


# ***PR 2004/14 - Income tax: Film Investment - 'Clancy of the Overflow'***

 This cover sheet is provided for information only. It does not form part of *PR 2004/14 - Income tax: Film Investment - 'Clancy of the Overflow'*

 This document has changed over time. This is a consolidated version of the ruling which was published on *9 June 2004*



## Product Ruling

### Income tax: Film Investment – ‘Clancy of the Overflow’

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Potential investors may wish to refer to the ATO’s Internet site at <http://www.ato.gov.au> or contact the ATO directly to confirm the currency of this Product Ruling or any other Product Ruling that the ATO has issued.

#### *Preamble*

*The number, subject heading, and the **What this Product Ruling is about** (including **Tax law(s)**, **Class of persons and Qualifications sections**), **Date of effect**, **Withdrawal**, **Arrangement** and **Ruling** parts of this document are a ‘public ruling’ in terms of Part IVAAA of the **Taxation Administration Act 1953**. Product Ruling PR 1999/95 explains Product Rulings and Taxation Rulings TR 92/1 and TR 97/16 together explain when a Ruling is a public ruling and how it is binding on the Commissioner.*

*[Note: This is a consolidated version of this document. Refer to the Tax Office Legal Database (<http://law.ato.gov.au>) to check its currency and to view the details of all changes.]*

#### **No guarantee of commercial success**

The Australian Taxation Office (ATO) **does not** sanction or guarantee this product. Further, we give no assurance that the product is commercially viable, that charges are reasonable, appropriate or represent industry norms, or that projected returns will be achieved or are reasonably based.

Participants must form their own view about the commercial and financial viability of the product. This involves a consideration of important issues such as whether projected returns are realistic, the ‘track record’ of the management, the level of fees in comparison to similar products, how this product fits an existing portfolio, etc. We recommend a financial (or other) adviser be consulted for such information.

This Product Ruling provides certainty for participants by confirming that the tax benefits set out below in the **Ruling** part of this document are available **provided that** the arrangement is carried out in accordance with the information we have been given and have described below in the **Arrangement** part of this document.

If the arrangement is not carried out as described below, participants lose the protection of this Product Ruling. Participants may wish to seek assurances from the promoter that the arrangement has been carried out as described in this Product Ruling.

Participants should be aware that the ATO will be undertaking review activities to confirm the arrangement has been implemented as described below and to ensure that the participants in the arrangement include in their income tax returns income derived in those future years.

#### **Terms of Use of this Product Ruling**

This Product Ruling has been given on the basis that the person(s) who applied for the Ruling, and their associates, will abide by strict terms of use. Any failure to comply with the terms of use may lead to the withdrawal of this Ruling.

## What this Product Ruling is about

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1. This Ruling sets out the Commissioner's opinion on the way in which the 'tax laws' identified below apply to the defined class of persons who take part in the arrangement to which this Ruling relates. In this Ruling this arrangement is sometimes referred to as 'Clancy of the Overflow', 'the Film' or 'the Project'.

### Tax laws

2. The tax laws dealt with in this Ruling are:
- Division 10BA of Part III of the *Income Tax Assessment Act 1936* (ITAA 1936);
  - Division 5 of Part III ITAA 1936;
  - Section 995-1 of the *Income Tax Assessment Act 1997* (ITAA 1997);
  - Section 26AG ITAA 1936;
  - Section 124ZAO ITAA 1936;
  - Section 124ZAG ITAA 1936;
  - Part IVA ITAA 1936.

Unless otherwise stated, all legislative references that follow are in relation to the ITAA 1936.

### Goods and services tax

3. In this Ruling, where applicable, all fees and expenditure referred to include Goods and Services Tax ('GST') set out in the *New Tax System (Goods and Services Tax) Act 1999* ('GST Act'). A person or entity who is registered for GST is entitled to claim input tax credits for the GST included in its expenditure provided that the acquisition is for a creditable purpose under Division 11 of the GST Act.

**Business Tax Reform**

4. The Government is currently evaluating further changes to the tax system in response to the *Ralph Review of Business Taxation* and continuing business tax reform is expected to be implemented over a number of years. Although this Ruling deals with the laws enacted at the time it was issued, future tax changes may affect the operation of those laws and, in particular, the tax deductions that are allowable. Where tax laws change, those changes will take precedence over the application of this Ruling and, to that extent, this Ruling will be superseded.

5. Taxpayers who are considering investing in the Project are advised to confirm with their taxation adviser that changes in the law have not affected this Product Ruling since it was issued.

**Note to promoters and advisers**

6. Product Rulings were introduced for the purpose of providing certainty about tax consequences for investors in projects such as this. In keeping with that intention, the Tax Office suggests that promoters and advisers ensure that potential investors are fully informed of any changes in tax laws that take place after the Ruling is issued. Such action should minimise suggestions that potential investors have been negligently or otherwise misled.

**Class of persons**

7. The class of persons to which this Ruling applies is those persons who enter into the arrangement described below on or after the date this Ruling is made. They will have a purpose of staying in the arrangement until it is completed, i.e. being a party to the relevant agreements until their terms expire, and deriving assessable income from this involvement as a result (as set out in the description of the arrangement).

8. The class of persons to which this Ruling applies does not include persons who intend to terminate their involvement in the arrangement prior to its completion, or who otherwise do not intend to derive assessable income from it.

**Qualifications**

9. The Commissioner rules on the precise arrangement identified in the Ruling. If the arrangement described in the Ruling is materially different from the arrangement that is actually carried out, the Ruling has no binding effect on the Commissioner. The Ruling will be withdrawn or modified.

10. A Product Ruling may only be reproduced in its entirety. Extracts may not be reproduced. As each Product Ruling is copyright, apart from any use as permitted under the *Copyright Act 1968*, no part may be reproduced by any process without prior written permission from the Commonwealth. Requests and inquiries concerning reproduction and rights should be addressed to:

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GPO Box 2154  
Canberra ACT 2601

or by e-mail: [commonwealth.copyright@dcita.gov.au](mailto:commonwealth.copyright@dcita.gov.au)

## Date of effect

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11. This Ruling applies prospectively from, the date this Ruling is made. However, the Ruling does not apply to taxpayers to the extent that it conflicts with the terms of settlement of a dispute agreed to before the date of issue of the Ruling (see paragraphs 21 and 22 of Taxation Ruling TR 92/20).

12. If a taxpayer has a more favourable private Ruling (which is legally binding), the taxpayer can rely on the private Ruling if the income year to which the private Ruling relates has ended, or has commenced but not yet ended. However, if the arrangement covered by the private Ruling has not begun to be carried out, and the income year to which it relates has not yet commenced, the Product Ruling applies to the taxpayer to the extent of the inconsistency only (see Taxation Determination TD 93/34).

