



# ***PR 2005/115 - Income tax: Future Films Australia: 'Hey, Hey, It's Esther Blueberger!'***

 This cover sheet is provided for information only. It does not form part of *PR 2005/115 - Income tax: Future Films Australia: 'Hey, Hey, It's Esther Blueberger!'*

 This document has changed over time. This is a consolidated version of the ruling which was published on *7 December 2005*



## Product Ruling

### Income tax: Future Films Australia: 'Hey, Hey, It's Esther Blueberger!'

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Potential participants may wish to refer to the Tax Office website at [www.ato.gov.au](http://www.ato.gov.au) or contact the Tax Office directly to confirm the currency of this Product Ruling or any other Product Ruling that the Tax Office has issued.

#### **Preamble**

*The number, subject heading, **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 IVA 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.*

## **No guarantee of commercial success**

The Tax Office **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.

Potential participants must form their own view about the commercial and financial viability of the product. This will involve 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 and how the product fits an existing portfolio. We recommend a financial (or other) adviser be consulted for such information.

This Product Ruling provides certainty for potential participants by confirming that the tax benefits set out 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, participants lose the protection of this Product Ruling. Potential participants may wish to seek assurances from the promoter that the arrangement will be carried out as described in this Product Ruling.

Potential participants should be aware that the Tax Office 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 law(s)' 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 'Hey, Hey, It's Esther Blueberger!', 'the Film', 'the Picture' or 'the Project'.

### Tax law(s)

2. The tax laws dealt with in this Ruling are:
- section 26AG of the *Income Tax Assessment Act 1936* (ITAA 1936);
  - section 79D of the ITAA 1936;
  - section 82KL of the ITAA 1936;
  - Division 5 of Part III of the ITAA 1936;
  - Division 10BA of Part III of the ITAA 1936;
  - section 124ZAG of the ITAA 1936;
  - section 124ZAO of the ITAA 1936;
  - Part IVA of the ITAA 1936;
  - Division 35 of the *Income Tax Assessment Act 1997* (ITAA 1997);
  - section 8-1 of the ITAA 1997;
  - section 25-25 of the ITAA 1997; and
  - section 995-1 of the ITAA 1997.

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 A New Tax System (Goods and Services Tax) Act 1999 (GST ACT). An entity is entitled to claim input tax credits for the GST included in its expenditure provided that the acquisition is a creditable acquisition under Division 11 of the GST Act.

### Changes in the Law

4. Although this Ruling deals with the laws enacted at the time it was issued, later amendments may impact on this Ruling. Any such changes will take precedence over the application of this Ruling and, to that extent, this Ruling will be superseded.

5. Taxpayers who are considering participating 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 participants in Produced Films such as this. In keeping with that intention the Tax Office suggests that promoters and advisers ensure that participants are fully informed of any legislative changes after the Ruling is issued.

### **Class of persons**

7. The class of persons to whom 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 (that is, being a party to the relevant agreement until their term expires), and deriving assessable income from this involvement as set out in the description of the arrangement. In this Ruling, each of these persons, referred to as 'Investors' will be wholesale clients for the purpose of the *Corporations Act 2001*.

8. The class of persons to whom this Ruling applies does not include persons who intend to terminate their involvement in the arrangement prior to its completion, who otherwise do not intend to derive assessable income from it or are non-residents of Australia for the purposes of the ITAA 1936 or ITAA 1997.

### **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. This work 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:

Commonwealth Copyright Administration  
Attorney General's Department  
Robert Garran Offices  
National Circuit  
Barton ACT 2600

or posted at: <http://www.ag.gov.au/cca>

## Date of effect

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11. This Ruling applies prospectively from 7 December 2005, 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 commenced and the income year to which it relates has not yet commenced, this 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 and ceases to have effect after 30 June 2006. The Ruling continues to apply, in respect of the tax law(s) ruled upon, to all persons within the specified class who enter into the arrangement specified below. Thus, the Ruling continues to apply to those persons, even following its withdrawal, who entered into the specified arrangement prior to withdrawal of the Ruling. This is subject to there being no change in the arrangement or in 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 incorporates the following relevant documents or parts of documents lodged with the Tax Office:

- Application for a Product Ruling dated 24 May 2005, and accepted as valid on 22 June 2005, as constituted by documents provided on 24 May 2005, 2 June 2005, 3 June 2005, 9 June 2005, 10 June 2005, 16 June 2005, 17 June 2005, 22 June 2005, 12 July 2005, 21 July 2005, 22 July 2005, 25 July 2005, 28 July 2005, 29 July 2005, 3 August 2005, 8 August 2005, 12 August 2005, 14 September 2005; 20 October 2005 and additional correspondence dated 2 June 2005, 9 June 2005, 15 June 2005, 21 June 2005, 12 July 2005, 21 July 2005, 26 July 2005, 27 July 2005, 28 July 2005, 1 August 2005, 4 August 2005, 15 August 2005, 19 September 2005; 23 September 2005; 13 October 2005, 17 October 2005

- 15 November 2005; 21 November 2005 and 23 November 2005;
- Correspondence from the Tax Office to the Applicant dated 27 May 2005, 7 June 2005, 22 June 2005, 1 July 2005, 15 July 2005, 15 September 2005, 1 November and 18 November 2005;
  - Draft Film Investment Program Synopsis received by the Tax Office 3 June 2005;
  - Draft **Investor Deed** between Future Films Australia Pty Limited ('FFA Ltd'), the Investor and KPMG ('the Custodian') received by the Tax Office on 24 May 2005 and updated 5 August 2005 and 20 October 2005;
  - Draft **Joint Venture Deed** between the Manager, the Investors and the Custodian received by the Tax Office on 24 May 2005 and updated 5 August 2005 and 20 October 2005;
  - Draft **Production Services Agreement ('PSA')** between Future Films Australia Production Subsidiary ('FFA Production') and the Investors received by the Tax Office on 24 May 2005 and updated 5 August 2005, 20 October 2005 and 21 November 2005;
  - Draft Deed of Assignment between the Assignor and Future Films Australia Production Services Pty Limited ('FFA Production Services') received by the Tax Office on 24 May 2005 and updated 5 August 2005 and 20 October 2005;
  - Draft **Deed of Assignment** between FFA Production Services; FFA Production and each Investor named in the Joint Venture Deed received by the Tax Office on 24 May 2005 and updated 5 August 2005 and 20 October 2005;
  - Draft **Head Distribution Agreement ('HDA')** between Future Films Australia Distribution Subsidiary Pty Ltd ('FFA Distribution') and the Investors received by the Tax Office on 24 May 2005 and updated 5 August 2005 and 20 October 2005;
  - Draft **Side Letter to the Head Distribution Agreement** from FFA Production to FFA Distribution and Investors received 21 November 2005;
  - Draft Full Recourse Loan Agreement between FFA Finance Subsidiary Pty Ltd ('FFA Finance') and Bristol & West PLC (B&W) received by the Tax Office 24 May 2005 and updated 5 August 2005 and 20 October 2005;

- Draft **Full Recourse Investor Loan Agreement** between FFA Finance and the Investors received by the Tax Office on 24 May 2005 and updated 5 August 2005 and 20 October 2005;
- Draft FFA Finance Sub Charge and Mortgage between FFA Finance and B&W received by the Tax Office on 24 May 2005 and updated 5 August 2005 and 20 October 2005;
- Draft **Investor Mortgage** between the Investors and FFA Finance received by the Tax Office on 24 May 2005 and updated 5 August 2005 and 20 October 2005;
- Draft **FFA Production Subsidiary Charge and Mortgage** between FFA Production and the Investors received by the Tax Office on 24 May 2005 and updated 5 August 2005 and 20 October 2005;
- Draft **FFA Distribution Subsidiary Charge and Mortgage** between FFA Distribution and the Investors received by the Tax Office on 24 May 2005 and updated 5 August 2005 and 20 October 2005;
- Draft Irrevocable Letter of Credit between a bank, the Beneficiary and the Applicant received by the Tax Office on 24 May 2005 and updated 5 August 2005 and 20 October 2005;
- Draft **Payment Instructions Deed** between B&W, FFA Production, FFA Finance, the Manager and the Investors received by the Tax Office on 24 May 2005 and updated 5 August 2005 and 20 October 2005;
- Draft Licence Agreement between Future Films Australia Distribution Pty Ltd and an International Company ('the Licensee') received by the Tax Office on 24 May 2005 and updated 5 August 2005 and 20 October 2005;
- Draft Composite Deed of Charge and Assignment between the Licensee and FFA Distribution received by the Tax Office on 22 July 2005 and updated 5 August 2005 and 20 October 2005;
- Draft **Standard Collection Account Management Agreement** between an International Collection Account Manager ('the CAM'), FFA Production Services, the Sales Agent, the B&W, the Investors, the Talent and the Completion Guarantor received by the Tax Office on 24 May 2005 and updated 5 August 2005 and 20 October 2005;

