funding programs of the Screen Australia's Indigenous Department.

Screen Australia is also responsible for the administration of:

- The official co-production program, which facilitates film and television producing between Australia producers and producers in countries with which Australia has implemented co-production treaties; and

- The Producer Offset funding mechanism that is paid through the Australian company tax system, and is discussed below.

2. State and Territory funding bodies

State and Territory funding bodies also provide funding programs for filmmakers at various stages of the development of film making experience. Each of these funding bodies determines its own priorities for support and funding for feature films, short films, television drama and documentaries, animation and digital media. Each funding program operated by State and Territory funding bodies has specific guidelines that describe the specific eligibility for the program and the deadlines for filing of applications.

For more information on the specific requirements of each finding program provided see the websites for the relevant organization:

- Screen NSW
- Film Victoria
- Screen Tasmania
- South Australian Film Corporation
- Screen West (WA)
- Screen Territory (NT)
- Screen Queensland

3. What is the 'Producer Offset' or 'Producer Rebate'?

The 'Producer Offset' under Division 376 of the *Income Tax Assessment Act 1997* (ITAA) and the Producer Offset Rules 2007 provide incentives for film production in Australia through the Australian tax legislation.[1] The operation of the Producer Offset (which is sometimes referred as the Producer Rebate) results in a producer receiving a payment from the Australian Taxation Office (ATO) of 40% of the budget of a qualifying feature film and 20% of the budget for qualifying television productions. The Producer Offset is a different funding mechanism to the grant and funding programs provided by Screen Australia or State and Territory film funding bodies, which are discussed above. The eligible productions for the Produce Offset are:

- a feature film that will be exhibited to the public in cinemas (at least 60 minutes in length, or 45 minutes for 3D films);
- a single-episode program (e.g. 30 minute documentary for television, telemovie or direct-to-DVD (of at least 60 minutes);
- a television series (documentary or drama) or mini-series (of at least 2 episodes, with a minimum episode length of 30 minutes); or
- short-form animation (of not less than 15 minutes in total duration).[2]

The Producer Offset has further very specific eligibility requirements published on the Screen Australia website concerning:

[1] *Income Tax Assessment Act 1997* (ITAA) http://www.screenaustralia.gov.au/producer_offset/

[2] The timing of programming for television production is based on an hour or half hour of television time of the commercial broadcaster. That is, it takes account of advertising breaks so that the actual screen time of the program is shorter than 1 hour or 30 minutes.

- the eligibility of producers;
- the production meeting a 'significant Australian content' test;
- the production meeting 'qualifying Australian production expenditure' (QAPE) requirements.

A basic understanding of both the official co-production program and Producer Offset funding is contained in the Screen Australia publication 'Doing Business with Australia'. Further information about the producer offset is also available on the ATO website.

Digital media projects (including console games, mobile and online games) are not eligible for Producer Offset financing.

4. Australian free-to-air broadcasters and pay-television channels

There are mandatory government standards for the broadcast of Australian content on commercial free-to-air television, and in respect of expenditure by Australian pay-television drama channels on Australian or New Zealand drama programming. This is an incentive for Australian free-to-air broadcasters and pay-television channels to provide financing for Australian film and television production, usually in the form of a licence fee for transmission rights.

The Australian Broadcasting Commission (ABC), Special Broadcasting Service (SBS) and National Indigenous Television (NITV) may provide specific funding programs for emerging filmmakers as well as funding productions of experienced filmmakers.

5. Film distribution companies

Australian film distribution companies are also possible sources of production finance for feature films.

However, convincing commercial free-to-air broadcasters, pay-television channels and film distribution companies to invest in film or television production is never easy. It requires the right project, the right production team (with the necessary level of professional experience in key positions), and a persuasive pitch so that the people that commission productions are convinced that the use of their funds will result in film or television production that has the commercial qualities that they want.

