



Australian Government



TERMS OF TRADE

Effective 1 July 2010

This version issued 27 January 2012 (see next page for change log).

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Change log

27 January 2012:

Updated the Screen Australia logo.

1 July 2011:

Introduction: Amended to incorporate the Producer Equity Program, and to clarify scope and application of the Terms of Trade and program guidelines.

1.1 General eligibility: Amended for clarity and to incorporate the Producer Equity Program.

1.2 Acting in good faith: Reference to minimum rates amended.

1.3 Fees: List of fees moved to Schedule A; application fees deleted for funding programs.

1.4 Audit rights: Amended for clarity.

1.5 Reporting and information provision: Amended for clarity.

4.1 Limits on Screen Australia funding: Amended to incorporate the Producer Equity Program; removed reference to prioritisation of projects with the lowest contribution from Screen Australia for television drama and children's television drama.

4.2 Producer contributions: Amended to incorporate the Producer Equity Program.

5.2 Equity investment: Reference to transitional arrangements to 1 July 2010 removed.

5.3 Development funding: Amended for clarity.

5.5 Screenrights: Reference to transitional arrangements removed.

5.6 Recoupment: Amended for clarity.

6.1 Copyright: Clarification of provisions for purchasing copyright held by Screen Australia for projects with development funding.

6.2 Other rights: Amendments to incorporate the transfer of Screen Australia's documentary Library and Sales functions to the NFSAA.

7 Reversion: Amended for clarity.

9 Accessibility of screen content: Audio description added as a requirement for feature films.

10 Delivery items: Amendments to incorporate the transfer of the Screen Australia Library to the NFSAA.

23 March 2011:

10.2 National Documentary Program – Delivery Items: Change to production stills delivery requirements.

10 January 2011:

1.4 Fees: Additional set-up fee for cases where the producer seeks a variation to the Disbursement Administration Service (DAS) agreement to split their share of gross receipts.

7 Reversion: Clarification of timing for reverting to the producer Screen Australia's entitlement to gross receipts.

TERMS OF TRADE

INTRODUCTION

Screen Australia funding programs

Screen Australia is the Federal Government's primary funding body for the Australian screen production industry. Its functions are to support and promote the development of a highly creative, culturally relevant, innovative and commercially sustainable Australian screen industry. To this end, Screen Australia offers funding programs covering development, production financing, Indigenous and marketing.

Funding is provided by way of grant, interest-free limited-recourse loan or recoupable equity investment, depending on the type of project and program applied for.

Funding decisions are determined by the terms and available funding for the relevant program, and, except in the case of Producer Equity payments, by the number and quality of competing qualifying applications. Eligibility requirements apply to both applicants and projects for which funding is sought.

For the purposes of determining the scope of its documentary funding programs, Screen Australia will have regard to the guidelines compiled by the Australian Communications and Media Authority (ACMA). These guidelines are available on the ACMA website.

Application of Terms of Trade and program guidelines

These Terms of Trade broadly outline the core terms on which the organisation will transact its business. They apply to Screen Australia funding support including, to a limited extent, the Producer Equity payment. They do not apply to Screen Australia acting in the capacity of:

- (a) the film authority responsible for the administration of the Producer Offset under Division 376 of the *Income Tax Assessment Act 1997* and by the Producer Offset Rules; or
- (b) the competent authority for the purposes of Australia's official co-production program.

Contracts entered into between Screen Australia and applicants for funding reflect both these Terms of Trade and the specific requirements relating to each program as set out in program guidelines.

Screen Australia will vary its Terms of Trade and program guidelines from time to time. If these documents change in the period between lodgement and contracting of a successful application, the following will apply:

- (a) The eligibility provisions within the Terms of Trade and program guidelines in force at the time of application will continue to apply;
- (b) In all other respects the Terms of Trade and program guidelines in force when Screen Australia approves funding (including funding by way of the Producer Equity payment) will apply.

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Except for section 1, these Terms of Trade do not apply to projects that seek Screen Australia funds only through the Producer Equity Program.

1. GENERAL MATTERS

This section applies to all Screen Australia funding programs, including the Producer Equity Program for low-budget documentaries.