## Withdrawal

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13. This Product Ruling is withdrawn on 30 June 2006 and ceases to have effect on and from that date. The Ruling continues to apply, in respect of the tax laws ruled upon, to all persons within the specified class who enter into the specified arrangement during the term of the Ruling. Thus, the Ruling continues to apply to those persons, even following its withdrawal, for arrangements entered into prior to withdrawal of the Ruling. This is subject to there being no change in the arrangement, or the persons' involvement in the arrangement.

## Arrangement

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14. The arrangement that is the subject of this Ruling is described below. This description is based on the following documents. These documents, or relevant parts of them, as the case may be, form part of and are to be read with this description. The relevant documents or parts of documents incorporated into this description of the arrangement are:

- Application for a Product Ruling that became valid on 3 December 2003 as constituted by documents provided on: 26 and 31 March 2003, 20 August 2003, 10 October 2003, 24 November 2003 and 3 December 2003; and additional correspondence dated: 17 March 2003, 12 May 2003, 4 September 2003, 10 October 2003, 24 November 2003, 2, 17 December 2003, 7, 27 January 2004 and 3 February 2004;
- Correspondence from the ATO to the Applicant dated 27 March 2003, 16 and 17 April 2003, 9 and 19 May 2003, 1 and 18 September 2003, 14, 23 and 31 October 2003, 12, 17 and 24 December 2003, 7, 9, 20 and 28 January 2004;
- Draft E of the Product Disclosure Statement ('PDS') for Clancy of the Overflow Film Project dated 21 March 2003 and received by the ATO on 26 March 2003;
- Draft 3 of the Constitution between Primary Securities Ltd ('Responsible Entity') and each several Investor for the Clancy of the Overflow Film Project dated 3 December 2003 and received by the ATO on 3 December 2003;
- Draft 5 of the Production and Investment Agreement ('PIA') between Primary Securities Ltd and each several Investor dated 3 December 2003 and received by the ATO on 3 December 2003;
- Draft 2 of the Production Agreement between Primary Securities Ltd and Clancy of the Overflow Pty Ltd ('Production Company') dated 3 December 2003 and received by the ATO on 3 December 2003;
- Draft 2 of the Marketing Agreement between Primary Securities Ltd, Clancy of the Overflow Pty Ltd and Clancy of the Overflow Marketing Pty Ltd ('Marketing Company') dated 3 December 2003 and received by the ATO on 3 December 2003;

- Purchase Agreement between Edgley International Pty Limited and Patrick Edgeworth dated 10 March 2002 in relation to the script copyright, received by the ATO on 26 March 2003;
- Deed of Assignment between Clancy of the Overflow Pty Ltd and Edgley International Pty Ltd dated 18 March 2002 and received by the ATO on 26 March 2003;
- Draft Compliance Plan for the Clancy of the Overflow Film Project ARSN 103 557 535 dated 28 January 2003 and received by the ATO on 26 March 2003;
- Draft Responsible Entity Services Agreement between Clancy of the Overflow Pty Ltd and Primary Securities Ltd received by the ATO on 3 December 2003;
- Custodian Agreement between Garton Smith & Barrett ('Custodian') and Primary Securities Ltd dated 1 July 2002 and received by the ATO on 28 March 2003.

**Note:** certain information has been provided on a commercial-in-confidence basis and will not be disclosed or released under Freedom of Information legislation.

15. The details of the arrangement are summarised as follows:

### **The participants**

16. The following entities are participants in the Project:

- **Investor:** Each person who is issued Units pursuant to the PDS will be an Investor in the Project;
- **Responsible Entity:** Primary Securities Ltd is the Responsible Entity which will operate the Project and issue Units to Investors. It is responsible for producing the Film and marketing the Investors' interest in the Film both domestically and internationally. The Responsible Entity will delegate production of the Film to the Production Company and marketing of the Film to the Marketing Company;
- **Custodian:** The Responsible Entity will appoint the Custodian, Garton Smith & Barrett, as its agent to act on its behalf to hold the Project Property for the Project. The Project Property will consist of the Application Money and receipts from the Film held in the Licence Fees Account;

- **Head Production Company:** The Responsible Entity will be commissioned by the Investors to produce and market the Film under the terms of the PIA, the Investment Agreement, and the Constitution;
- **Production Company:** Clancy of the Overflow Pty Ltd will be commissioned by the Responsible Entity to produce the Film under the terms of the Production Agreement;
- **Marketing Company:** The Responsible Entity and the Production Company will grant an exclusive licence to the Marketing Company to market the Film under the terms of the Marketing Agreement;
- **Distribution Guarantor:** The Distribution Guarantor will provide a guarantee to the Responsible Entity for an amount equal to 60% of the Investors' Investment Amount without any variation or deduction less the amount of any Proceeds paid to the Responsible Entity in accordance with Item I of Schedule 4 of the Marketing Agreement and which is to be payable 30 months after delivery of the Film pursuant to the Distribution Guarantee Agreement.

### **Defined Terms**

17. Terms which have been defined within the relevant documents to the arrangement include the following:

- **Applicant** means the person who makes an Application, and includes persons who jointly make an Application.
- **Application** means an application pursuant to a PDS to become an Investor in relation to one or more Units and an offer to become a party to the PIA as an Investor.
- **Application Money** for each Unit means the sum of \$1,000.00.
- **Budget** means the budget for production of the Film as it appears in Annexure A of the PIA and any variations agreed pursuant to clause 5.4 of the Production Agreement and clause 3.3(a) of the PIA.
- **Copyright** means:
  - (a) copyright subsisting in the Film by virtue of Part IV of the *Copyright Act 1968* including future copyright;

- (b) copyright in the Film in accordance with the law of a country other than Australia including future copyright; and
  - (c) rights in the Film in the nature of or analogous to the rights in (a) and (b) of this paragraph in accordance with the law of Australia or any other country.
- **Cut-Off Date** means 5 years from the date of Delivery of the Film to the Marketing Company and acceptance of the Delivery Materials by the Distribution Guarantor pursuant to the terms of the Distribution Guarantee Agreement.
- **Deductible Unit** means a Unit that the money paid for will be used for the production costs of the Film and does not include a Non-Deductible Unit.
- **Deferreds** means deferred fees payable to third parties associated with the production of the Film including Key Production Personnel which deferred fees are approved by the Responsible Entity as set out in Schedule 2 Part A Item II of the PIA, including without limitation any increase in the Budget authorised in accordance with clause 3.3(a) of the PIA.
- **Delivery Date** means on or about 15 June 2005 unless otherwise notified in writing to Investors.
- **Distribution Guarantee** means the guarantee to be provided by the Distribution Guarantor to the Responsible Entity which shall be for an amount equal to 60% of the Investment Amount without any variation or deduction less the amount of any Proceeds paid to the Responsible Entity in accordance with Item I of Schedule 4 of the Marketing Agreement and which is to be payable 30 months after delivery of the Film pursuant to the Distribution Guarantee Agreement.
- **Distribution Guarantee Agreement** means the agreement to be entered into between the Marketing Company, the Responsible Entity and the Distribution Guarantor in the form to be approved by the Responsible Entity for the Distribution Guarantee.
- **Distribution Guarantee Amount** means the amount paid to the Responsible Entity in relation to the Distribution Guarantee pursuant to the Distribution Guarantee Agreement.