- Draft **Escrow Deed** between B&W, FFA Production, the Investors and the Signatories received by the Tax Office on 24 May 2005 and updated 5 August 2005 and 20 October 2005;
- Draft **Charge over Cash Deposit and Account** between FFA Production Services and the Investors received by the Tax Office on 24 May 2005 and updated 5 August 2005 and 20 October 2005;
- Draft **Payments Directions Deed** between B&W, the Production Guarantor, FFA Production, FFA Distribution, the Licensee, FFA Finance, the Manager and the Investors received by the Tax Office on 24 May 2005 and updated 5 August 2005 and 20 October 2005; and
- Provisional Certificate under section 124ZAB, dated 12 November 2004, in relation to 'Hey, Hey, It's Esther Blueberger!'.

**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 documents highlighted are those that the Investors enter into. There are no other agreements, whether formal or informal, and whether or not legally enforceable, which an Investor, or an associate of the Investor will be a party to that are part of the arrangement to which this Ruling applies. The effect of the agreements is summarised as follows.

16. In accordance with the above documents, an Investor who participates in the Project must be a wholesale client as defined in section 761G of the Corporations Act 2001. A wholesale client is explained in paragraphs 139 to 143 in the Explanation area of this Product Ruling.

### **The Participants**

17. The parties involved in the arrangement are:

- **Manager:** FFA Ltd is conducting a programme under which Investors are selected to participate and invest in the joint venture for the production and exploitation of the film 'Hey, Hey, It's Esther Blueberger!' (the Film).
- **Investor:** a person who directly expends capital monies on the production of the Film and as a consequence becomes one of the first owners of copyright of and associated rights in the Film and who is accepted by the Manager in accordance with the Investor Deed and enters into the following:
  - an Investor Deed;

- Joint Venture Deed;
- PSA;
- Deed of Assignment;
- HDA;
- Payment Instructions Deed;
- Standard Collection Account Management BV; and
- Escrow Deed.

Where an Investor chooses to finance their Further Capital Contribution through FFA Finance they will also enter the following:

- Full Recourse Loan Agreement;
  - Investor Mortgage;
  - FFA Production Subsidiary Charge and Mortgage;
  - FFA Distribution Subsidiary Charge and Mortgage; and
  - Charge over Cash Deposit and Account and Payments Directions Deed.
- **Custodian:** KPMG will be appointed as Custodian to deal with and account for the Programme Investment strictly in accordance with the terms and conditions of the Investor Deed.
  - **Assignor:** FFA Production Services will secure an assignment of all rights in and to the Film and all underlying and ancillary rights relating thereto from the owner of those rights and assign those to the Investors.
  - **Rights Owner:** Tama Pty Ltd ('Tama') is the current owner in the underlying and ancillary rights relating to the Film. Tama will enter into an assignment agreement transferring those rights to FFA Production Services.
  - **Production Company:** FFA Production is the producer and they will engage a third party producer to actually produce and deliver the Film to the Investors.
  - **Head Distributor:** FFA Distribution will enter into sub distribution arrangements for the exhibition, distribution and marketing of the film for the term of the HDA.
  - **Licensee:** In payment for the Distribution Rights, the Licensee will pay the Investors the Minimum Guarantee Amount.

- **Collection Account Manager:** The Collection Account Manager ('CAM') will be appointed to:
  - open the Collection Account;
  - pay Gross Receipts and Collection Account Interest into the account;
  - calculate and pay entitlements; and
  - provide statements to the parties to the Standard Collection Account Management Agreement.
- **Commissioning Producer:** A yet to be appointed Commissioning Producer will guarantee, under a Commissioning Agreement, to complete and deliver the Film and agree to provide Completion Funds to complete and deliver the Film if the Production Company fails to do so.

#### **Defined terms**

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

- **'Adjusted Gross Participation'** means 15% of 100% of the Adjusted Gross Proceeds of the Film when the Adjusted Gross Proceeds exceed 80% of the production costs of the Film shown at Item 3 of Schedule 8 of the HDA.
- **'Adjusted Gross Proceeds'** means the Adjusted Gross Proceeds set out in Schedule 9 of the HDA.
- **'Assignment Amount'** means 0.55% of the Capital Contributions that is provided by all of the Investors in total.
- **'Bank'** (in relation to Composite Deed of Charge and Assignment, Payment Direction Deed and Payment Instructions Deed) means B&W, a bank organised under the laws of England and Wales, having its registered office at One Temple Back East, Temple Quay, Bristol, BS99 7AX.
- **'Budget'** means the estimated cost of production of the Film comprising Item 1 of Schedule 9 of the PSA.

- **'Business Day'** means:
  - (a) for determining when a notice, consent or other communication is given, a day that is not a Saturday, Sunday or public holiday in the place to which the notice, consent or other communication is sent; and
  - (b) for any other purpose, a day (other than a Saturday, Sunday or public holiday) on which banks are open for general banking business and the Bank is open for business in Sydney.
- **'Capital Contribution'** means the total sum comprising the Initial Capital Contribution ('ICC') and any Further Capital Contribution ('FCC') of the Investor.
- **'Capital Proportion'** means the proportion (expressed as a percentage) which the Capital Contribution of the Investor bears to the aggregate Capital Contributions of all the Investors.
- **'Collection Account'** means the Bank Account at the Collection Account Bank designated to receive those Gross Receipts, as described in 2.2 of the Standard Collection Account Management Agreement, which are payable into this account.
- **'Collection Account Interest'** means interest accrued on the Collection Account at the Collection Account Bank.
- **'Collection Account Bank'** means the bank at which the Collection Account is opened, held and maintained.
- **'Completed and Delivered'** means with reference to the Film, that the Film has been completed and delivered as evidenced by production of a certificate of delivery duly certified by the Completion Bonder and 'Completion and Delivery' shall be construed accordingly.
- **'Completion Funds'** means the moneys needed to pay Over-Budget Costs, if any.
- **'Contractual Rights'** means all rights of the Mortgagor(s) (actual and contingent) under or in relation to the Mortgaged Agreements including, without limitation:
  - (a) the right to demand and to receive payment of the Receivables and to give a good receipt for the Receivables;

- (b) the benefit of all claims for damages for the breach by each Contracting Party of any term of the Mortgaged Agreements and of any warranties and indemnities contained in the Mortgaged Agreements;
  - (c) the right to compel performance of the terms of the Mortgaged Agreements;
  - (d) the right to agree any amendments to, or to grant any waivers or consents to, the terms of, or the termination or replacement of, the Mortgaged Agreements; and
  - (e) the right to agree to the settlement of any disputes under the Mortgaged Agreements.
- **'Copyright'** means:
  - (a) Copyright in accordance with Section 86 of the *Copyright Act 1968* (Commonwealth);
  - (b) Copyright under the law of any country other than Australia; and
  - (c) rights wheresoever arising in the nature of and analogous to the rights in (a) and (b).
- **'Custodial Bank Account'** means the segregated bank account held by the Custodian for the purpose of their holding the Programme Investments details of the account being set forth in Item 3 of Schedule 2 of Investor Deed
- **'Delivery'** (in relation to the PSA) means delivery to and acceptance by the Manager of the Joint Venture of the Film and Delivery Material on or before the Delivery Date.
- **'Delivery Date'** (in relation to the PSA) means the date identified in Schedule 5 or such later date as is otherwise agreed by the parties, but being in no case a date after 30 June 2008.
- **'Delivery Means'** means of delivery of the Programme Investment to the Custodian, as identified in Item 2 of Schedule 2 of the Investor Deed
- **'Demand Notice'** means a notice of demand in the form set out in Schedule 1 of the Irrevocable Standby Letter of Credit duly completed and signed by the Beneficiary.
- **'Distribution Rights'** means the right to enter into distribution agreements for the sale, lease, license, exhibition, transmission or any other form of exploitation of the Film through the Territory as further described in Exhibit A of the License Agreement.