1.1 General eligibility for Screen Australia funding

In the following provisions:

- (1) “broadcaster” means a company providing television broadcasting services in Australia (including subscription television services) under the *Broadcasting Services Act 1992 (Cth)*.
- (2) “related party” means:
 - (a) a director or other officer of an applicant company; or
 - (b) the holding company or a subsidiary of an applicant company; or
 - (c) any company of which an individual applicant is a director or other officer; or
 - (d) any other company of which a director or other officer of an applicant company is a director or other officer.

1.1.1 Applicant eligibility

The following paragraphs set out eligibility provisions specific to individual applicants and company applicants, and then ‘common eligibility rules’ applicable to both individuals and companies (and, to the extent indicated, to related parties).

An individual applicant must be:

- (a) an Australian citizen; or
- (b) an Australian resident, being a person who is domiciled in Australia, and who has actually been in Australia, continuously or intermittently, for more than one half of the year immediately preceding the application.

An individual applicant may not be:

- (a) an employee of a broadcaster; or
- (b) enrolled full-time in a film, television or interactive digital media course at a film school or other tertiary educational institution. Applications from part-time students will be assessed on a case-by-case basis.

An applicant that is a company must be:

- (a) incorporated and carrying on business in Australia, and have its central management and control in Australia.
By way of exception to this provision, when applying for P&A funding (or similar marketing support), a company which would otherwise be ineligible may be funded where it is considered appropriate in all the circumstances to do so.

An applicant that is a company may not be:

- (a) a broadcaster;
- (b) a holding company or subsidiary of a broadcaster; or
- (c) jointly owned by one or more companies referred to in (a) or (b).

All applicants must also:

- (a) not be in breach of any obligation under any agreement they have with Screen Australia or any of Screen Australia's predecessors;
- (b) always act 'in good faith' in all their dealings with Screen Australia (see 1.2 below);
- (c) have the capacity and resources to carry out the project or proposal that is the subject of the application;
- (d) have the right to carry out the project or proposal that is the subject of the application (including any relevant copyright and appropriate clearances from all significant participants). If the application is based on an underlying work, Screen Australia will expect, at the least, an appropriate option;
- (e) have meaningful creative control of the project that is the subject of the application.

Where a related party to an applicant is in breach of an obligation under an agreement with Screen Australia or any of its predecessor agencies, Screen Australia reserves the right to regard the applicant as ineligible.

1.1.2 Project eligibility

In order to provide funding to any project, Screen Australia must be satisfied either that the project is an official co-production or that the project has significant Australian content. In the case of applications for development funding, these tests will be applied having regard to the project's stage of development.

1.2 Acting in good faith

Screen Australia acts in the public interest and must exhibit the highest levels of propriety in its dealing with applicants. Screen Australia requires applicants to act in the same way in their dealings with Screen Australia. Applicants must be honest and open in all dealings with Screen Australia. They must not mislead or deceive Screen Australia by act or omission.

Screen Australia also expects all recipients of funding support to act fairly and reasonably in relation to third parties involved in the funded project. Fairness and reasonableness include:

- (a) paying at least award minimum rates or, where applicable, any minimum agreed between the relevant guilds, for all work performed by third parties on their project, including key creatives, cast and crew;
- (b) respecting the rights of all relevant persons, whether those rights be copyright or other intellectual property rights, moral rights or Indigenous Cultural and Intellectual Property rights.

1.3 Fees

Screen Australia may charge fees for some services and application fees for some programs, as set out in Schedule A.

1.4 Audit rights

Screen Australia may require funding recipients to provide an independent audit report in relation to expenditure of the Screen Australia funds. For example, in the case of production investment, a complete audit is required of all production expenditure at project completion.

Where an independent audit report is not required, Screen Australia may require the funding recipient to provide a statutory declaration verifying the expenditure report(s). In all cases, Screen Australia reserves the right to carry out an audit of the expenditure of its funding support to ensure compliance with contract requirements.