- **Distribution Guarantor Expenses** means the amounts payable by the Marketing Company to the Distribution Guarantor pursuant to the Distribution Guarantee Agreement.
- **Investment Account** means the Cash Management Account described as the Investment Account in Schedule 3 of the PIA and established in accordance with clause 3.8(a) of the PIA.
- **Investment Amount** means the total aggregate amount invested by the Investors in the Project, being \$1,000 per Unit.
- **Licence Fees** means an amount equal to the aggregate of Responsible Entity Proceeds.
- **Licence Fees Account** means the bank account described as the Licence Fees Account in Schedule 3 of the PIA and established in accordance with clause 3.7 of the PIA as an interest bearing account.
- **Marketing Expenses** means, for the purpose of the Marketing Agreement, costs and expenses incurred and substantiated by the Marketing Company in relation to marketing the Film being of the type listed in Schedule 2 of the Marketing Agreement (except those provided for in the Budget).
- **Non-Deductible Investment Amount** means the total aggregate amount invested by the Non-Deductible Investors in the Project, being \$1,000 per Unit.
- **Non-Deductible Investor** means an Investor who is the registered holder of Non-Deductible Units.
- **Non-Deductible Unit** means a Unit that the money paid for will be used for budget costs other than production costs.
- **Offer** means the offer by the Responsible Entity to issue Units under the PDS.
- **Overage** means any sum over the Budgeted Cost required to Complete, deliver and Market the Film as contemplated by the Budget and the PIA, after deduction of any sum paid by the Completion Guarantor.
- **Prescribed Proportion** is defined in the Constitution to mean the following fraction:

P/T

where:

P is the number of Units registered in the name of the Investor; and

T is the total number of Units registered;

- **Proceeds** means gross revenue after deduction of the following:
  - (a) Marketing Expenses;
  - (b) Distribution Guarantor Expenses;
  - (c) Distribution Fees as approved by the Responsible Entity (other than Annual Distribution Fees payable to the Marketing Company in accordance with clause 4.2 of the Marketing Agreement);
  - (d) agreed commissions and costs paid to any sub-licensee or distributor (other than Distribution Fees), as approved by the Responsible Entity;
  - (e) any fee payable to an approved collection agency, as approved by the Responsible Entity; and
  - (f) any Tax required to be withheld from gross revenue (to the extent that the Marketing Company is not entitled to a credit or rebate in respect of such Tax);

derived by the Marketing Company from marketing the Film and generally exploiting the Film throughout the world, including but not limited to the Underlying Rights, whether in accordance with an agreement that came into effect before or after the date of the Marketing Agreement (approved by the Responsible Entity) and received by the Responsible Entity (or custodian properly appointed by the Responsible Entity pursuant to the terms of the Constitution) or any replacement appointed in accordance with clause 5.1 of the Marketing Agreement, and includes without limitation:

- (a) money received from Insurances relating to marketing the Film and payments into the Proceeds Account in accordance with clause 9.5 of the Production Agreement;
- (b) money obtained in connection with any Claim relating to the Film Assets or Copyright;

- (c) awards or prizes other than:
  - (a) those made to individuals for contributions to the production of the Film; and
  - (b) those made to the Film but customarily paid to individuals for contributions to the production of the Film;
- (d) money received from exploitation of the soundtrack rights in the Film;
- (e) money obtained from statutory licences in accordance with the *Copyright Act 1968* and collection agencies such as 'Screenrights';
- (f) interest accruing on money in the Proceeds Account; and
- (g) any Underage;

but does not mean any amount paid or payable in relation to the Distribution Guarantee.

- **Proceeds Account** means the bank account described as the Proceeds Account in Schedule 3, of the PIA, and established by the Production Company and held by the Responsible Entity in accordance with clause 3.8 of the PIA as an interest bearing account into which the Proceeds are to be paid.
- **Project Property** means the interest of each Investor in:
  - (a) the Application Money;
  - (b) any other contributions of money or money's worth to the Project under this Constitution, the PIA or otherwise;
  - (c) Receipts;
  - (d) money borrowed or raised by the Responsible Entity for the purposes of the Project as provided in the PIA or otherwise;
  - (e) any other entitlement to money as provided in the Constitution, the PIA or otherwise;
  - (f) any other property which the Investor acquires directly or indirectly with, or with the proceeds of, the money described in (a), (b), (c), (d), or (e); and

- (g) income or property derived, directly or indirectly, from the money or property described in (a), (b), (c), (d), (e) or (f).
- **Project Term** means the period of 5 years from the Delivery Date.
- **Receipts means:**
  - (a) the Licence Fees;
  - (b) any interest and income earned from moneys in the Trust Account;
  - (c) any receipts from the sale of the Project or all rights of the Investor in relation to the Project under the terms of the Sale Agreement; and
  - (d) any other receipts in relation to the Project to which the Investor is entitled.
- **Responsible Entity Proceeds** means the Distribution Guarantee Amount paid to the Responsible Entity pursuant to the Distribution Guarantee Agreement and Proceeds derived by the Responsible Entity in relation to marketing the Film pursuant to the Marketing Agreement.
- **Trust Account (Licence Fees Account)** means the trust account kept by the Responsible Entity in its capacity as a bare trustee for the Investor, whether pooled with other moneys held in relation to the Project pursuant to sub-clause 8.2 of the Constitution or otherwise.
- **Underage** means the difference between the audited cost of the Film (excluding budgeted marketing expenditure) and the Budgeted Cost (excluding budgeted marketing expenditure), where the Budgeted Cost exceeds the audited cost. For the purposes of calculating the audited cost of the Film, proceeds of sale of Production Assets, insurance claims actually applied against costs incurred in the production of the Film, and any rebates (including from the Completion Guarantor), refunds, bonds or the like will be set against the costs of the Film.