- **'Drawdown Date'** means the date of Drawdown, being the date specified for the same in the Notice of Drawdown.
- **'Entitlement'** means such part or parts of the Collected Gross Receipts, payable to all persons, firms companies etc. who have the right to receive an Entitlement ('Beneficiaries') and/or the Collection Account Manager under the terms and conditions of the Standard Collection Account Management Agreement.
- **'Escrow Account'** means an interest bearing deposit account to be opened by and in the name of FFA Production at B&W.
- **'Escrow Fund'** means all amounts, including accrued interest, standing to the credit of the Escrow Account from time to time.
- **'Event of Default'** means an event or circumstance described in clause 9.1 of the FFA Distribution Subsidiary Charge and Mortgage.
- **'Expiry Date'** means 17.00 hours (London time) on the day which is 60 days after the Payment Date.
- **'Exploitation Revenues'** means, in accordance with clause 6.5(c) of the Joint Venture Deed, the Investor's entitlement to participate in receipts from the exploitation of the Film, including net proceeds and adjusted gross proceeds but excluding the Minimum Guarantee Amount.
- **'Fee'** as defined in Schedule 6 of the PSA means an amount that is equal to the total of:
  - a fee being equivalent to the amount of 1.5% of the Investors' Capital Contribution(item 1); and
  - the amount of the film budget (item 2).
- **'Film Production Account'** means a bank account of the Joint Venture to be established in respect of its production of the Film Project and managed by the Manager.
- **'Film Project'** means a film or motion picture project that in the opinion of the Manager satisfies the Film Project Criteria.
- **'Final Repayment Date'** means the earlier of:
  - (a) the date of receipt of the Minimum Guaranteed Amount under the HDA; and
  - (b) the date which is eighty five (85) months from the [30th June] 2006.

- **'Finance Documents'** means the Full Recourse Loan Agreement, the Security Documents, the Escrow Agreement, the Payment Instructions Deed, the Payment Directions Deed, the Letter of Credit, the Investor Loan Agreement, the Distribution Agreement and the PSA together with any other document designated as such by both the Lender and the Borrower, and 'Finance Documents' shall mean all of them.
- **'Financial Close'** means financial close in relation to the Film, whereby subject to and on the terms and conditions of Escrow Account, the Fee is released from the escrow account and the Letter of Credit is irrevocably and unconditionally issued by a bank.
- **'Financial Closing Date'** means 30 June 2006.
- **'Financing Agreements'** means the agreement or agreements referred to in the Completion Guaranty.
- **'Fixed Charge Property'**:
  - in relation to the FFA Finance Sub Charge and Mortgage means the Mortgaged Property consisting of:
    - (a) all real property (freehold and leasehold), all buildings and Fixtures on real property and all proceeds of sale of any of them;
    - (b) fixed plant, machinery and equipment;
    - (c) uncalled or unpaid capital (including any amount characterised as a premium when the relevant shares were issued);
    - (d) goodwill;
    - (e) all rights under documents or agreements of any kind and any Books concerning the Mortgagor's business transactions;
    - (f) all book and other debts payable to the Mortgagor including the proceeds of those debts;
    - (g) all Intellectual Property.

- in relation to the FFA Production Subsidiary Charge and Mortgage means the Mortgaged Property consisting of:
  - (a) all real property (freehold and leasehold), all buildings and Fixtures on real property and all proceeds of sale of any of them;
  - (b) fixed plant, machinery and equipment;
  - (c) uncalled or unpaid capital (including any amount characterised as a premium when the relevant shares were issued);
  - (d) goodwill;
  - (e) all benefits, claims and returns of premiums relating to Insurances;
  - (f) all rights under documents or agreements of any kind and any Books concerning the Mortgagor's business transactions;
  - (g) all book and other debts payable to the Mortgagor including the proceeds of those debts;
  - (h) all Intellectual Property; and
  - (i) [all money (including interest) standing to the credit of the Proceeds Account and the debt represented by that account].
- **'Floating Charge Property'** means all Mortgaged Property that is not Fixed Charge Property or Mortgaged Agreements.
- **'Further Capital Contribution'** ('FCC') means such further sum of capital (being additional to the Initial Capital Contribution) as is contributed by the Investor, being no more than 2.65 times the amount of the Initial Capital Contribution.
- **'Gross Participation'** means 6% of 100% of Gross Receipts and all such entitlements of the Investors.
- **'Gross Receipts'** means all proceeds (exclusive of VAT or similar taxes or duties) derived from the distribution agreements but more specifically defined in Schedule 9 of the HDA.
- **'Initial Capital Contribution'** ('ICC') means the sum paid on behalf of the Investor by the Custodian from the Custodial Bank Account for the purposes of the Joint Venture pursuant to clause 29 of Investor Deed.

- **'Investor Majority'** means a majority of the Investors at any one time by reference to the Capital Proportion of each Investor as per the Joint Venture Deed.
- **'Lending Bank'** means B&W who will advance or proposes to advance funds pursuant to the Loan Offer.
- **'Letter of Credit' ('LofC')**:
  - in relation to Composite Deed of Charge and Assignment means:
    - the LofC in respect of the Film to be provided by a bank in respect of the obligations of the Licensee to pay the Minimum Guaranteed Amount together with all rights and remedies pursuant to such LofC and all proceeds of the same.
  - in relation to the Escrow Deed means:
    - the LofC proposed to be issued by a bank, but not B&W, subject to satisfaction of certain conditions precedent, at Financial Close.
- **'the Loan Offer'** means an offer from B&W to lend monies to FFA Finance to on lend to the investors in respect of the Film Project, the conditions of such lending satisfying the matters identified in Schedule 6 of the Full Recourse Loan Agreement.
- **'Mandatory Cost'** means any mandatory cost as described and determined in Schedule D of the Full Recourse Loan Agreement.
- **'Margin'** means twenty (20) basis points.
- **'Minimum Guarantee Amount' ('MGA')**:
  - in relation to the Investor Deed means:
    - as defined in Item 2 of Schedule 8 of the HDA.
  - in relation to the Joint Venture Deed means:
    - the final amount payable to the Investors forming the Joint Venture pursuant to the HDA. The payment of the MGA is to be secured by issuance of a letter of credit.
  - in relation to the License Agreement and Payment Directions Deed means:
    - an amount payable on July 31, 2013 (85 months from the date of the Licence Agreement).

- in relation to the HDA means:
  - the amount shown at Item 2 of Schedule 8 of the Agreement, payable on 31 July 2013.
- **‘Mortgaged Agreements’:**
  - in relation to the FFA Finance Sub Charge and Mortgage means each of and all rights and interest under each of the following documents to which the Mortgagor is a party:
    - (a) the Investor Mortgage including, without limitation, the interest of the Mortgagor as legal mortgagee in respect of, or in respect of a Security Interest in, as the case may be:
      - (i) the Joint Venture Deed;
      - (ii) the Productions Services Agreement;
      - (iii) the Rights Agreement;
      - (iv) Distribution Agreement;
      - (v) Distribution Sub Charge;
      - (vi) Production Sub Charge;
      - (vii) the Escrow Agreement; and
      - (viii) the Escrow Charge;
    - (b) the Investor Loan Agreement;
    - (c) the Funds Flow Document (if any);
    - (d) the Payment Directions Deed; and
    - (e) the Payment Instructions Deed,  
including for the avoidance of doubt the right to receive and sue for all revenues and payments under each of those agreements.
  - in relation to the FFA Production Subsidiary Charge and Mortgage means each of and all rights under each of the following documents:
    - (a) the PSA;
    - (b) the Sub-PSA;
    - (c) the Completion Guarantee;
    - (d) the Production Shortfall Guarantee; and
    - (e) the book debts.

- in relation to the FFA Distribution Subsidiary Charge and Mortgage means each of and all rights under each of the following documents:
  - (a) the HDA;
  - (b) Licence Agreement, including the right to receive the Minimum Guarantee as defined in that document;
  - (c) the charge and assignment given by the Licensee. in favour of the Mortgagor; and

including for the avoidance of doubt the right to receive and sue for all revenues and payments under each of those agreements.

