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Screen Producers Australia's submission to the review of the Export Market Development Grants Scheme, 2015

Screen Producers Australia was formed by the screen industry to represent small-to-medium enterprises (SME) across a diverse production slate of feature film, television and interactive content.

As the peak industry and trade body, we consult with a membership of more than 300 production businesses in the preparation of our submissions. This consultation is augmented by ongoing discussions with our elected Council and appointed Policy Working Group representatives. Our members employ hundreds of producers, thousands of related practitioners and drive more than \$1.7 billion worth of annual production activity from the independent sector.

On behalf of these businesses we are focused on delivering a healthy commercial environment through ongoing engagement with elements of the labour force, including directors, writers, actors and crew, as well as with broadcasters, distributors and government in all its various forms. This coordinated dialogue ensures that our industry is successful, employment levels are strong and the community's expectations of access to high quality Australian content have been met.

Screen Producers Australia welcomes this opportunity to make a submission to the 2015 review of the Export Market Development Grants (EMDG) scheme. Screen Producers Australia has limited our comments to the following areas:

- 1. Business clustering**
- 2. Certainty of payment**
- 3. Principal status**
- 4. Commissions to sales agents and distributors**
- 5. Export Earnings Test**
- 6. Review of Austrade decisions**

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The EMDG scheme greatly assists producers to penetrate export markets and to achieve export sales. This increases employment and most importantly, facilitates innovation through matching Australian exporters knowledge and expertise against the world's best practice.

The independent production sector in Australia is highly competitive. These businesses are characterised by their professionalism, entrepreneurial spirit and quality of output. They operate in a media landscape that is equally characterised by its dynamism, in which technological changes are giving rise to changes in production, distribution, consumption and business models.

In this context, business confidence has never been more reliant on the global marketplace with distribution barriers continuing to breakdown. For example, in Screen Producers Australia's 2014 Annual Business Survey, three quarters of respondents believed their business would grow over the coming year. The most commonly cited reason for this optimism was increased output in new markets. Specifically, half of the respondents are seeking international investment in their companies and three-in-four businesses are actively developing co-productions.¹

The local screen industry benefits from this international engagement as our talented technicians, performers and creators are working globally as a result, there is also increased revenue from expert earnings and competitive tension that improves the quality of our content. In return, the local screen industry is significantly larger than it would be if it were purely domestically oriented.

Access to the international market is influenced by a number of policy levers. From a Federal Government perspective this includes competitive tax incentives, coordination of international industry and government networking events and trade missions, advancement of co-production treaty negotiations and the continuation of the EMDG scheme.

As a result, the Australian screen industry is a world leader, both the creative and technical expertise is world's best practice and Australians are consistently recognised at international awards. The sustainability of the Australian screen industry's export endeavours has been greatly assisted by the EMDG scheme.

In 2013/14, Austrade provided approximately \$4.73 million of EMDG support to 72 independent production and post-production businesses.² This represents 4.2 per cent of the \$113.6 million paid in EMDG to 2,445 exporting businesses. The EMDG scheme is a crucial measure for the independent production sector and is well and truly achieving its stated objectives. However, there are a number of adjustments required to make it more small business friendly.

¹ National Roadshow Presentation, 2014 (<http://screenproducersaustralia.org.au/assets/Uploads/2014-Roadshow-Pres-PUBLIC2.pdf>)

² Audiovisual Trade: Export Market Development Grants, 2013/14 (<http://www.screenaustralia.gov.au/research/statistics/tradeexportmarketdevelopmentgrants.aspx>)

1. Business clusters

Only approved bodies, such as Screen Producers Australia, can claim the EMDG in respect to promotion on behalf of a collective. Consideration should be given to recognising business clusters as a type of applicant. A broadening of the current approved joint venture provisions to allow claims by an approved business cluster would be highly beneficial to the sharing of knowledge amongst cluster members, with a consequent improvement in their innovation and export market development.

This would be particularly beneficial for the screen industry that has a high proportion of small entities unable to meet the required threshold, despite their reliance on attending international markets to finance and sell their productions. Alternatively, the ability for small entities to claim their expenses through an approved body should be permitted. We note there has been extensive research into the role of clustering in assisting industries to identify opportunities for growth.³

2. Certainty of payment

One of the major problems with the EMDG scheme is that when the Australian exporter incurs an export promotion expense, there is no certainty as to the level of rebate they will obtain. This is because there is a two-tranche payment system.

Currently, applicants who receive the maximum rebate receive a payment of up to \$60,000 initially, but then have to wait to following June to know whether they will receive a second payment. Therefore, a business may undertake export promotion in August 2015 and the second tranche rebate will not be received until June 2017. Furthermore, the other key difficulty is that the first tranche guaranteed payment is not announced until the July following the financial year in which the expense was incurred.

The problem with a retrospective announcement of the first tranche is that in essence, no applicant knows whether a particular expense will receive a rebate at the time it incurs the expense. As the first tranche has varied from \$27,500 in 2009/10 to the current \$60,000, this uncertainty can negatively impact decisions to commit additional funds to export promotion.

Consideration should be given to adjusting this flaw in the EMDG scheme as it weakens the aim of encouraging applicants to increase the level of their export promotion. Previously, the EMDG scheme paid the full grant entitlement upon determination of the application. This should be reinstated if the scheme is to reach its full potential.