6. International sources of film funding

a. 'Official' co-productions and other co-productions

An 'official' co-production is a film financing and production arrangement that is organized under co-production treaty or Memorandum of Association (MOU) that the Australian government has signed with another country. As at 1 February 2013, Australia has co-production treaties with Canada, China, Germany, Ireland, Israel, Italy, South Africa, Singapore and the United Kingdom and signed MOUs with France and New Zealand. Screen Australia manages the 'official' co-production program, although the negotiation of the treaties and MOUs is the responsibility of the Department of the Prime Minister and Cabinet – Office for the Arts.

Screen Australia publishes 'International Co-production Program Guidelines' which explain the process of applying for recognition as an official' co-production. The eligible films and other requirements can differ between each co-production treaty or MOU. For example, some co-production arrangements are specifically limited to feature films, while television drama series, documentary films and series, animation and other formats may qualify for others.

The advantage of producing a qualifying film as an 'official' co-production is that the production will meet the 'significant Australian content' (SAC) test for accessing the Producer Offset; qualify as 'Australian content' for the purposes of broadcaster 'Australian Content' quotas; and be eligible for production investment from Screen Australia as well as state and territory film funding bodies.

b. Film financing in the international market

It is also open to Australian filmmakers to enter international film financing and production arrangements for feature films, short films, television drama and documentaries, animation and digital media that are not organized under an official co-production treaty or MOU.

There are funding opportunities at international co-production and film funding markets and there are film funding events run in conjunction with some international film festivals. Screen Australian publishes information about film markets and International Pitching Forums.

Emerging filmmakers may find funding opportunities outside Australia from public service broadcasters that are looking for programming made by emerging filmmakers. There are also some Foundations that make grant funds available where the films meet the funding criteria of the organization. See, for example, the following websites:

- International Documentary Association
- World Cinema Fund
- The Bertha Britdoc Documentary Journalism Fund
- The Ford Foundation's JustFilms

7. Attracting Private Funding and Investment

Filmmakers can offer investment opportunities to private investors in the production of their film. The making of offers or invitations to investors to provide money including (however worded) an offer to invest in a film are likely to be considered as 'investment schemes' under the *Corporations Act 2001 (Cth)* [3]*.* The Corporations Act requires ASIC to regulate all investment schemes, whatever legal status of the entity making the offer, so that a film investment scheme may be regulated whether offered by a sole trader or a partnership or a company.

The Corporations Act defines an 'investment contact' as any contract, scheme or arrangement that involves the investment of money in or under such circumstances that the investor acquires or may acquire an interest in, or right in respect of, property.[4] A film investment scheme may take the form of an offer to the investor of a return on investment comprising an interest in the film's copyright and/or a share in the proceeds of marketing the film and/or any profits .[5] Unless it falls within an

[3] Film investment schemes: Regulatory Guide 19 (RG 19) http://www.asic.gov.au/rg

[Note that RG 19 was published before changes to the Corporation Law regarding "managed investment scheme"; the replacement of Division 10B/10BA ATAA by the "Producer Offset" scheme; and the creation of Screen Australia to replace the Film Finance Corporation (FFC).]

[4] Defined in s.9 Corporations Act 2001 (Cth).

[5] An 'Investment' is defined as "[a]n asset bought with the aim of producing an income and/or an increase in value over time." https://www.moneysmart.gov.au/glossary/i/investment

exemption, the offer of interests in film investment schemes must be made as a 'managed investment scheme', which must be registered with ASIC.[6]

There are limited circumstances in which an investment scheme is not required to be disclosed to the ASIC or offered through a managed investment schemes that is approved by the ASIC. The Corporations Law provides for exceptions for a personal offer or small scale offering of an interest in securities and offers made to what are described as 'sophisticated investors';[7] or to what is defined as a 'professional investor'.[8] The offers and invitations that are excluded from regulation have specific requirements that must be met.

The regulation of investment schemes is a complex topic that is beyond the scope of this information sheet, and filmmakers should seek advice from an appropriately qualified lawyer, accountant or tax adviser.

8. Crowd funding

Crowd funding has emerged as an important source of funding for film projects. Crowd funding involves using the Internet to access a pool of funds from members of the online community in order to finance a particular project. In 1997, independent writer/director Mark Kines used online crowd funding to finance the completion of his unfinished feature Foreign Correspondents. By 1999, he had raised more than $125,000, which allowed him to complete his film.