- **‘Mortgaged Property’:**

- in relation to the FFA Finance Sub Charge and Mortgage means all the Mortgagor’s interest in all its property anywhere (real and personal) acquired after the date of execution of this document, including without limitation:
  - (a) the Mortgaged Agreements;
  - (b) the Contractual Rights;
  - (c) the Receivables;
  - (d) the Fixed Charge Property; and
  - (e) the Floating Charge Property,

acquired after the date of execution of this document but excluding any land located in Australia and acquired within 12 months of the date of execution of this document.

It also includes:

- (a) any of the Mortgagor’s existing property located outside of Australia; and
- (b) any of the Mortgagor’s interest in, to, under or derived from the Mortgaged Agreements, the Contractual Rights and the Receivables located outside Australia,

acquired on or before the date of execution of this document.

- in relation to the FFA Production Subsidiary Charge and Mortgage and the FFA Distribution Subsidiary Charge and Mortgage means all the Mortgagor’s interest in all its property anywhere (real and personal, present and future), including without limitation:

- (a) the Mortgaged Agreements;
  - (b) the Contractual Rights;
  - (c) the Receivables;
  - (d) the Fixed Charge Property; and
  - (e) the Floating Charge Property.
- **'Notice of Drawdown'** means a notice substantially in the form set out in Part I of Schedule C of the Full Recourse Loan Agreement.
- **'Outside Delivery Date'** means the outside delivery date in respect of the Film, being the date which falls on the second anniversary of Drawdown.
- **'Payment Date'** means the date specified in Schedule 2.
- **'Picture'** means the same as 'Film'.
- **'Production Account'** means the account opened by FFA Production in accordance with the PSA. The Production Account is subject to the conditions of the Escrow Deed.
- **'Production Company Copyright'** means an interest equal to 5% of the Copyright of and associated rights in of the Film.
- **'Production Schedule'** means the schedule for production of the Film comprising Item 2 of Schedule 9 of the PSA.
- **'Programme Investment'** means the amount the Investor deposits with the Custodian as identified at Item 1 of Schedule 2 of the Investor Deed, being an amount no less than \$25,000 and thereafter in increments of \$12,500.
- **'Receivables'** means the Mortgagor's rights to all choses in action and to receive money or other property payable or deliverable under or in connection with the Mortgaged Property.
- **'Secured Liabilities'** means all moneys, debts and liabilities from time to time due, owing or incurred by The Licensee to FFA Distribution Subsidiary, in each case:
  - (a) whether present or future;
  - (b) whether alone or jointly with any other person;
  - (c) whether actual or contingent;
  - (d) whether as principal or as surety;
  - (e) in whatsoever name, firm or style;

(f) in whatsoever currency denominated; or

(g) otherwise;

including, without limitation, all liabilities in connection with foreign exchange transactions, accepting, endorsing or discounting notes or bills, under bonds, guarantees, indemnities, documentary or other credits or any instruments from time to time entered into by FFA Distribution Subsidiary for or at the request of the Licensee together with interest to the date of payment at such rates and upon such terms as may from time to time be agreed and all commission, fees, costs (including, without limitation, legal fees) on a full indemnity basis and other charges.

- **‘Secured Money’** means all amounts (including damages) that are payable, owing but not payable, or that otherwise remain unpaid by the Mortgagor to the Mortgagee on any account under or in connection with the Transaction Documents or any transaction contemplated by the Transaction Documents, at any time, whether:
  - (a) present or future, actual or contingent;
  - (b) incurred alone, jointly, severally or jointly and severally;
  - (c) the Mortgagor is liable on its own account or the account of, or as surety for, another person and without regard to the capacity in which the Mortgagor is liable;
  - (d) due to the Mortgagee alone or with another person;
  - (e) the Mortgagee is entitled for its own account or the account of another person;
  - (f) arising from a banker and customer relationship or any other relationship;
  - (g) originally contemplated by the Mortgagor or the Mortgagee or not; and
  - (h) the Mortgagee is the original person in whose favour any of the above amounts were owing or an assignee and, if the Mortgagee is an assignee:
    - (i) whether or not the Mortgagor consented to or knew of the assignment;
    - (ii) no matter when the assignment occurred; and

- (iii) whether or not the entitlements of that original person were assigned with the Mortgage,  
under or in connection with the Secured Obligations.
- **'Secured Obligations'** means in respect of a Mortgagor at any time, all the liabilities and obligations of the Mortgagor to the Mortgagee under or in connection with the Transaction Documents or any transaction contemplated by the Transaction Documents, and includes any liabilities or obligations which:
  - (a) are liquidated or unliquidated;
  - (b) are present, prospective, actual or contingent;
  - (c) are in existence before or come into existence on or after the date of this document;
  - (d) relate to the payment of money or the performance or omission of any act;
  - (e) sound in damages only;
  - (f) accrue as a result of any Event of Default;
  - (g) are reasonably foreseeable as likely, after that time, to fall within any of items (a) to (f); or
  - (h) arise from a banker and customer relationship, or any other relationship, and irrespective of:
    - (i) whether the Mortgagor is liable or obligated solely, or jointly, or jointly and severally with another person;
    - (ii) whether the liability or obligation is due to the Mortgagee alone or with another party;
    - (iii) whether the liability or obligation was originally contemplated by the Mortgagor or the Mortgagee or not;
    - (iv) the circumstances in which the Mortgagee comes to be owed each liability or obligation and in which each liability or obligation comes to be secured by the Mortgage, including, any assignment of any liability or obligation or of the Mortgage:
      - (A) whether or not the Mortgagor consented to or knew of the assignment;

- (B) no matter when the assignment occurred; and
  - (C) whether or not the entitlements of the original creditor were assigned with the Mortgage; or
  - (v) the capacity in which the Mortgagor comes to owe or the Mortgagee comes to be owed that liability or obligation.
- **'Security Account'** means the account referred to in the Escrow Agreement as the 'Escrow Account' being the account held with B&W, and maintained by the Chargor with the Account Bank and all rights of the Chargor in relation thereto or such other account or accounts as the Investors shall designate from time to time as replacements for such account.
- **'Specification'** means the specification in respect of the Film comprising Item 3 of Schedule 9 of the PSA.
- **'Swap Rate'** means the fixed rate of interest applicable to the Facility as determined with reference to the Swap Arrangements.
- **'Swap Arrangements'** means the interest rate swap arrangements or interest rate management arrangements to be entered into amongst the Lender and its Affiliates or by the Lender or an Affiliate of the Lender with third parties selected by the Lender, for the purpose of fixing interest rates in connection with the provision of the Facility.
- **'Term'** means the period from the date of the License Agreement until 25 years from the first theatrical release of the Picture in any part of the Territory.
- **'Territory'** means the entire universe.
- **'Transaction Document':**
  - in relation to the FFA Finance Subsidiary Charge and Mortgage means:
    - (a) The FFA Finance Subsidiary Charge and Mortgage;
    - (b) The Full Recourse Loan Agreement;
    - (c) Payment Directions Deed;
    - (d) Payment Instructions Deed;
    - (e) any document or agreement that the parties agree in writing is to be a Transaction Document for the purposes of this document;

- (f) any document or agreement that is entered into under any of the above;
  - (g) any document or agreement that amends, supplements, replaces or novates any of the above; and
  - (h) any undertaking (whether or not in writing) by or to a party or its lawyers that is given under or relates to any of the above.
- in relation to the Investor Mortgage means:
  - (a) The Investor Mortgage;
  - (b) The Full Recourse Loan Agreement;
  - (c) The Payment Directions Deed;
  - (d) The Payment Instructions Deed;
  - (e) The Joint Venture Deed;
  - (f) The Investor Deed;
  - (g) any document or agreement that the parties agree in writing is to be a Transaction Document for the purposes of this document;
  - (h) any document or agreement that is entered into under any of the above; and
  - (i) any document or agreement that amends, supplements, replaces or novates any of the above.
- in relation to the FFA Production Subsidiary Charge and Mortgage means:
  - (a) The FFA Production Subsidiary Charge and Mortgage;
  - (b) The PSA;
  - (c) Payment Directions Deed;
  - (d) Payment Instructions Deed;
  - (e) any document or agreement that the parties agree in writing is to be a Transaction Document for the purposes of this document;
  - (f) any document or agreement that is entered into under any of the above;
  - (g) any document or agreement that amends, supplements, replaces or novates any of the above; and

- (h) any undertaking (whether or not in writing) by or to a party or its lawyers that is given under or relates to any of the above.
- in relation to the FFA Distribution Subsidiary Charge and Mortgage means:
  - (a) The FFA Distribution Subsidiary Charge and Mortgage;
  - (b) The HDA;
  - (c) Payment Directions Deed;
  - (d) Payment Instructions Deed;
  - (e) any document or agreement that the parties agree in writing is to be a Transaction Document for the purposes of this document;
  - (f) any document or agreement that is entered into under any of the above;
  - (g) any document or agreement that amends, supplements, replaces or novates any of the above; and
  - (h) any undertaking (whether or not in writing) by or to a party or its lawyers that is given under or relates to any of the above.