1.5 GST

Generally, GST is payable on Screen Australia's funding and fees. Screen Australia requires the applicant to have an Australian Business Number (ABN), and to register for GST if required by law. Where GST is payable, Screen Australia will require the applicant to issue a Tax Invoice as a precondition to drawdown of the Screen Australia funds.

1.6 ISAN

All projects in which Screen Australia holds copyright are required to have an International Standard Audiovisual Number (ISAN).
See www.australasia-isan.org/

1.7 Reporting and information provision

For all projects and activities with funding from Screen Australia (whether by way of recoupable equity investment, grant or limited recourse loan), the recipient will be required to provide some form of reporting/acquittal.

For example, in the case of equity investment funding, the producer will be required to provide regular reporting in relation to the 'Marketing' of the project and 'Gross Receipts' (as those terms are defined in the relevant funding agreement).

In addition, funding recipients may also be required to provide information about the funded project or activity for the purposes of Screen Australia's strategy and research function.

The information requirements will be set out in the relevant funding agreement.

2. CREDITING SCREEN AUSTRALIA

Screen Australia requires acknowledgement of its support, for example by way of a credit on the film and its publicity materials. Credit requirements vary according to the nature of the support provided by Screen Australia and are detailed in the funding agreement.

3. INDIGENOUS CONTENT

Where there is Indigenous content or participation in any production, the producer is required to comply with Screen Australia's protocols, including those related to treatment of 'Indigenous Cultural and Intellectual Property Rights'. For more information, see 'Indigenous Content and Participation' in

Screen Australia's program guidelines and *Pathways & Protocols: a filmmaker's guide to working with Indigenous people, culture and concepts* available from www.screenaustralia.gov.au/funding/business/Indigenous_Content.aspx

4. PRODUCER CONTRIBUTIONS AND LIMITS ON SCREEN AUSTRALIA FUNDING

4.1 Limits on Screen Australia funding

There are limits on the amount of production funding that Screen Australia can provide for an individual project.

In the case of projects eligible for the Producer Offset ("Offset projects") or documentaries eligible for Producer Equity ("Producer Equity documentaries"), the amount of direct support that Screen Australia can provide will be limited so that total Federal Government funds, including the Offset or Producer Equity, are capped at:

- 75% of the project budget for documentaries;
- 65% for all feature films (unless exceptional circumstances warrant funding up to 75%);
- 40% for television drama and 45% for children's drama production.

In the case of projects eligible for neither the Producer Offset nor Producer Equity, Screen Australia funding will be capped at 75% of the project budget.

Funding in excess of the above limits may be considered on a case-by-case basis in exceptional circumstances.

In addition to the above limits, absolute caps on Screen Australia's investment may also apply. These are set out in the relevant program guidelines.

In relation to official co-productions, the above provisions apply only to the Australian producer, and only to the Australian components of the budget.

4.2 Producer contributions

Screen Australia expects the producer to make a contribution towards the production budget for Offset and Producer Equity projects.

For Offset projects, that contribution will be at least 90% of the projected value of the Offset for feature films and television, and at least 85% of the projected value of the Offset for documentaries. That proportion of the Offset which becomes a contribution to the production budget will be deemed to be the producer's equity in the project (in addition to any other equity contributed by the producer).

Screen Australia will not cashflow the Producer Offset or any part of the Producer Offset.

In relation to official co-productions, the above provisions apply only to the Australian producer, and only to the Australian components of budget and revenue.

5. TERMS OF FUNDING AND GROSS RECEIPTS

5.1 Grant

Funding provided by way of grant does not have to be repaid other than in case of breach or where not all of the grant is required.

5.2 Equity investment

For finance provided by way of recoupable investment (equity), Screen Australia requires an initial recoupment entitlement to participate in gross receipts commensurate with its investment. The recoupment structure for a project will be determined on a case-by-case basis taking into account Screen Australia's investment and the investment of others, both equity and non-equity investors.

Producers will receive the recoupment position associated with the Offset and any other equity contributed by the producer. Once all equity investment is repaid, the producer's profit share will be 50%. All equity investors (including the producer in relation to the Producer Offset equity, Producer Equity payment equity and any other producer equity investment) will share the remaining 50% *pro rata, pari passu*.