Filmmakers can use crowd funding websites to access an international market of potential investors. The 'crowd' of people linked through the crowd funding website make individual financial contributions to finance the filmmaker's project. Often their contribution will entitle them to something in return for their support depending on the amount they contribute. The operators of the crowd funding website will usually also require the filmmaker to make some payment for the use of their crowd funding platform, for example, a percentage of the funds raised.

Filmmakers should be aware that any financial contributions they receive through crowdfunding may be subject to income tax as assessable income. This will depend whether their filmmaking activities are considered to be part of a business they are carrying on, as distinct from merely a hobby. To assist you work out if you are operating a business or not, see the Australian Taxation Office website.

The types of rewards or benefits given to crowd funders by the filmmaker might include a 'thank you' in the credits, a meeting with the producer or tickets to an advance screening of the film, a role in a crowd scene, or a share of the intellectual property in the film. In Australia, such 'rewards' or 'perks' may transform the request for donations of money into a "managed investment scheme" as described in the *Corporations Act 2001* (*"Corporations Act")*. This is an important consideration because crowd funding projects are generally not regulated by ASIC unless they are also "managed investment schemes". A "managed investment scheme" exists where funds are pooled to create financial benefits such as property interests (which are financial products and regulated under the *Corporations Act*).

It is possible to have a rewards program that is outside the regulatory scope of the *Corporations Act*, if the rewards are specific, nominal non-financial products or services. If the rewards offered are not financial benefits, for example copies of the finished film, a promise that the investor can be an extra in the film, invitations to the film's launch party, t-shirts, or seats at the premier, then the crowd

[6] Chapter 5C, Part 5C.1, s.601ED Corporations Act 2001 (Cth).

[7] s. 708 - Offers that do not need disclosure - Corporations Act 2001 (Cth).

[8] Defined in s.9 Corporations Act 2001 (Cth).

funded project will not be a managed investment scheme. A pure request for a donation of money (without accompanying 'reward') would also not be within the meaning of 'investment contact' or 'securities' as discussed above. The criteria used to work out if a crowd funded project is a "managed investment scheme" are complex and you should seek legal advice in relation to your specific project.

For more information about this, you should read ASIC's "guidance on crowd funding" here: http://www.asic.gov.au/asic/asic.nsf/byheadline/12-196MR+ASIC+guidance+on+crowd+funding?openDocument.

ASIC has identified risks of crowd funding websites to include fraud, incomplete projects leading to non-delivery of rewards and filmmakers losing the funds due to fraud or bankruptcy of the crowd funding website operator. Actions to minimize such risks include background checks (of both the host website and the business owners behind the specific project seeking funding), assessment of the viability of crowd funding projects and determining whether the website maintains individual trust accounts for each crowd funding project.[9]

In addition, promising and then failing to deliver some reward or perk may constitute misleading or deceptive conduct in breach of the *Competition and Consumer Act 2010* (Cth) – which includes the Australian Consumer Law – or may breach State or Territory Fair Trading legislation.

Using crowd funding websites necessarily involves posting a short description or treatment of the film project requiring financing, so filmmakers using this model to raise funds should assess whether the early release of their idea in this way suits their business practice.

Crowd funding can be a low risk, engaging way to attract interest and investment in a film, but like all business decisions, film makers should weigh up the risks and benefits. There are fundamental differences in the services provided by many crowd funding platforms. Arts Law recommends filmmakers read the terms and conditions of each crowd funding website carefully and seek business and legal advice if they have any questions.

Further information

The Screen Australian website publishes sample paperwork and documents for various aspects of filmmaking.

Forbes Magazine, "Top 9 Advantages of Investment Crowdfunding", 20 February 2013

Need more help?

If you have questions about any of the topics discussed above please contact Arts Law.

[9] http://www.asic.gov.au/asic/asic.nsf/byheadline/12-196MR+ASIC+guidance+on+crowd+funding?openDocument

The Arts Law Centre of Australia has been assisted by Screen Australia and the Commonwealth Government through the Australia Council, its arts funding and advisory body.