**General overview**

19. The following table summarises the abbreviations used throughout the remainder of this ruling:

<b>Abbreviation</b>	<b>Name</b>
<b>Participants</b>	
FFA	Future Films Australia Pty Limited
FFA Production Services	Future Films Australia Production Services Pty Ltd
FFA Production	Future Films Australia Production Subsidiary Pty Ltd
FFA Distribution	Future Films Australia Distribution Subsidiary Pty Ltd
FFA Finance	Future Films Australia Finance Subsidiary Pty Ltd
B&W	Bristol & West PLC

**PR 2005/115**

<b>Abbreviation</b>	<b>Name</b>
<b>Participants</b>	
Investors	Joint Venture Investors
<b>Documents &amp; other Terms</b>	
PSA	Production Services Agreement
HDA	Head Distribution Agreement
MGA	Minimum Guarantee Amount
ICC	Initial Capital Contribution
FCC	Further Capital Contribution
CC	Capital Contribution
LofC	Letter of Credit
CAM	Collection Account Manager

**The Film**

20. The Manager is seeking to raise investment funds to be applied to the production of a qualifying Australian film 'Hey Hey It's Esther Blueberger!'. Provisional Certificate number P06892 dated 12 November 2004 was issued to Tama Films Pty Ltd ('Tama') by the Department of Communications, Information Technology and the Arts ('DICTA') in respect of the Film. The certificate is currently in force and states that the proposed film will, when completed, be a 'qualifying Australian film' for the purposes of Division 10BA. Tama will notify DCITA of their consent to transfer the Provisional Certificate to FFA Production. FFA Production will notify DCITA that they are taking over as producer of the Film. The transfer of the provisional certificate will happen prior to the commencement of fundraising from Investors.

21. The total budgeted cost of the Film is \$7,298,850 which comprises direct production costs of \$7,016,971 and non-deductible expenses of \$281,879. In addition Investors will be required to pay certain project fees (See paragraph 70). The maximum funds to be raised, incorporating budget costs of the film, Project fees and GST total \$7,630,462. The ICC required from Investors will be \$2,095,325 (GST inclusive). FCC will total no more than \$5,535,137 (GST inclusive). The total amount to be raised to cover project fees may be less where Investors choose not to finance their FCC through FFA Finance and therefore do not incur the loan establishment fee.

**The Project**

22. Investors will be invited to contribute funds to invest in the Film Project. They will pay an ICC to the Custodian on application and then a FCC upon acceptance. The total of the ICC and the FCC is referred to as CC.

23. FFA Finance will provide a loan facility to assist Investors in making the FCC. FFA Finance will obtain funds for the facility from B&W. The interest on the loan will be capitalised and both the principal and the interest will be repayable in a single payment in 2013. Investors will mortgage their rights and interest in the Film as security for the loan. Investors have the option of not borrowing the FCC from FFA Finance and may utilise their own resources to fund their payment.

24. The CC will be paid into a Production Account in accordance with the Joint Venture Deed. Funds in the Production Account will be subject to the terms of the Escrow Deed, pending the issue of an irrevocable LofC to support the payment of the MGA. The effect of the Escrow Deed is that the funds will not be available to be used until the LofC is in place and escrow is lifted and the funds are released to FFA Production to be used in the production of the film. The Production/Escrow Account will be held by Bristol & West (B&W). Investors will take a charge over the money held in Escrow until the LofC is in place.

25. On completion of the Film Investors will obtain a 95% interest in the Copyright of and associated rights in the Film. The remaining 5% interest will be retained by FFA Production. After seven years FFA Production has the option to acquire the Copyright interest and associated rights from Investors for its fair market value at that time.

26. All Investors will be entitled to the MGA which will be payable on 31 July 2013, seven years after the commencement of the arrangement. The MGA will be equal to at least the total of the principal and capitalised interest on the loan required to fund the FCC. The MGA will be guaranteed by an irrevocable LofC. The MGA is payable under the HDA, however the LofC will be provided by unnamed unrelated sub-licensees from an unnamed unrelated bank.

27. For those Investors who borrow the FCC through FFA Finance the date for repayment of the loan and capitalised interest coincides with the date of payment of the MGA. Where Investors do not borrow from FFA Finance the MGA will be paid directly to them.

28. Investors will obtain an interest in the underlying rights in relation to the Film via an assignment arrangement. Tama, original owner of the rights, will assign the rights in perpetuity to FFA Production Services for the consideration of £1. FFA Production Services will assign the rights in perpetuity to the Investors for the consideration of 0.55% of the Investor's CC. The Investors will then grant FFA Production, as the producer, a non-exclusive license to use the rights to produce the Film for nil consideration.

29. FFA Production is contracted to act as the producer for the Film, however they will contract another entity to carry out the physical production of the Film.

30. FFA Distribution is contracted to act as the Head Distributor of the Film. FFA Distribution will enter into a license agreement with an unrelated licensee who will be responsible for the distribution of the Film throughout the whole universe. The unrelated licensee will sub-license the actual distribution to unknown unrelated sub-licensees. The unknown unrelated sub-licensees are to provide distribution guarantees to enable the acquisition of an irrevocable LofC from an unknown unrelated bank.

31. Under the arrangement Investors will be entitled to a 6% share of gross receipts (Gross Participation) and the MGA. Additional amounts (Adjusted Gross Participation) may be payable if the Film is highly successful.

32. Under the arrangement fees will be paid to the Future Films Australia group totalling 8.0% and 9.6% of CC by non-borrowing investors and borrowing investors respectively. In addition the Joint Venture will pay an annual ongoing management fee equal to 0.275% of CC for each year the arrangement operates. These fees are made up of the fees contained in the Joint Venture Agreement, the PSA, the Full Investor Loan Agreement and an executive producer's fee incorporated into the budget.

## **Obtaining Investor funds**

33. Applications for investment will only be accepted from an Investor who is a wholesale client as defined in section 761G of the *Corporations Act 2001* (see paragraphs 139 to 143 in the Explanation section of this Product Ruling).

34. On entering the Project the Investors will enter into a number of agreements as detailed below.

## **Investor Deed**

35. An Investor will enter into an Investor Deed and will be required to make an ICC at the time of application. The ICC will be held in trust by the Custodian pending acceptance into the Project. Acceptance is considered to be the time that the Investor forms a Joint Venture with other Investors. The minimum ICC is \$25,000 and thereafter in multiples of \$12,500.

36. The Investor will also be required to pay a FCC at the time of acceptance. The amount of the FCC will be affected by whether or not the Investor chooses to finance the FCC from their own sources or via a loan facility to be offered by FFA Finance.

37. For an Investor utilising the loan facility the FCC will be 2.65 times the amount of the ICC. A non borrowing Investor will pay a smaller FCC as they will not incur the loan establishment fee payable by those utilising the FFA Finance loan facility.

38. Under the Investor Deed the Investor appoints the Custodian to deal with their investment strictly in accordance with the terms and conditions of the Investor Deed.

39. The Investor irrevocably appoints the Manager as their attorney to complete the following documents or agreements in a form approved by the Manager and for the purpose of their execution and delivery at any time and in any order, on or after the date of the Investor Deed:

- (a) the Joint Venture Deed;
- (b) the PSA;
- (c) the HDA; and

where an Investor borrows funds from FFA Finance,

- (a) a Full Recourse Investor Loan Agreement;
- (b) Investor Mortgage;
- (c) FFA Production Subsidiary Charge and Mortgage; and
- (d) FFA Distribution Subsidiary Charge and Mortgage.