- **Unit** means one of the equal undivided interests comprising a certain proportionate share of the legal and beneficial ownership of Copyright (as provided in the PIA), and includes any other rights, powers and authorities to which the Investor is entitled under the Constitution or otherwise in relation to the Film, and which were allotted pursuant to the PDS or transmitted, transferred, mortgaged, assigned or otherwise disposed of from a predecessor in title which predecessor in title or some earlier predecessor in title was allotted the Units pursuant to the PDS.

### **The Project**

18. The Project is a managed investment scheme established to produce an Australian feature film to be titled 'Clancy of the Overflow'. The Project will be established to produce the Film with funds contributed by Australian resident Investors and to exploit the Copyright for the benefit of Investors during the term of the Project. The Project will commence on execution of the PIA and will cease 5 years after delivery of the Film.

19. Provisional Certificate number PO5588, dated 3 June 1999, has been issued by the Department of Communications, Information Technology and the Arts in respect of the Film to Edgley Productions Pty Ltd. This certificate is currently in force in relation to the Film and states that the proposed Film will, when completed, be a 'qualifying Australian film' for the purposes of Division 10BA.

### **Product Disclosure Statement (PDS)**

#### ***Deductible and Non-Deductible Units***

20. Applicants can apply to invest in the Project by completing the application form attached to the PDS. Applications must be for at least 10 Units or a greater even number of Units (eg. 12 Units). There will be up to 32,275 Units in the Project on offer to the public. These Units are comprised of:

- up to 29,275 Deductible Units @ \$1,000 per Unit; and
- up to 3,000 Non-Deductible Units @ \$1,000 per Unit.

21. Investors may invest in Deductible Units and/or Non-Deductible Units. Each person who is issued Units, whether Deductible Units and/or Non-Deductible Units, will be an Investor in the Project.

22. The Investment Amount raised from Deductible Units will be used on the production of the Film, whereas the Investment Amount raised from Non-Deductible Units will be used on non-production costs such as the costs of the Offer, the Responsible Entity's fees and marketing the Film.

### *Precondition to Acceptance of Applications*

23. The Precondition to production of the Film under clause 2 of the Production Agreement is that the Responsible Entity must first deposit an amount equal to or exceeding the total Budgeted Cost less Deferrals into the Investment Account.

24. Unless the Precondition is satisfied, no Underlying Rights will be transferred by the Production Company to the Responsible Entity and the Responsible Entity will not be able to produce or market the Film.

25. Application Money received by the Responsible Entity prior to the allotment of Units to the Investors will be held by the Responsible Entity as bare trustee for the Investors in the Trust Account in the Custodian's name until the Precondition is satisfied. Once the Precondition is satisfied the following will occur:

- Applications will be accepted by the Responsible Entity, subject to the Responsible Entity's absolute discretion to accept or refuse any Application in whole or in part (clause 4.2 of the Constitution);
- Applicants will be deemed to become a party to the Constitution and the PIA (clauses 4.5 and 4.6 of the Constitution);
- Units will be allotted to Applicants and Applicants will become Investors in the Project (clause 4.5 of the Constitution);
- The Responsible Entity will be entitled to receive the Application Money in its own capacity as a fee for undertaking to produce the Film for Investors (clause 11.2 of the Constitution). The Application Money will be deposited into the Responsible Entity's Investment Account; and
- The Project shall be deemed to have commenced on the date Units are first allotted (clause 15.1 of the Constitution).

***Budgeted Cost (production budget)***

26. The maximum production budget for the Film will be \$29,275,000 unless it is varied in accordance with clause 3.3(a) of the PIA and clause 5.4 of the Production Agreement. The production budget will be determined no later than 30 June 2004 having regard to the Investment Amount received from Investors on or before that date and the amount of any Deferrals agreed to by 30 June 2004. The minimum production budget will be \$18,805,000.

27. Any Deferrals will be the obligation of the Production Company and will be paid out of Proceeds to the Production Company in accordance with Schedule 4 item II of the Marketing Agreement (refer paragraph 57 below). Any deferred amounts will relate to the production of the Film.

***Budgeted Costs (non-production)***

28. The maximum budgeted cost for non-production items in the budget is \$3,000,000 and the minimum budgeted non-production costs is \$2,500,000.

***Minimum Applications***

29. The Project will not proceed unless Applications for at least 18,805 Deductible Units and 2,500 Non-Deductible Units are received by 30 June 2004. Where the Applications for Deductible Units is greater than 18,805, the minimum number of Non-Deductible Units required for the Project to proceed will increase on a proportional basis because additional Non-Deductible Units will be required to cover the additional brokerage costs associated with the Offer. Should the minimum Applications for both Deductible Units and Non-Deductible Units not occur, all Applications will be refunded to Applicants without interest.

***Investor's Copyright Interest***

30. In relation to each Unit issued, an Investor will acquire a proportional, undivided legal and beneficial interest as tenant in common of 50% of the Copyright in the Film from the time such Copyright subsists until the end of the Project Term. An Investor's Prescribed Proportion will be based on the Investor's number of Units as a proportion of the total Units issued. There is no distinction between holders of Deductible Units and Non-Deductible Units in this regard. The Production Company will hold the remaining 50% of the Copyright in the Film until the end of the Project Term and will hold 100% of the Copyright thereafter.

***Investors' Film Licence Fees***

31. After its completion, the Film will be marketed locally and internationally in order to generate revenues. Once deductions for certain expenses such as marketing, distributions and commissions are made, Investors will be entitled to a pro rata share in Licence Fees for 5 years from the Delivery Date. Any revenue generated and distributed to Investors will be paid from the Licence Fee Account by the Responsible Entity. At the end of the Project Term all Units will terminate, lapse, and cease to have any rights and the Responsible Entity will assign the whole of the respective interest of each Investor in the Copyright in the Film to the Production Company.

32. Licence Fees to be paid to Investors will be based on the amount of the Responsible Entity Proceeds. Any Licence Fees will form part of the Project Property. The distribution of Licence Fees will be in accordance with Schedule 3 of the PIA (refer paragraph 43 below).

**Constitution**

33. The Constitution will be entered into between the Responsible Entity and each several Investor in the Project. It sets out the arrangements authorising the Investor's entry into the PIA, the dealing with Receipts, and the payment of fees and expenses.

***Responsible Entity Roles and Responsibilities***

34. The Responsible Entity acts in three capacities in relation to Investors:

- (i) As an agent, the Responsible Entity will confirm the entry into the PIA and certain other powers as set out in the Constitution;
- (ii) As a bare trustee, the Responsible Entity holds the Project Property. The Responsible Entity will appoint the Custodian as its agent under the Custodian Agreement to hold the Project Property;
- (iii) As an independent contractor under the PIA, the Responsible Entity will produce and market the Film in accordance with the PIA, which includes its right to sub-contract and delegate.