5.3 Development funding

If a project has received development funding from Screen Australia and proceeds to production with Screen Australia production funding, the development funds must be recognised in the production budget (as an above-the-line cost) and will become part of Screen Australia's total investment in the project.

Where the project goes into production without Screen Australia production funding, development funding provided by Screen Australia is not repayable unless the producer wishes to acquire any copyright interest held by Screen Australia, in which case see 6.1 below.

5.4 Subordination

Generally, Screen Australia will not subordinate its recoupment right to other equity investors. Screen Australia expects to participate in gross receipts *pro rata and pari passu* with other equity investors.

5.5 Screenrights

Screen Australia does not require Screenrights revenue to form part of Screen Australia's gross receipts.

5.6 Recoupment

The producer is ultimately responsible for the collection and disbursement of all gross receipts. Screen Australia will generally require the appointment of a collection account manager for feature films for all territories other than Australia and New Zealand. Screen Australia does not require the appointment of a third party to disburse gross receipts generated in Australia and New Zealand. However, it does offer this service (for a fee) under a Disbursement Administration Service Agreement (DASA).

5.7 Official co-productions

In relation to official co-productions, the above provisions apply only to the Australian producer, and only to the Australian components of budget and revenue.

6. RIGHTS FOR DEVELOPMENT AND PRODUCTION FUNDING

6.1 Copyright

Screen Australia requires the producer to have, or be in a position to acquire on appropriate terms, all underlying rights required to make and exploit the project.

Screen Australia requires a 1% copyright interest, for the duration of the project's copyright, in:

- (a) all projects for which it provides development or production funding as a grant in excess of \$100,000 (all prior funding from Screen Australia or its predecessor agencies will be included in assessing whether the \$100,000 funding level has been reached);
- (b) all projects for which it provides recoupable production investment.

When a project that has received development funding from Screen Australia does not proceed to production with Screen Australia funding, the producer may purchase any copyright held by Screen Australia subject to the terms of the relevant development agreement(s). Where there is no provision for purchase in the agreement(s), the producer must reimburse all of the development funding in order to acquire the copyright.

6.2 Other rights

In addition, Screen Australia requires the following rights:

- (a) the right to use the project and promotional materials (in whole or part) for its corporate and promotional purposes;
- (b) approval or meaningful consultation rights as set out in the project's Production Investment Agreement (PIA);
- (c) a right to participate in revenues generated by further exploitation of the production including through sequels, spin-offs and remakes (and formats, where relevant), with licence fees expected to be of the following order:
 - documentaries and adult TV drama series (6 or more episodes): \$5,000 per episode for the first series; \$7,500 for each subsequent series
 - all other formats: 2% of the production budget.

In addition to the above rights:

- (d) in the case of National Documentary Program projects, Screen Australia will require the producer to enter into a Licence and Delivery Deed with the National Film and Sound Archive of Australia (NFSAA), whereby the producer agrees to deliver certain items to the NFSAA and to authorise the NFSAA to license third parties to use footage and stills delivered by the producer for the purposes of the Zero Fee Licensing Scheme and stock footage licensing (both of which functions transferred from Screen Australia to the NFSAA with effect from 1 July 2011);

- (e) in the case of all other funded projects, Screen Australia will require the producer to enter into a Delivery Deed with the NFSAA, whereby the producer agrees to deliver certain items to the NFSAA.

7. REVERSION

Screen Australia will revert its entitlement to gross receipts in favour of the producer, seven years after the first to occur of the following:

- the date of the first theatrical screening, broadcast or other communication of the title to the public in a territory defined as a Major Territory in the production investment agreement for the title
- the date of the first disbursement of gross receipts derived from marketing the title.

This will apply to all production investments (including investments under the All Media and Indigenous programs) approved by Screen Australia under these Terms of Trade.

Screen Australia's approach to reversion for titles approved by Screen Australia and its predecessor agencies before 1 January 2009 is set out in guidelines available on the Screen Australia website.