3. Principal status

In the intellectual property area, Austrade strictly enforce the requirement that only one applicant can apply for a particular piece of intellectual property. This means that where copyright is jointly owned, Austrade have ruled that none of the copyright owners are entitled to lodge an EMDG application.

There are further difficulties with principal status where an Australian producer pitches an idea for a film or television series to a foreign studio. The pitch is successful and the content is produced in Australia in

³ For example, Australia's Wine Industry: Collaboration and Learning as Causes of Competitive Success, 2000 (<http://www.nswbusinesschamber.com.au/NSWBC/media/Misc/Ask%20Us%20How/Australias-Wine-Industry.pdf>)

partnership with a local business utilising the tax offset provisions thereby generating significant employment within Australia.

However, because the Special Purpose Vehicle (SPV) that produces the piece of content is Australian, albeit owned in partnership with the foreign studio, the SPV is deemed to be the 'principal' in the export transaction. This means the Australian producer cannot claim any of the costs they incurred in successfully pitching the intellectual property to the foreign studio. The same problem arises with service providers in the screen industry such as sound mixers, editors, special effects, etc.

The irony is that if the piece of content were made offshore all parties (producer and service providers) would qualify for EMDG rebates. One assumes this is an unintended consequence. We note that the rule on principal status does not apply in respect to goods, nor does it apply in the tourism services area. For example, both a wool producer and the person who makes the wool into a garment are able to claim an EMDG rebate in respect to the garment that is marketed internationally.

Much emphasis has been placed on the ability of Australian manufacturers to be niche players in global supply chains. When a large budget feature film is produced in Australia for a foreign studio, such as *The Great Gatsby*, hundreds of individual niche players form part of the supply chain that makes the film. To deny these niche experts eligibility for the EMDG scheme does not seem to fit with the need for Australia's SME's to increasingly innovate to remain world leaders.

When Australia's future lies in the export of intellectual property, consideration should be given to amending this anachronism. The key to the EMDG scheme is increasing innovation among SME's and the adherence to principal status appears at odds with this intent.

4. Commissions paid to sales agents and distributors

Typically a sales agent and/or distributor will work in a number of ways with the producer to facilitate the sale of international rights for a piece of content. This may occur through a 'distribution advance' that forms part of the finance plan prior to production as well as a commission and reasonable marketing expenses. The commission and expenses are then subtracted from the producer's international gross receipts and the remainder is used to recoup the advance.

When the bar to commissions was first introduced, Austrade did not recognise the promotion of income from the licensing of the intellectual property as an eligible activity. Consideration should be given to broadening the eligibility of the EMDG to include commissions paid to foreign sales agents and/or distributors.

In many of cases, the sales agent and/or distributor absorbs all their marketing and trade fair costs within their commission. They will attend the major markets for the producer so as to secure territorial distributors. Virtually all the sales agent and/or distributors activities are aimed at increasing licensing fees to the Australian producer. Because they often operate on a commission only basis, none of these costs can typically be claimed for the EMDG rebate.

Austrade's current policy is only to allow these types of payments where the overseas sales agent and/or distributor supplies evidence of actual expenses incurred, which form part of the commissions charged.

However, this information is not easily procured because distributors are not contractually obliged to provide it or their accounting systems do not allow a separate breakdown per individual title. This can therefore deny the Australian producer the ability to claim legitimate export promotion costs.

5. Export Earnings Test

It is accepted that there should be a requirement for export earnings to be generated in the longer term. However, the difficulty with the current export earnings test, in respect to intellectual property licencing, is that it does not reflect the 'average' provisions contained within the Income Tax Assessment Act.

By way of an example, a foreign licensee normally pays a 'distribution advance'. Until that advance is recouped from royalties, no further cash payments will be made to the producer. If a producer receives an advance in year two of their export grant history, this may prevent them receiving a grant in year three, because they are 'capped' at 40 per cent of their export earnings in year three, 20 per cent in year four, 10 per cent in year five, 7.5 per cent in year six and 5 per cent thereafter.

Consideration should be given to allowing any excess of export earnings from a prior year to be carried forward as a credit to a later year. If as is usual, a producer receives significant royalty advances in years one and two (where no export earnings are required for eligibility), we would submit that this excess of export earnings above what is required. The current legislation only recognises cash payments (the distribution guarantees).

We note there is an Option B, which allows an applicant to seek a ruling from Austrade because it requires fully audited accounts as well as fully audited future export earnings. Option B is not a realistic option for film and television producers. It will also not recognise past export earnings that are in excess of what was required, to receive the grant paid.

6. Review of Austrade decisions

There is no requirement for Austrade to determine an application within a prescribed timeframe. If an applicant disagrees with an Austrade determination they can request that Austrade review that determination. However, again there is not prescribed timeframe under which this request for review will be addressed.

An applicant's rights to seek an independent review by the Administrative Appeals Tribunal are not crystallised until such time as Austrade has finalised its decision on a request for a review. This can lead to an applicant's rights to seek an independent review being delayed indefinitely.

Consideration should be given to providing an avenue for an applicant who is aggrieved by unreasonable delays in the processing of their application to approach an independent ombudsman. In this regard, we support in principle the moves by the Minister for Small Business Bruce Billson to create a Small Business and Family Enterprise Ombudsman, independent of the Administrative Appeals Tribunal.⁴

⁴ Government outlines plans for small business and family enterprise ombudsman, 2013 (<http://bfb.ministers.treasury.gov.au/media-release/005-2013/>)