35. Except where the Responsible Entity acts as a bare trustee or as an independent contractor under the PIA, the Responsible Entity shall always act in relation to the Project as the agent for the Investor (clause 6.2). Under clause 6.3, each Investor appoints the Responsible Entity as the sole and exclusive agent for the Investor in relation to the Project.

36. The Constitution, at clause 7.1, lists the responsibilities and powers of the Responsible Entity. The Responsible Entity shall deal with the Licence Fees in accordance with the PIA (clause 14.1).

### ***Responsible Entity Fees***

37. At clause 11.1 the Responsible Entity is entitled to any interest earned on the Application Money, and at clause 11.2 the Responsible Entity shall be entitled to receive as remuneration the Application Money of each Investor, being \$1,000 for each Unit allotted to the Investor.

38. Under the Responsible Entity Services Agreement between the Responsible Entity and the Production Company, the Responsible Entity will be entitled to fees for its role as responsible entity of the Project. These fees will be payable by the Production Company and will be predominately funded out of the Application Moneys for Non-Deductible Units. No part of the Application Fee for Deductible Units or Licence Fees will be applied towards payment of the Responsible Entity's fees.

### **Production and Investment Agreement ('PIA')**

39. Under the PIA, Investors commission the production of the Film and take one or more of the undivided shares of Copyright in the Film and licence their interest in Copyright to the Responsible Entity (clause 3.1(a)). At clause 9.1 the Investor severally grants the Responsible Entity an exclusive licence of the Investor's Copyright Interest for marketing the Film throughout the world.

40. At clause 4.1 the Investor agrees to the investment of the Investor's Investment Amount in the Film upon allocation of the Units to the Investor, and the Non-Deductible Investor agrees to the use of the Non-Deductible Investor's Investment Amount as described in the Budget. At clause 4.2, the Responsible Entity agrees to pay the Investment Amount and the Non-Deductible Investment Amount into the Investment Account to be applied in accordance with the PIA and the Production Agreement.

41. During the production of the Film, the Responsible Entity is to ensure reports are provided to Investors at six-weekly intervals by way of the production website (clause 5.4). On completion of the Film the Responsible Entity is to deliver the Film to the Marketing Company in a form acceptable to the Distribution Guarantor (clause 9.2).

42. The Responsible Entity must issue irrevocable instructions to any delegates, sub-contractors and sub-licensees to pay Proceeds and any Distribution Guarantee Amount to which the Responsible Entity and the Production Company are entitled directly into the Proceeds Account. The Responsible Entity must pay the Responsible Entity Proceeds into the Licence Fees Account (clauses 10.1 and 10.2).

### ***Licence Fees***

43. Licence Fees are to be paid to Investors within 14 days of Responsible Entity Proceeds being deposited into the Licence Fee Account, provided the balance in the Licence Fee Account exceeds \$2,500 (clause 10.2). Licence Fees will be paid to Investors in the order specified in Schedule 3, as follows:

1. First, to the Investors pro rata and pari passu in accordance with the proportion of their investment in the project until the Investors in aggregate receive an amount equal to 60% of the Investment Amount;
2. Second, to the Non-Deductible Investors pro rata and pari passu in accordance with the proportion of their investment in the Project until the Non-Deductible Investors in aggregate receive an amount equal to the Non-Deductible Investment Amount, taking into account the sum of any Licence Fees paid to Non-Deductible Investors under 1 above;
3. Third, to the Investors (other than Non-Deductible Investors) pro rata and pari passu in accordance with the proportion of their investment in the Project until the Investors (other than Non-Deductible Investors) in aggregate receive an amount equal to the Investment Amount, taking into account the sum of any Licence Fees paid to Investors (other than Non-Deductible Investors) under 1 above; and
4. Fourth, until the Cut-Off Date to the Investors pro rata and pari passu in accordance with the proportion of their contribution to the Investment Amount.

### **Production Agreement**

44. Broadly, under the terms of the agreement, the Responsible Entity commissions the Production Company to produce the Film.

45. The obligations of the parties under the agreement are subject to and conditional on the Responsible Entity first depositing an amount equal to or exceeding the total Budgeted Cost less Deferrals into the Investment Account (clause 2).

46. The Responsible Entity is to pay the Investment Amount into the Production Account (clause 6.1 and 6.2), in accordance with the Drawdown Schedule at Part B of Schedule 3. The Production Account will be an interest bearing account established by the Production Company on execution of the Production Agreement (clause 12). Payment of the Budget is divided into five drawdowns from the Investment Account over the course of the Film's production.

47. Under clause 3.1, on payment of the first drawdown by the Responsible Entity, the Production Company will assign to the Responsible Entity, free of any security interest:

- (a) The Underlying Rights; and
- (b) Part of the property to which the Production Company becomes entitled in the Underlying Rights as at the time of acquisition.

48. At this time, the Production Company will also grant to the Responsible Entity an exclusive sub-licence of the Underlying Rights in the Music and a non-exclusive sub-licence of the Underlying Rights in the Selected Music (clause 3.3). At clause 4.1 the Investors are acknowledged as the first owners of 50% of the Copyright in the Film in consideration of payment of the Investment Amount.

49. Under clause 12.6, interest that accrues on money in the Production Account shall be used to meet the costs of any of the following:

- (a) Any Overage;
- (b) Enhancements to the Film;
- (c) Marketing Expenses;

and to the extent not used for any of the above, the interest will be treated as Proceeds and paid into the Proceeds Account

50. In the event that the costs of production of the Film are lower than the estimated costs stated in the Budget, any Underages will be used to meet the cost of the following:

- (a) Any Overage;
- (b) Enhancements to the Film;

Provided the costs are not non-deductible expenses under the provisions of Division 10BA of the ITAA 1936 and to the extent the Underages are not used for any of the above, the Underages will be treated as Proceeds and paid into the Proceeds Account (clause 13.2).

51. If there is any Overage in relation to the production of the Film, it will be met by the Production Company either from its own resources or from money provided by the Completion Guarantor (clause 13.1).

52. The Responsible Entity licenses the Production Company to use the Underlying Rights to produce and complete the Film (clause 5.1). In return, the Production Company must produce, complete, and deliver the Film. Under clause 8 the Production Company must ensure that:

- (a) the Film is produced as a 'qualifying Australian film' under the ITAA 1936;
- (b) the film maintains a provisional certificate issued by the Minister for Communications and the Arts or other responsible body;
- (c) a final certificate is obtained not more than six months after the Completion Date as defined in the PIA;
- (d) the Minister is notified forthwith of any matter concerning the issue or maintenance of the provisional certificate and final certificate;
- (e) all directions given by the Minister are complied with; and
- (f) the Responsible Entity is promptly provided with a copy of the final certificate on receipt.