Where there is reversion, Screen Australia will:

- retain a 1% copyright share in the project;
- require annual reporting on sales and exploitation of the project for the purposes of Screen Australia research and analysis.

Once reversion takes place, any Disbursement Administration Service Agreement will terminate. Subject to any relevant continuing agreement, the producer will take on all responsibility to disburse gross receipts to any other investor who still has an interest in the project after the Screen Australia reversion.

8. COMPLETION GUARANTEE

Generally, Screen Australia requires the appointment of a completion guarantor for production investment projects. Depending on the experience and track record of the producer, a completion guarantor may not be required in relation to documentary productions or low-budget (non-Offset) films.

9. ACCESSIBILITY OF SCREEN CONTENT

Screen Australia requires that feature films it finances be captioned and audio described to provide access for the hearing and/or visually impaired, for cinemas and DVD. The producer will need to budget for these requirements. Feature film producers are also required by Screen Australia to use reasonable endeavours to ensure that all Australian distribution agreements include access for the hearing and/or visually impaired via captioned and audio-described theatrical screenings and DVDs.

Screen Australia also encourages producers of all non-feature film content to budget for captioning and audio description to provide access to their projects for both hearing and visually impaired audiences.

10. DELIVERY ITEMS FOR SCREEN AUSTRALIA AND NFSAA

10.1 Deliverables for Screen Australia

As a condition of production funding, the producer must deliver the following delivery materials to Screen Australia:

- On the delivery date:
 - three DVD copies of the project
 - an electronic press kit and written publicity pack
 - a copy of the master set of production stills on CD or DVD.
- When available:
 - three copies of the commercial release DVD
 - three theatrical posters for Australia and overseas
 - soundtrack on CD (where available).
- One copy of each platform element of a cross-platform or multi-platform project at the same time as the element is delivered under any Transaction Document.

Additional marketing materials (eg layered key art, trailer, stills) may also be requested by Screen Australia's Marketing Department in the lead up to a market or festival.

Screen Australia deliverables must be included in the project budget.

10.2 Deliverables for the NFSAA

For all projects, the materials specified in the Delivery Deed between the Producer and the NFSAA (see 6.2 above) are to be delivered directly to the NFSAA (at the best quality available and at the completed resolution).

In addition, National Documentary Program projects must deliver the materials required in accordance with the Licence and Delivery Deed between the producer and the NFSAA (see 6.2 above).

NFSAA deliverables must be included in the project budget.

GLOSSARY

CASHFLOW

Funds provided by an investor, the producer, a distributor, broadcaster or lender during production to meet the day-to-day costs of production.

CHAIN OF TITLE

The set of documentation that establishes the producer's ownership of the rights in the script (and novel or stage play, if relevant), and rights with respect to underlying rights, which entitle the producer to make and market the film.

COLLECTION ACCOUNT MANAGER (CAM)

The organisation (usually overseas) appointed to collect international licence fees, distribution advances, etc directly from a sales agent's sub-licensees, administer the collections account, pay the sales agent's commissions and expenses and distribute the remaining gross receipts in accordance with the recoupment/disbursement schedule in the production and investment agreement for the film or interparty agreement (if applicable).

COMPLETION GUARANTOR

For either a flat fee (in the case of most documentaries) or a percentage of the below-the-line budget of a film, a completion guarantor will guarantee or 'bond' a project. This means that they will meet budget overages to ensure that the film is completed and delivered.

COPYRIGHT

The exclusive right to copy, broadcast, perform, exhibit, communicate to the public and otherwise commercially deal with and exploit works such as novels, stage plays, scripts, music, film and sound recordings. Copyright is personal property and can only be transferred in writing. Copyright assignments and licences relating to the script form part of the chain of title.

GROSS RECEIPTS

All revenue from sales of a film, and all receipts from exploitation of ancillary and other underlying rights, any claims relating to the film and its underlying rights, statutory licences under the *Copyright Act* and interest on the collections account.

LIMITED RECOURSE LOAN

A loan repayable only from a defined source of revenue (for example, revenue from marketing a film) or only on the occurrence of a particular event.