#### **Joint Venture Deed**

40. An Investor is accepted into the project when they form a Joint Venture with other Investors for the purpose of producing the Film. Pursuant to the Joint Venture Deed, each Investor will:

- (a) have an interest in that Copyright as tenant in common equal to their Capital Proportion; and
- (b) subject to any security as contemplated by clause 5 or anything in clause 11, be entitled to deal with its interest in the Copyright in its absolute discretion including, without limitation, dispose of, or otherwise create an interest in the Copyright without the consent of any other party to this Deed.

41. On the creation of any Copyright the Investors will have a 95% share in the Copyright of and associated rights in the Film; the remaining 5% interest will be retained by FFA Production.

42. The Joint Venture shall continue for an indefinite period and will not terminate any sooner than 31 July 2013, unless the PSA is terminated in accordance with clause 9 of that agreement. At any time after expiry of the said period the Investors may by Investor Majority wind up the Joint Venture.

43. When the Joint Venture is formed Investors will be required to make a FCC as described in paragraph 36. Investors may choose to pay their FCC either through an FFA Finance loan facility or from their own resources.

44. For those choosing to borrow from FFA Finance the amount of the loan facility will be equal to the Investor's required FCC. The term of the loan will be from the commencement of the Joint Venture until 31 July 2013. Principal and capitalised interest on the loan will be payable in a single payment due on 31 July 2013. The amount receivable by an Investor under the MGA will not be less than the total of the principal and interest amount(s) payable under the loan facility.

45. The funds advanced under the FFA Finance loan will be paid into the Production Account in accordance with the terms of the Payment Instructions Deed.

46. Those Investors who choose to fund the FCC from their own resources will be required to pay their FCC directly into the Production Account.

47. All Investors will be entitled to a MGA payable on 31 July 2013 regardless of whether or not they borrow from FFA Finance to fund their FCC. The MGA will be underwritten by an irrevocable LofC provided by the Licensee.

## **Escrow Deed**

48. Upon execution of the PSA total CC will be placed into the Production Account which will be subject to the conditions of the Escrow Deed. The effect of the Escrow Deed is that funds will not be allowed to be drawn from the account until the terms of the Escrow Deed are satisfied, in particular an irrevocable LofC is in place underwriting the MGA.

49. The Investors will take out a 'charge over cash deposit and account' ('the Charge') over the Production Account while it is held in Escrow. The purpose of the Charge is to protect the interests of the Investors such that, if the LofC is not in place by the Outside Issuance Date the funds in the Production Account will be returned to the Investors in accordance with the Payment Instructions Deed.

50. The Outside Issuance Date is nine months and one day after the execution of the PSA.

## **Finance Arrangements**

### ***Full Recourse Loan***

51. Under the Loan Agreement between B&W and FFA Finance, B&W will make available to FFA Finance an Australian dollars (AUS\$) term Loan Facility. FFA Finance will apply all amounts borrowed towards funding the production costs of the Film by on lending the funds to the Investors. The sole purpose of the loan facility is to fund the FCC of the Investors.

52. FFA Finance may not drawdown the Facility until it has provided to B&W the documents listed in Part I of Schedule B in form and substance satisfactory to B&W. These documents include a copy of the executed Joint Venture Deed, Investor Loan Agreements, Investor Mortgage, Investor Deeds, Head Distribution and Sub Distribution Agreements and the Product Ruling.

53. FFA Finance undertakes to repay the Facility together with interest and all other amounts due and payable under the Agreement, in full, in a single bullet repayment on the Final Repayment Date.

54. In the event that the Film is not Completed and Delivered by the Outside Delivery Date, FFA Finance undertakes to repay the Facility to B&W, together with interest and all other amounts due and payable under this Agreement, in full, in a single bullet repayment on the Permitted Prepayment Date.

55. All payments and amounts made or due to be made by FFA Finance pursuant to this Agreement shall be made in full, without set off, deduction or counterclaim, in freely available funds to such account as B&W may notify FFA Finance from time to time.

56. The rate of interest on the Facility is the percentage rate per annum which is the aggregate of:

- (a) the Margin;
- (b) the Swap Rate; and
- (c) Mandatory Cost, if any.

57. Any interest, periodic payment, commission or fee accruing will accrue from day to day and is calculated on the basis of the actual number of days elapsed in a year of 365 days or, in any case where the practice in the London Interbank Market differs, in accordance with that market practice.

58. FFA Finance shall pay to B&W on the Drawdown Date:

- (a) an arrangement fee equal to 65 basis points; and
- (b) the Margin equal to 20 basis points.

\*A basis point is equal to 0.01%

### ***Full Recourse Investor Loan Agreement***

59. FFA Finance will make an Advance to the Investors who choose to use the Loan Facility an amount equal to the amount received under the Full Recourse Loan Agreement. FFA Finance will only lend to the Investors if it receives funds under the Full Recourse Loan Agreement.

60. The Investors must use the amount borrowed to fund the production costs of the Film.

61. The Investors must pay interest on the loan on the same dates and in the same (or equivalent) manner as FFA Finance is required to pay interest on the loan from B&W under the Full Recourse Loan Agreement.
62. The rate of interest payable on the loan is the same rate of interest that is payable by FFA Finance on the loan facility from B&W under the Full Recourse Loan Agreement. Interest on the loan capitalises and accrues in the same manner as interest accrues under the Full Recourse Loan Agreement.
63. The Investors must repay the loan and capitalised interest on the date on which FFA Finance is required to repay the loan under the Full Recourse Loan Agreement. The Investors must make each payment to FFA Finance in the same manner, on the same date, at the same time and in the same currency as that required of FFA Finance under the Full Recourse Loan Agreement.
64. The Investors must pay FFA Finance a loan establishment fee of an amount equivalent to 2.2% of the loan on the date of Investor Loan is executed.
65. FFA Finance will take action to recover any amounts remaining unpaid after the repayment date, but only after it tries to recover any moneys owed to it through enforcement of the Investor Mortgage (and in particular, by first exercising its rights in relation to the LofC).

### ***Additional financial agreements***

66. In addition to the above loan agreements the following documents will be entered into to provide security to B&W and FFA Finance in respect of amounts owed to them.

### ***Investor Mortgage***

67. Under this Agreement, each Investor, as beneficial owner, mortgages and assigns absolutely its Mortgaged Property in favour of FFA Finance by way of continuing security for the punctual payment and discharge of the Secured Money. The Mortgage is a first ranking security.

### ***FFA Finance Sub Charge and Mortgage***

68. Under this Agreement FFA Finance charges all the Mortgaged Property in favour of the B&W by way of continuing security for the punctual payment of the Secured Money and the punctual performance of the Secured Obligations (to the maximum extent permitted by law). The Mortgage is a first ranking charge.

69. FFA Finance assigns absolutely to B&W all of its right title and interest in and to each of the Mortgaged Agreements currently existing or as and when they are entered into, the Receivables and the Contractual Rights (to the maximum extent permitted by law).

***Fees payable***

70. There are a number of fees payable by Investors. The fees payable are summarised in the table below:

Fee	Amount (GST inclusive where GST is payable)	Agreement
Assignment Amount	0.55% of the CC	Deed of Assignment clause 2.1
Programme Establishment Fee	1.1% of the CC	Joint Venture Deed clause 6.5(a)(i)
Management Fee	1.65% of the CC	Joint Venture Deed clause 6.5(a)(ii)
Loan Establishment Fee*	2.2% Loan amount	Full Recourse Investor Loan Agreement clause 7
Production Services Fee	1.65% of the CC	Production Services clause 2.1
Executive Production Fee	3.85% of the CC	Production Budget
Ongoing Management Fee (annual payment)	0.275% of the CC	Joint Venture Deed clause 6.5(e)
Expenses of administration and business of the Joint Venture	Amount incurred	Joint Venture Deed 6.5(b)

<p>Where the Joint Venture is entitled to a share of Exploitation Revenues they will be required to pay the Manager:</p> <p>Once the Joint Venture has received an amount equal to 15% but less than 20% of the CC</p> <p style="text-align: center;">and</p> <p>When the amount received exceeds is equal to or greater than 20%</p>	<p style="text-align: center;">5% of all Exploitation Revenues until the Joint Venture has received an amount equal to 20% of the CC;</p> <p style="text-align: center;">10% of all subsequent Exploitation Revenues</p>	<p style="text-align: center;">Joint Venture Deed 6.5(c)</p>
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\*This fee is only payable by those Investors who borrow funds from FFA Finance to finance their FCC.