53. On the Cut-Off Date, the Responsible Entity assigns all of the Film Assets back to the Production Company. As agent for the Investors, the Responsible Entity also grants the Production Company a power of attorney to allow it to transfer the Investors' Copyright Interest to itself on the Investors' behalf (clause 3.5).

54. The Production Company must issue irrevocable instructions to the Marketing Company and any sub-licensees to pay Proceeds directly into the Proceeds Account (clause 16).

**Marketing Agreement**

55. The Agreement is between the Responsible Entity, the Production Company and the Marketing Company. At clause 4 the Responsible Entity grants the Marketing Company an exclusive sub-licence, and the Production Company grants the Marketing Company an exclusive licence, of their interest in the Copyright, Underlying Rights and the Marketing Materials for marketing the Film throughout the world.

56. Under clause 4.4(a) the Marketing Company is to provide the following to the Responsible Entity and the Production Company with each disbursement of Proceeds:

- (i) Copies of all statements and reports provided by the sub-licensees;
- (ii) A statement of all Proceeds received, receivable and expended in accordance with this Agreement; and
- (iii) A report on the Marketing Company's marketing activity.

57. The Marketing Company is to instruct the Distribution Guarantor and any sub-licensees to pay any Distribution Guarantee Amounts and Proceeds directly into the Proceeds Account (clauses 5.1 and 5.2). Any Distribution Guarantee Amount and Proceeds must be disbursed in accordance with Schedule 4, as follows:

- A The Distribution Guarantee Amount will be paid to the Responsible Entity.
- B Proceeds will be paid to the Responsible Entity and the Production Company, in the order specified below:
  1. First, to the Responsible Entity until the Responsible Entity receives an amount equal to 60% of the Investment Amount, taking into account the Distribution Guarantee Amount paid to the Responsible Entity pursuant to A above;
  2. Second, to the Production Company until the Production Company receives an amount equal to the total Deferreds;
  3. Third, to the Responsible Entity until the Responsible Entity receives an amount equal to 100% of the Investment Amount taking into account the sums paid to the Responsible Entity in Item I and pursuant to A above;
  4. Fourth, until the Cut-Off Date:
    - (a) as to 50% to the Responsible Entity
    - (b) as to 50% to the Production Company.

5. Fifth, after the Cut-Off Date, 100% to the Production Company.

58. At clause 5.4 the Production Company appoints the Responsible Entity as its agent to receive and disburse to the Production Company the Production Company's share of any Proceeds made directly into the Proceeds Account.

## **Distribution Guarantee**

59. The Distribution Guarantor will provide the Distribution Guarantee. The Distribution Guarantor will be entitled to certain fees, defined as the Distribution Guarantor Expenses, which will be met from either Non-Deductible Investors' Investment Amounts or Gross Film Proceeds. The Distribution Guarantor will use its own resources to meet its obligations under the Distribution Guarantee.

## **Finance**

60. This ruling does not apply if a finance arrangement entered into by an Investor to fund the Investor's investment in the arrangement includes or has any of the following features:

- there are split loan features of the type referred to in Taxation Ruling TR 98/22;
- entities associated with the Project are involved, or become involved, in the provision of finance to Investors for the project;
- there are indemnity arrangements, or other collateral agreements, in relation to the loan, designed to limit a borrower's risk;
- the funding arrangements transform the Project into a 'scheme' to which Part IVA may apply;
- repayments of principal and payments of interest are linked to derivation of income from the Project;
- the funds borrowed, or any part of them, will not be available for the conduct of the project, but will be transferred (by any means, and whether directly or indirectly) back to the lender, or any associate of the lender;
- lenders do not have the capacity under the loan agreement, or a genuine intention, to take legal action against defaulting borrowers; or
- the terms or conditions are not arm's length.

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## **Ruling**

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61. For Investors that are issued Deductible Units in the Project, a deduction is available under Division 10BA for the amount invested in the Project to be applied to the production costs of the Film. The deductible amount will be \$1,000 per Deductible Unit allotted to the Investor.

62. A deduction is not available until the Investor has entered into the PIA, the Investor has been allotted Deductible Units in the Project, the Production Agreement has been entered into between the Responsible Entity and the Production Company, and the budget has been agreed between the parties.

63. Investors that are allotted Non-Deductible Units in the Project will not be entitled to a deduction under Division 10BA for the amount of their investment.

64. The Investors who acquire Copyright will comprise a tax law partnership for the purposes of Division 5 of Part III (see definition of 'partnership' in section 995-1 of the ITAA 1997) as they will be in receipt of income jointly from the commercial exploitation of their Copyright interest. The licence fees received by a Partnership in respect of the Film, less any GST on those licence fees, are assessable income of the Partnership under section 26AG in the income year in which they are received from the Licence Fee Account. However, pursuant to subsection 26AG(9), any income received by a Partnership from the use of, or the right to use, the Copyright is taken to have been derived by the partners. No such income is taken into account for the purposes of calculating the net income or loss of the Partnership of any year of income and, if this is the only income derived by the Partnership, it will not be necessary to lodge partnership income tax returns. Any income derived will be taken to be the income of each Investor in proportion to their share in the partnership.

65. Interest in respect of funds borrowed and any other revenue outgoings relating to the investment incurred by the Investors to make their contributions may be deductible to the Investors in accordance with section 8-1 of the ITAA 1997, but only to the extent of film income which is derived, subsection 124ZAO(2). Any excess interest and revenue outgoings may be carried forward indefinitely and offset against future film income, subsection 124ZAO(3).

66. Upon completion of the Film, after the audit has been carried out by an independent auditor, Division 10BA deductions will be withdrawn from Investors in respect of the moneys spent on non-tax deductible items, section 124ZAG.

67. The deductibility or otherwise of interest arising from loan agreements entered into with financiers is outside the scope of this Ruling.

