



28 June 2007

Peter Young  
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Dear Peter,

### **Producer Rebate Scheme**

I am writing to you, following consultation with the Australian Directors Guilds' national membership, to respond to a number of specific issues regarding the proposed Producer Rebate announced in the May Federal Budget and to assist in the Government's current thinking.

The ADG intends to follow up shortly with a more comprehensive response to the Government's Film package, to note the concerns that the industry has about the proposals included in the package, and to make suggestions about possible future directions in regards to specific sectors. The ADG's membership has serious concerns about some of the details of the package – including the various rebate percentages, QAPE thresholds, eligibility of above the line costs and other elements of the Package – that go to the heart of the effectiveness of the film package in achieving the aims of Government

However, given that the details announced on Budget night represent current Government policy, we understand that they are not matters of negotiation at an administrative level. The following comments will instead be confined to those areas that clearly required further stakeholder consultation following the Budget announcement.

Those areas that the Department has made clear are of immediate interest, namely:

- Who should be able to apply for the rebate?
- What should be used to determine whether a film is an 'eligible' film?, and
- What should be used to determine qualifying expenses?

## ***1. Who should be able to apply***

The Australian Directors Guild is of the view that the Producer Rebate should be made available only to the independent sector, and in particular independent producers, rather than entities that are primarily broadcasters, distributors or exhibitors.

The stated intention of Government in developing the Producer's Rebate was to not only increase the scale of production in Australia but to allow producers to use the rebate to build up equity and hence develop more sustainable businesses. Allowing entities such as broadcasters, who already have considerable market power, to access the rebate *may* have the effect of increasing production, however it would do little to support independent producers and hence would not meet the Government's overall intention. It would also do little to add to the overall diversity within the production sector.

The ADG suggests that the current definitions of independent producer used in the Australian Content Standard (2005) provides a useful starting point for a definition of what represents a truly independent producer.

### **Recommendation 1**

**That the rebate be made available only to independent producers and that the current definitions of independent producer used in the Australian Content Standard (2005) be used a useful starting point for a definition.**

## ***2. What should be an eligible film?***

The Australian Directors Guild has been engaged in ongoing negotiations and industry consultations with the FFC over the past month about possible qualifying Australian content tests.

While there are still questions about the best mechanism and process regarding the definition of an Australian film, the Australian Directors Guild is of the view that a qualifying Australian test should not set any mandatory thresholds, but should nonetheless focus primarily on five key elements, with a priority given to the first three:

1. where the project was originated and by who,
2. where the creative control resides
3. where the financial control and ownership reside,
4. the creative participants involved in production,
5. the Australian setting, subject matter or Australian perspective/point of view

By focusing on an overall balance of these elements, with the greater weighting on the first three, the ADG is confident the test of 'Australian-ness' would keep out productions that were not bona fide Australian, but would need not need to become prescriptive, and act as a cap on the creative imagination of Australian filmmakers.

It is perhaps worth looking at the sorts of films that were previously excluded under 10BA but which both the Government and the industry have flagged that they are willing to accept as Australian films for the purposes of the rebate. Two recent examples include Baz Luhrmann's *Australia* and George Miller's *Happy Feet*.

*Australia* would satisfy almost all of the above points, because of its heavy Australian origination, creative involvement and setting, while a film like George Miller's *Happy Feet* satisfies most of them. The only element that might mitigate against the latter could be the Australian subject matter, although one could argue that *Happy Feet* did have an Australian sensibility even though it was set among animated animals in Antarctica (although one Board member did point out to me that part of Antarctica, at least, is an Australian protectorate).

While Australian 'sensibility' is not a straightforward issue, one could mount a strong argument that at the very least *Happy Feet* was not clearly from any other culture. In other words, it was not an American or English concept or cultural icon with a supposedly Australian 'perspective' tagged on for convenience.

The ADG would suggest that while some concept of "Australian subject matter" is important, that it should not be defined so prescriptively that it does not allow Australians to make what would otherwise be accepted as genuinely Australian films on global themes, or with international settings. Few would dispute that a film like *Babe*, for example, was not a genuinely Australian film, however if it was to be made today, and a pre-requisite for certification was Australian setting, it is highly likely that it would not qualify. Similarly a film like *Dark City* was not set in Australia, but neither was it set in a futuristic LA or Tokyo, or based on a US superhero cartoon. In terms of its origination and creative force it was a genuinely Australian film.

It is also worth bearing in mind that Australia is a migrant nation. To accept that it should only make Australian stories set in Australia would seem to limit the capacity of filmmakers to engage with stories that talk to the migrant experience that is part of Australia's rich history. A film like *Disgrace*, which was recently funded by the FFC, is an example of a story set entirely outside Australia, and yet one that tells of the experience of an Australian citizen who happened to grow up in South Africa. The definition of "Australian-ness" should be calibrated to ensure that it does not automatically exclude projects such as this.

The case of documentary is even more apposite to this issue. Many Australian documentary filmmakers have made important, internationally recognised films about the Asia-Pacific region and the world, providing an Australian perspective on global events. These include films about both the region as well as those focusing

on broader international events and developments. The fact that they are not about immediate Australian stories, or characters, or may not be talking specifically about some aspect of Australian culture does not mean that they are thereby not Australian. Instead, they express something about an Australian perspective on the world.