### ***Acquisition of the underlying rights***

71. In order to facilitate the financing and production of the Film Tama, the current owner of all rights in and to the Film and all underlying and ancillary rights relating to the Film, will enter an Assignment Deed whereby they will assign their rights in respect of the film to FFA Production Services for the consideration of £1. The assignment of these rights will be effective in perpetuity.

72. FFA Production Services in turn will assign 95% of the rights received from Tama to the Investors for the consideration of 0.55% (GST inclusive) of the CC, which is approximately \$41,968.

73. The Investors will grant a non exclusive licence to FFA Production, for nil consideration, the use of the underlying rights for the purpose of producing the Film.

### **Production of the Film**

#### ***Production Services Agreement***

74. The Investors will commission FFA Production to produce the Film for the cost specified in the Budget, in accordance with the Production Schedule and with all the terms and conditions of the Agreement. A fee of 1.65% (GST inclusive) of the Investor's CC is payable to FFA Production upon execution of the PSA.

75. FFA Production must do all things of every kind reasonably required to enable the Investors to complete and deliver the Film to FFA Distribution in accordance with the terms of the HDA.

76. FFA Production is also entitled to an executive production fee of 3.85% (GST inclusive) as part of the production budget.

77. Investors will hold a 95% interest and FFA Production a 5% interest (the Production Company Copyright) in the Copyright of and associated rights in the Film. The Investors own the Copyright pursuant to section 98(3) of the Copyright Act.

78. FFA Production acknowledges and agrees that, save for Production Company Copyright, all Copyright and other Intellectual Property rights in the Film and the Screenplay (including all underlying literary, dramatic, artistic or musical works that are incorporated into, synchronized with or otherwise form part of the Film or Screenplay) will be assigned to the Investors under the Assignment Deed between FFA Production Services and the Investors.

79. FFA Production shall establish the Production Account as soon as practicable after execution of the PSA, and shall pay the 'Fee' into the Production Account. The 'Fee' is defined in Schedule 2 of the PSA to be equivalent to 1.65% of the CC and an amount equal to the Film budget. Funds held in the Production Account can only be disbursed in accordance with the terms of the PSA.

80. Once the Film is delivered the balance, if any, of Item 2 of Schedule 6 of the 'Fee' shall be payable to FFA Production as a success fee in respect of delivery of the Film at or within budget.

81. FFA Production shall be responsible for any monies expended by it or on its behalf in connection with the production of the Film in excess of the Budget unless such Overage is approved in advance by the Investors in writing.

### **Producer's responsibilities**

82. In addition to the general production activities of the Film the producer specifically undertakes the following responsibilities:

- (a) advise DCITA that they are taking over the rights in relation to the Film and will be the producer of the film;
- (b) forward to the Tax Office a copy of the letter from DCITA confirming that they are the producers of the film and that the provisional certificate remains in force;
- (c) lodge the section 124ZADA declaration with the Tax Office by 31 July of the year in which capital monies are first expended on the production of the film;
- (d) lodge an application for a Final Certificate within 6 months of the film being completed; and
- (e) arrange for the final audit in respect of the film.

## **FFA Production Subsidiary Charge and Mortgage**

83. Under this Agreement, FFA Production charges all the Mortgaged Property in favour of the Investors by way of continuing security for the punctual payment of the Secured Money and the punctual performance of the Secured Obligations (to the maximum extent permitted by law). This Mortgage is a first ranking charge.

84. FFA Production assigns absolutely to the Investors all of its right title and interest in and to each of the Mortgaged Agreements currently existing or as and when they are entered into, the Receivables and the Contractual Rights (to the maximum extent permitted by law).

## **Completion guarantee**

85. No completion guarantee arrangement has, as yet, been entered into. However FFA intend that Investors will have the benefit of:

- (a) completion bonding in respect of the film, that underwrites its completion and delivery by the required dates, to budget, and in accordance with specification; and
- (b) standard entertainment insurance including errors and omissions insurance.

86. Such completion bonds and insurances are standard practice in the film industry and FFA Production will require the Commissioning Producer to obtain the above bonding and insurance arrangements to ensure completion and delivery of the Film or financial compensation for the Film not being completed. While the completion bonding arrangements have not been finalised, it is the expectation of FFA that these arrangements will be in industry standard form. The bond will provide an insurance guarantee given by a third party that a film will be delivered on time and on budget.

87. There are various risks associated with film production, including failure to deliver the film on time, on budget, in a state and of content such that it may be publicly screened, or indeed screened at all. Completion bonding will be required as part of the arrangements for production of the Film for an Investor under the Project, so as to provide for the risk that the Film will not be delivered on time and within budget. Errors and omissions insurance will also be required as part of the arrangements for production to cover other risks including copyright infringement and defamation by the finished film.

88. Investors will be at risk for the loss of their investment or part thereof as there will be circumstances in which the bonding is not available either due to bonder default or due to exclusions from the completion bonding arrangements.

89. Investors will not have the benefit of the MGA if there has been no delivery of the completed film and the completion bond does not provide coverage. The completion bond will not compensate the Investors for example, for their fees, costs, or interest outgoings expended. Accordingly, the Investors will be at risk for a loss of their investment part thereof in the event that the film is not completed, or completed in breach of the specification, timing or other delivery requirements imposed by the distributors.

## **Distribution of the Film**

### ***Head Distribution Agreement***

90. Under the HDA, the Investors licenses, solely, exclusively and irrevocably FFA Distribution the right to exploit the Film and to grant licenses to others to exploit the Film.

91. As full and complete consideration for all rights granted to it, FFA Distribution agrees to pay the Investors:

- (a) the MGA as set forth in Clause 11.2;
- (b) the Adjusted Gross Participation as set forth in Clause 11.3; and
- (c) the Gross Participation as set forth in Clause 11.4.

92. The completed film will be delivered to FFA Distribution as set forth in the Delivery Schedule (Schedule 5) at the Investors' sole cost and expense, on or before the Delivery Date (Schedule 6). An extension of up to 6 calendar months will be available for delays caused by events of 'force majeure'.

93. The obligations of the parties under the HDA are subject to the satisfaction of all of the following conditions precedent (clause 2):

- (i) Each party's receipt of copies of this Agreement, executed by the other party;
- (ii) The Investor's receipt of a perfected security interest in an irrevocable and validly issued LofC. The LofC shall in no case or circumstance provide for payment to the Investors where the Film has not been delivered to FFA Distribution as required under the HDA; and
- (iii) The Investors acknowledge and provide the right of FFA Distribution to enter into collection or licensing arrangements with other parties to fulfil all or any of the obligations of FFA Distribution to the Investors under Clause 11.

94. The Investors and FFA Distribution agree that they will exert all reasonable, good faith business efforts to cause the prompt and timely fulfilment of the Conditions Precedent

## **FFA Distribution Subsidiary Charge and Mortgage**

95. Under this Agreement FFA Distribution charges all the Mortgaged Property in favour of the Investors by way of continuing security for the punctual payment of the Secured Money and the punctual performance of the Secured Obligations. This Mortgage is a first ranking charge.

96. FFA Distribution assigns absolutely to the Investors all of its right, title and interest in and to each of the Mortgaged Agreements currently existing or as and when they are entered into, the Receivables and the Contractual Rights.

## **License Agreement**

97. FFA Distribution will enter into a Licence Agreement with a third party not related to the Future Films Australia group. Under the Licence Agreement FFA Distribution will grant to the Licensee an exclusive license for the Territory. The Territory is defined as the entire Universe.

98. The Term of Licence Agreement will be from the date of execution and expiring 25 years after first theatrical release in the Territory.

99. The Licensee shall use its best endeavours to sell the Film to potential distributors in the Territory and endeavour to maximise revenues from exploitation in accordance with its best commercial judgement.

100. In payment of the Distribution Rights granted under the Licence, the Licensee shall pay to FFA Distribution from Gross Receipts the amounts set forth in clause 3(a) of the Licence Agreement. These amounts will comprise:

- the MGA; and
- the Further Consideration.