68. Part IVA will not apply to deny deductibility or to accelerate assessability of the above amounts.

## Assumptions

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69. This Ruling is made subject to the following assumptions:

- (a) The Investor was a resident of Australia for tax purposes at the time the money was expended (subparagraph 124ZAF(1)(b)(i));
- (b) The investment moneys will be paid to the Production Company by way of contribution to the cost of producing the Film under a contract entered into on or before the end of the financial year in which the capital moneys are to be expended, being 30 June 2004. The production contract will specify that the investment moneys contributed represent the estimated cost of production of the Film (paragraph 124ZAF(1)(a) and subparagraph 124ZAF(1)(d)(iv));
- (c) At the relevant time, a provisional certificate (section 124ZAB) or a final certificate (section 124ZAC) is in force in relation to the Film;
- (d) Each Investor, at the relevant time, expects to become one of the first owners of the Copyright in the Film when the Copyright comes into force (subparagraph 124ZAF(1)(c)(i));
- (e) Each Investor, at the relevant time, intends to use the interest in the Copyright for the purpose of producing assessable income from the exhibition of the Film as mentioned in subparagraph 124ZAF(1)(c)(ii);
- (f) There will be in force a declaration lodged in respect of the Film in accordance with subsection 124ZADA(1) by a person accepted by the Commissioner under subsection 124ZADA(2) as an appropriate person to make such a declaration (subparagraph 124ZAF(1)(d)(iii));
- (g) Before the expiration of six months after the time when the Film is completed, an application will be made for a final certificate in accordance with section 124ZAC, otherwise the provisional certificate shall be deemed never to have been in force (subsection 124ZAB(10));

- (h) All requirements of the Department of Communications, Information Technology and the Arts will be met and final certificates will be issued;
- (i) The Film will be completed and the Investors' interest in the Copyright in the Film will be used for income producing purposes within two years after the close of the financial year in which the contributions are made (subsection 124ZAF(2));
- (j) By reason of the said capital moneys being expended, the Investor will become one of the first owners of the Copyright in the Film before 1 July 2006;
- (k) In producing the Film:
- where an amount is expended by a person ('the Film producer') for the supply of goods or the provision of services; and
  - the Commissioner is satisfied that the Film producer and the person supplying the goods or providing the services are not dealing with each other at arm's length in relation to the transaction;
- that the amount of moneys expended on the supply of those goods or the provision of those services will not exceed the amount of moneys that would have been expended by the Film producer if the Film producer and the person supplying the goods or providing the services had dealt with each other at arm's length (section 124ZAJ);
- (l) At the time the Investor expends the capital moneys by way of contribution to the cost of producing the Film, the Investor is at risk, according to the definition of 'risk' in subsection 124ZAM(2), with respect to an amount equal to or greater than the amount of those capital moneys expended (subsection 124ZAM(1));
- (m) No pre-sale arrangements, distribution rights agreements, distribution guarantee agreements, or other like agreements, have been, or will be, entered into in circumstances where such agreements would put funds into the hands of the Investors, by loan or otherwise, to enable them to expend capital moneys by way of contribution to the cost of producing the Film;

- (n) In the event of any Underage, the Production Company will use the Underage to meet the costs of Overages, enhancements to the Film and Marketing Expenses, with any remainder paid into the Proceeds Account, in a manner that will preserve the status of the Film as a 'qualifying Australian Film';
- (o) The dominant purpose of the Investors is to make a commercial return from their investment in the Film and the arrangements will be executed in the manner described in this Ruling;
- (p) Non-deductible expenditure associated with the Project in respect of Division 10BA will be met by Investors who contribute funds toward Non-Deductible Units in the Project.

## **Explanation**

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### **Division 10BA**

#### *The 'directly expended' requirement*

70. Subsection 124ZAA(6) requires that capital money contributed to the production of a film must be 'expended directly in producing (the) film' in order for a deduction under Division 10BA to be available.

71. Paragraph 8 of Taxation Ruling IT 2111 discusses this requirement. It states: 'Direct expenses on a film production which qualify for a deduction under Section 124ZAA can generally be described as **those relating to the production process** as distinct from those associated with financing or marketing of the Film. Such expenses would **typically include amounts paid for the acquisition of story rights and the surveying of locations, payments to the producers, directors and cast, and the costs of insurance of production associated risks, drawing up performers' contracts and the building of sets and scenery**' (emphasis added).

72. Our view is that the 'directly expended' requirement is not met at the point in time when the Investors make payments to the Responsible Entity in respect of the budget for the Film. Rather, the extent of the application of the money by The Responsible Entity to elements of production will ultimately determine the portion of the Investors' contribution that meets this requirement. Generally, this will not be known until after the completion of the Film.

73. The Investors will pay the application money to the Responsible Entity for application towards the production costs. In doing this, the Responsible Entity is to ensure that funds contributed by Investors are only expended on items within the Film production budget, with non-deductible expenditure to be met by funds contributed by non Division 10BA Investors.

74. In determining the amount that is 'directly expended' on the production of the Film, we will also consider the ultimate application of any funds obtained by the Production Company as 'underage'. In this regard, the Production Company has agreed that any Underage will be used to meet the costs of Overages, enhancements to the Film, and Marketing Expenses, with any remainder paid into the Proceeds Account, in a manner that will preserve the status of the Film as a 'qualifying Australian film'.

75. Quantification of the amount of money directly expended on the production of a film, and consequently the deduction available under Division 10BA, can only be determined after a film has been produced. To do this, a full audit of the application of the film production funds would normally be required. The practice of conducting an audit of the contribution account that is held by a Production Company (known as an audit of the 'film fund') is considered inadequate in this regard.

76. Accordingly, while a deduction should be available in respect of the contributions made by Australian Investors, the deduction will be withdrawn with retrospective effect if the amounts contributed are not directly expended on the Film.

### ***The 'at risk' rule***

77. Section 124ZAM reduces claims for Division 10BA deductions where the Commissioner is satisfied that a taxpayer was not at risk in respect of any part of the expenditure of capital moneys the taxpayer made by way of contribution to the cost of producing a film. Subsection 124ZAM(2) specifies the amount of risk is the amount of loss that, in the Commissioner's opinion, would be suffered by reason of the taxpayer's said capital expenditure where no income is derived from the taxpayer's interest in the copyright of the Film, other than excepted income as defined in subsection 124ZAM(3).

78. Paragraph 13 of Taxation Ruling IT 2111 discusses the 'at risk' rule and states the rule:

'... does not operate to affect the deductions available to Investors where pre-sale arrangements or the sale of distribution rights are effected prior to completion of the Film unless the arrangements put funds into the hands of Investors-by loan or otherwise - to enable them to make their

contributions to the costs of film production. Similar considerations apply in respect of a distribution guarantee arrangement under which an amount may be paid to Investors by a producer or another person in exchange for distribution rights, if a specified return is not achieved within a particular period (e.g. a specified percentage of the Film budget within 2 years). Payments under an arrangement of that kind would also not offend the 'at risk' rule.'

79. The 'at risk' rule applies to an investor's risk of loss before and after completion and distribution of the Film. Any arrangement which limits an investor's risk of loss can breach the 'at risk' rule. Certain types of common industry arrangements affecting risk during production of the Film are accepted as not offending the 'at risk' rule. This acceptance does not extend to arrangements which put funds into the hands of Investors to enable them to make their contributions to the costs of film production. This cannot be taken to mean that post-completion arrangements are also acceptable if they do not put funds into the hands of Investors to enable them to make their contributions. The position in paragraph 13 of IT 2111 is limited to the situations expressly mentioned.