Similarly a film made about or in Australia by non-Australian people or companies does not suddenly make it Australian. Wildlife filmmaking is a great example of a genre that uses Australia's natural heritage, however it would be hard to argue that the BBC's natural history unit should be considered Australian just because it happens to be shooting an Australian asset.

In the view of the ADG the perspective of those with the key creative and financial control in the making of these films is the key to whether they should be considered Australian or not. Hence the weighting towards issues of origination and creative and financial control suggested in the five points above.

#### *Shot/post-produced in Australia*

Finally, the view of the ADG is that a 'qualifying Australian film' definition should not be primarily determined by whether production or post-production is undertaken in Australia.

Under the new rebate scheme this matter becomes somewhat redundant, as it will be addressed within the Government's determination regarding qualifying expenses. Because even if a film has overcome the threshold tests to be considered Australian under a qualifying test, if it is 100% shot and post-produced overseas a producer will not be able to get much (if any) rebate from the Government for these expenses.

In other words, there is little incentive to make a qualifying Australian film with large amounts of international spend, as few of these international costs will be eligible under QAPE.

This limits the Government's exposure on costs for Australian films that happen to have overseas spend, and should allow a greater level of flexibility regarding the impact of local shooting and post on the definition of Australian content.

#### *Timing of Certification of Australian film*

There is a related question regarding the point at which producers are eligible to apply for certification, and to have some certainty about whether the project that they are financing will ultimately satisfy whatever Australian content test is finally agreed on.

The ADG has deep concerns that the rebate may only be available once a project has been fully financed. This substantially narrows the economic models of film-

making that may benefit from the new scheme and, in fact, runs counter to some of its principal aims: it will force producers to give away rights earlier than they may otherwise wish to, thereby decreasing the long-term returns to the film-maker.

While there may be an argument for certificating projects that have some form of marketplace attachment in place, insisting on all financial arrangements being locked in seems overly prescriptive.

There is also a further issue facing producers seeking finance in the marketplace. Previously the 10BA certificate has been used as both a financing tool as well as a trigger of Australian-ness. However, if certification only takes place when financing arrangements have been put in place, it is possible that an Australian producer may not be certain that the film that they are developing and financing will ultimately be “Australian” and therefore qualify for the rebate.

The ADG is concerned that this is unworkable in the private sector, given that private investors require some level of certainty about the film that they are investing in. The ADG recommends that at the very least some mechanism be put in place to provide something similar to the provisional certificate under 10BA, at least for the purposes of establishing the “Australian-ness” of a project. Some form of authority prior to the certificate being issued would provide an important level of certainty to producers and potential investors.

### **Recommendation 2.1**

**That any qualifying Australian test should focus primarily on five key elements, with higher weighting given to the first three:**

- 1. where the project was originated and by who,**
- 2. where the creative control resides,**
- 3. where the financial control and ownership reside,**
- 4. the creative participants involved in production,**
- 5. the Australian setting, subject matter or Australian perspective/point of view, with an appropriate level of flexibility in terms of what represents “Australian pov”**

### **Recommendation 2.2**

**That qualifying Australian films not require full financing to be place in order to gain certification.**

### **Recommendation 2.3**

**That a mechanism be put in place that allows a project’s Australian-ness to be established prior to the project’s ultimate certification for the Producer Rebate.**

### **3. What should be a qualifying expense?**

The Government has indicated that the QAPE provisions for the new Producer Rebate will be based on the existing QAPE provisions for the existing Refundable Film Tax Offset (which is to be renamed the Location rebate).

The ADG is aware of a number of costs that are not eligible under the existing RFTO QAPE, largely because they are costs that are incurred in offshore territories by the international production companies making films in Australia. These costs include financing costs, bonds and insurance, international freight and deliverable items. The ADG would submit that these costs are genuine production costs, and that if they are incurred in Australia that they should be eligible to be considered as QAPE alongside other Australian production costs. This should be the same for any other genuine cost of production.

One particular cost includes development repayments, which are included in the production budget. While development costs incurred prior to certification are not included, per se, the ADG would submit that any repayments to third party as part of the production budget – be it from a funding agency, state agency, or other party – should be eligible. These are essential and industry recognised costs, and reflect the true budget of a production.

The ADG would also encourage the QAPE provisions to be focused on services provided by Australian taxpayers, rather than where the services for production are provided. This would allow Australian documentary makers to make films based on international subjects, because they would be able to claim the rebate on the costs of the Australian practitioners involved despite the fact that the shoot may be occurring both in Australia and overseas. At the same time, it would not open up the rebate to abuse by drama producers wanting to shoot outside Australia for costs reasons.

#### **Recommendation 3.1**

**That direct production costs incurred in Australia such as financing, bonds and insurances, freight and deliverable items be included as eligible QAPE items.**

#### **Recommendation 3.2**

**That bona fide development repayments incurred prior to certification but included as part of the production budget be considered eligible QAPE items**

#### **Recommendation 3.3**

**That QAPE expenses be focused on services provided by Australian taxpayers rather than on the location of their delivery.**