NON-OFFSET PROJECT

Describes projects where the producer cannot claim the Producer Offset (being, generally, projects which do not meet the Producer Offset's eligibility requirements in terms of budget, qualifying expenditure and/or format).

OFFICIAL CO-PRODUCTION

A production between two or more countries that is officially approved as made under a treaty, or another form of government or quasi-government arrangement (typically, a Memorandum of Understanding or MOU). In addition to meeting the requirements of the relevant treaty or MOU, in order to be approved as an Official Co-production, the project must comply with Screen Australia's International Co-production Guidelines.

OFFSET PROJECT

Projects which would be eligible for the Producer Offset in terms of budget, qualifying expenditure and format.

PRODUCER EQUITY PAYMENT

Payment under Screen Australia's Producer Equity Program, which provides direct, non-recoupable funding in lieu of the Producer Offset for eligible documentary projects with budgets of \$500,000 or less. The payment amounts to 20% of the approved production budget. The program is administered by Screen Australia separately from its administration of the Producer Offset, and according to Producer Equity Program Guidelines.

PRODUCER OFFSET

The Producer Offset is a tax-based incentive based on expenditure on goods and services provided in Australia. It is available to eligible feature films at 40% of Qualifying Australian Production Expenditure (QAPE) and for eligible formats other than feature films at 20% of QAPE, as set out in the *Income Tax Assessment Act 1997* (ITAA 1997). Screen Australia is the *film authority* for the purposes of the ITAA 1997 and administers the Producer Offset scheme separately from its development, production and marketing support functions.

PRO RATA AND PARI PASSU

The expression relates to contributions to a budget and to recoupment of investments and refers to the percentage and timing of contribution or recoupment. A *pro rata* contribution or recoupment is one that is provided or received at the same rate or in the same proportion as the contribution or recoupment of another party. *Pari passu* contributions or recoupment are made or received at the same time as contributions or recoupment of another party.

SUBORDINATION

A subordinated investment is one in which the investor recoups on less favourable terms than other investors, eg an investor invests 40% of the budget with another who invests 60%, but on terms that the 40% investor recoups all its money first. In this case, the 60% investor would be 'fully subordinated' to the 40% investor.

UNDERLYING RIGHTS

The bundle of rights that must be acquired in order to be able to produce and commercially exploit the project, such as rights in relation to the novel or play on which the script is based.

ZERO FEE LICENSING SCHEME

The Zero Fee Licensing Scheme is administered by the National Film and Sound Archive of Australia (and was, until 30 June 2011, administered by Screen Australia's Library). The Scheme enables an independent Australian documentary producer to license archival footage and stills free of charge from the Film Australia Collection Library. The maximum that any producer can access is 40 stills or 10 minutes of archive footage per one-hour documentary (from a variety of programs or from one program but never a continuous 10 minutes and never more than 20% of a program's duration).

Schedule A: Fees

Unless otherwise indicated in the Program Guidelines, Screen Australia charges the following non-refundable fees (plus GST):

- Application fee for reversion of entitlement to gross receipts (see item 7):
 - \$100 – documentary projects
 - \$300 – all other project reversions.
- Legal and administration fee for production investment funding (other than Indigenous Department projects):
 - 2% of the value of the Screen Australia investment, with this fee capped at \$100,000.
 - Screen Australia reserves the right to recover legal costs in excess of the 2% limit in certain cases, for example, in the case of complex deal structures or where foreign law or other specialist legal advice is required.
- Fees for providing a disbursement service:
 - Initial Set-up Fee:
 - \$250 – one-off documentaries
 - \$500 – all other projects
 - Additional Set-up Fee:
 - (deducted from the producer's share, where the producer seeks a variation to the Disbursement Administration Service Agreement (DASA) to split their share of gross receipts):
 - \$250 – one-off documentaries
 - \$500 – all other projects
 - Disbursement Fee (per disbursement):
 - The greater amount of:
 - 1% of the Collected Gross Receipts collected in the relevant disbursement period
 - OR
 - \$200 for features and theatrical documentaries /
 - \$100 for TV drama and documentary series /
 - \$75 for one-off documentaries.