80. The arrangement ruled on does not contain any features which attract the operation of section 124ZAM.

### *Non-arm's length transactions*

81. Where, in producing a film, an amount is expended by a person ('the film producer') for the supply of goods or the provision of services, subsection 124ZAJ(1) allows the Commissioner to reduce deductions under Division 10BA for such amounts where he is satisfied that:

- the film producer and the person supplying the goods or providing the services were not dealing with each other at arm's length in relation to the transaction; and
- the amount of moneys expended on the supply of those goods or the provision of those services exceeds the amount of moneys that would have been expended by the film producer if the film producer and the person supplying those goods or providing those services had dealt with each other at arm's length.

82. The Commissioner will not be in a position to determine whether his discretion in subsection 124ZAJ(1) ought to be exercised until such time as the Film has been produced. Furthermore, to make such a determination, a full audit of the Film's application and production funds would normally be required.

83. Accordingly, while a deduction should be available in respect of capital moneys expended by Investors by way of contribution to the cost of producing the Film before the end of the financial year ending 30 June 2004, the deduction will be reduced with retrospective effect if the Commissioner determines that a producer of the Film dealt with a supplier of goods or a provider of services, in the course of producing the Film, in circumstances where the parties were not dealing at arm's length and the producer paid more for the goods or the services than the producer would have paid had the transaction been at arm's length.

#### *Interest on borrowed funds*

84. Interest incurred in respect of funds borrowed by the Investors, if any, to make their contributions will only be deductible in any year to the extent of film income derived in that year (subsection 124ZAO(2) of the ITAA 1936). Any excess interest may be carried forward to succeeding years of income for offset against future film income (subsection 124ZAO(3)).

#### **Assessable Income**

85. The Investors in Clancy of the Overflow will be considered to be a partnership for income tax purposes as they are in receipt of ordinary income or statutory income jointly (see the definition of 'partnership' in section 995-1 of the ITAA 1997). The licence fees received by a Partnership of Investors in a Film, less any GST payable on those licence fees, will be assessable income of the Investors under section 26AG in the income year in which they are received from the Licence Fee Account. Although there exists a tax law partnership, subsection 26AG(9) provides that income of a partnership assessable under section 26AG is taken to be income derived by the partners/Investors. The amounts received as income are payments for the right to use the rights attaching to a 'qualifying Australian film' possessed by the Investors in respect of a particular period.

86. Section 17-5 of the ITAA 1997 excludes from assessable income an amount relating to GST payable on a taxable supply.

**Part IVA**

87. For Part IVA to apply, there must be a 'scheme' (section 177A), a 'tax benefit' (section 177C), and a dominant purpose of entering into the scheme to obtain a tax benefit (section 177D). The arrangement subject to this Ruling will be a 'scheme'. The Investor will obtain, for example, a 'tax benefit' from entering into the scheme, in the form of a deduction allowable under the provisions in Division 10BA that would not have been obtained but for the scheme.

However, it is not possible to conclude, from the arrangement outlined in this Ruling, that the scheme will be entered into or carried out with the dominant purpose of obtaining this tax benefit.

88. An Investor to whom this Ruling applies intends to stay in the scheme for its full term and derive assessable income from the exploitation of the Copyrights of the Film. Further, there are no features of the Project, as described in the said arrangement, that suggest that the Project is so 'tax driven' and 'so designed to produce a tax deduction of a certain magnitude', that the operation of Part IVA is attracted.

**Payment of interest by an Investor where an assessment is amended**

89. Section 204 provides that where an amendment of an assessment increasing the liability of a taxpayer to tax is made, the taxpayer is liable to pay a general interest charge to the Commissioner on the amount by which the tax payable by the taxpayer under the amended assessment exceeds the tax payable by the taxpayer under the assessment that was amended.

90. Investors who expend capital moneys by way of contribution to the cost of producing a film should be aware of this provision because, should the circumstances surrounding the production of a 'qualifying Australian film' require the Commissioner to go back and reduce the deductions claimed by Investors in that film, section 204 will have application. There is a discretion in section 8AAG of the *Taxation Administration Act 1953* (TAA 1953) under which the Commissioner can remit, in appropriate circumstances, the whole or part of the charge.

## **Detailed contents list**

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**Commissioner of Taxation**

11 February 2004

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| <i>Previous draft:</i>                 | - ITAA 1936 124ZADA(1)          |
| Not previously released in draft form  | - ITAA 1936 124ZADA(2)          |
|  | - ITAA 1936 124ZAF A            |
| <i>Related Rulings/Determinations:</i> | - ITAA 1936 124ZAF A(1)(a)      |
| PR 1999/95; TR 92/1; TR 92/20;         | - ITAA 1936 124ZAF A(1)(b)(i)   |
| TR 97/16; TR 98/22; TD 93/34;          | - ITAA 1936 124ZAF A(1)(c)(i)   |
| IT 2111                                | - ITAA 1936 124ZAF A(1)(c)(ii)  |
|  | - ITAA 1936 124ZAF A(1)(d)(iii) |
|  | - ITAA 1936 124ZAF A(1)(d)(iv)  |
| <i>Subject references:</i>             | - ITAA 1936 124ZAF A(2)         |
| - Australian films                     | - ITAA 1936 124ZAG              |
| - film income                          | - ITAA 1936 124ZAJ              |
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| - interest expenses                    | - ITAA 1936 124ZAM              |
| - Product Rulings                      | - ITAA 1936 124ZAM(1)           |
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|  | - ITAA 1936 124ZAO(2)           |
|  | - ITAA 1936 124ZAO(3)           |
| <i>Legislative references:</i>         | - ITAA 1936 Pt IVA              |
| - ITAA 1936 26AG                       | - ITAA 1936 177A                |
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| - ITAA 1936 Div 5 of Part III          | - ITAA 1936 177D                |
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| - ITAA 1936 124ZAA(6)                  | - ITAA 1997 8-1                 |
| - ITAA 1936 124ZAB                     | - ITAA 1997 Div 27              |
| - ITAA 1936 124ZAB(10)                 | - ITAA 1997 995-1               |
| - ITAA 1936 124ZAC                     | - TAA 1953 Pt IVAAA             |

- TAA 1953 8AAG
- ANTS(GST)A 99
- ANTS(GST)A 99 38-190(1)
- Copyright Act 1968
- Copyright Act 1968 Pt IV

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ATO references:

NO 2003/005750  
ISSN 1441-1172