101. The MGA and the Further Consideration are payable as specified in Exhibit A of the Licence Agreement. Payment shall be done in accordance with the payment instructions in Exhibit B to the Licence Agreement.

## **The Minimum Guarantee Amount**

102. Under the HDA Investors will be entitled to the MGA in consideration for the rights granted to FFA Distribution.

103. In turn, the Licensee, under the Licence Agreement, will secure the payment of the MGA by the provision of:

- an irrevocable LofC from a bank approved by FFA Distribution; or

- by an equivalent instrument or document in a form acceptable to FFA Distribution.

**Irrevocable Letter of Credit**

104. It is a condition subsequent of the arrangement that the Film will not be made unless a LofC is in place before the Outside Issuance Date. If the LofC is not in place before that date the funds held in Escrow in the Production Account will be returned to the Investors and B&W in accordance with the Payment Instructions Deed.

105. The bank who is to provide the LofC irrevocably and unconditionally undertakes to the Investors to pay such amounts:

- as falls due under the LofC;
- in Australian dollars;
- in immediately available funds; and
- to the accounts specified by the Investors in the Demand Notices,

and otherwise in accordance with the provisions of the LofC.

106. The bank providing the LofC is as yet unknown but it will not be B&W.

107. The bank and the Investors by its acceptance of the LofC agree that the LofC represents a separate transaction from the transaction contemplated by the HDA and that the LofC is not dependent on or subject to the terms of the HDA.

108. The LofC expires absolutely on the Expiry Date. The Investors will return this LofC to the bank on the Expiry Date provided that it has no claim outstanding under or in connection with the LofC.

**Income rights and payment*****Standard Collection Account Management Agreement***

109. FFA Production Services will enter into a Collection Account Management Agreement ('CAM Agreement') with an independent third party who is in the business of providing collection account management services. The CAM Agreement will be negotiated on an arms length basis, be based on standard film industry practice and will not differ materially in its terms and effect from the standard CAM Agreement provided as part of the ruling application.

110. The Parties to the Agreement, excluding the CAM, jointly appoint the CAM during the Term of the Agreement to:

- act as their sole and exclusive agent;
- open the Collection Account;
- calculate the entitlement(s);

- provide statements to the parties; and
- carry out the payment of entitlement(s) to each of the Beneficiaries in accordance with the terms and conditions of the Agreement.

111. The Licensee and any sublicensees will undertake to insert into any licence, sublicense or distribution agreements irrevocable instructions that Gross Receipts received from distribution of the Film will be deposited into the Collection Account.

112. The CAM will provide to the parties to the agreement a statement specifying the source of Gross Receipts, the amount of the Collection Account interest and the allocation of those the Collected Gross Receipts to the beneficiaries of the Collection Account.

113. The CAM shall pay out entitlements from the Collection Account to the beneficiaries within ten working days of the issue of the Statement.

### ***Head Distribution Agreement***

114. Under the HDA Investors are entitled to receive the amounts as specified in paragraph 91.

115. The MGA is payable on 31 July 2013.

116. FFA Distribution will give to Investors a statement showing details of sales and payments in respect of the distribution of the film and a revenue statement detailing the Adjusted Gross Proceeds and Gross Receipts. The statements will issue quarterly for the first 4 years, on 31 March, 30 June, 30 September and 31 December, commencing on the theatrical release of the film. Thereafter the statements will issue each 6 months for the next 6 years and then annually until the end of the term of the agreement.

117. Payments and statements due from FFA Distribution will be made within sixty (60) days of the relevant period.

### ***Disposal of Copyright***

118. There are two options under the arrangement for the change of ownership of the Copyright of and associated rights in the Film.

119. The HDA gives FFA Distribution the sole and exclusive right to buyout the Copyright and all other right, title and interest of the Investors in the Film ( 'Buyout Option'). Any time from 31 August 2013 and for a period of six (6) calendar months from that date FFA Distribution have the right to purchase the Copyright of and associated rights in the Film from the Investors for fair market value of the Copyright of and associated rights in the Film as determined by an independent third party. FFA Distribution shall exercise the option by providing the Investors a notice in writing ('Buyout Notice') of its intention to exercise the Buyout Option. Ownership of the Copyright of

and associated rights in the Film passes to FFA Distribution from the date of receipt by Investors of the Buyout Notice.

120. Under the Licence Agreement, FFA Distribution grants the Licensee the option to acquire the Copyright (including the Distribution Rights) in perpetuity by payment of the then fair market value of such Copyright ('Acquisition Price). The Licensee shall exercise this option by issuing a notice in writing to FFA Distribution from 31 August 2013 and within 6 calendar months from that date. Upon receipt of the Acquisition Price by FFA Distribution, the License Agreement is deemed terminated and Licensee shall be the owner of the Copyright.

### ***Payment Directions Deed***

121. The Payment Directions Deed specifies where the payments due under the MGA are to be paid:

- (a) FFA Distribution directs the Licensee to pay the amount payable under clause 3(a) of the Licence Agreement directly to the Investors.
- (b) Those Investors who have borrowed from FFA Finance to fund their FCC direct the Licensee to pay the amount payable directly to FFA Finance to be applied in repayment of its their loan.  
  
Those Investors who have not borrowed from FFA Finance direct the Licensee to pay the amount directly to an account nominated by the Manager in writing to the Licensee.
- (c) FFA Finance directs the Licensee to pay the amount payable to it, under paragraph (b) directly to B&W to be applied in repayment of its loan under the Full Recourse Loan Agreement.
- (d) The Licensee agrees to comply with such payment directions within one Business Day of becoming liable to make any payment under (a).

### ***Finance***

122. This Ruling will not apply if a different finance arrangement is entered into with FFA Finance.

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

- there are split loan features of a type referred to in Taxation Ruling TR 98/22;

- there are indemnity arrangements or other collateral agreements in relation to the loan designed to limit the borrower's risk;
- the funding arrangements transform the Project into a 'scheme' to which Part IVA may apply;
- the loan or rate of interest is non-arm's length;
- repayments of the principal and payments of interest are linked to the 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 mechanism, 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
- entities associated with the Project, other than FFA Finance are involved or become involved, in the provision of finance to Investors for the Project.

## Ruling

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### Division 10BA

124. A deduction is available to an Investor in the Film under Division 10BA for 92% of the amount contributed toward the production costs of the Film.

125. A deduction is not available until:

- the production budget of \$7,298,850 has been achieved;
- each Investor's Investor Deed has been executed; and
- the Joint Venture Deed has been executed.

**Note:** The issue of an unconditional and irrevocable LofC by the Outside Issuance Date is a condition subsequent of the arrangement. If the LofC is not in place by the Outside Issuance Date then the Division 10BA deductions will cease to be allowable.

126. Upon completion of the Film, after the audit has been carried out by an independent auditor, Division 10BA deductions will be withdrawn from Investors to the extent that their investment moneys were spent on non-deductible expenses, in excess of those stated above (section 124ZAG).

**Section 8-1 of the ITAA 1997*****Management Fee, Ongoing Management Fee and Interest***

127. Subject to section 124ZAO (see paragraphs 132 to 133), the management fee, ongoing management fee and interest are deductible in terms of section 8-1 of the ITAA 1997.

***Programme establishment fee***

128. The programme establishment fee is an expense of a capital nature and is therefore not deductible in terms of section 8-1 of the ITAA 1997.

**Section 25-25 of the ITAA 1997**

129. The Loan Establishment fee payable to FFA Finance is a borrowing expense and is deductible under section 25-25 of the ITAA 1997 subject to section 124ZAO (see paragraphs 132 to 133). The deductibility or otherwise of borrowing costs arising from loan agreements entered into with financiers other than FFA Finance is outside the scope of this Ruling.

**Partnership and section 26AG**

130. For the year ending 30 June 2006 and subsequent years of income, Investors, who initially acquire 95% of the Copyright of and associated rights in the Film, 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). The partners will receive income jointly from the commercial exploitation of their Copyright interest in the Film.

131. All amounts received by the Partnership, in respect of the Film are assessable income of the Partnership under section 26AG in the income year in which they are received. This includes amounts received on the disposal of a Copyright interest. 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.

## **Section 124ZAO**

132. With the exception of deductions under section 124ZAFB, section 124ZAO will operate to limit the amount of any deduction otherwise allowable in relation to the Film and in gaining or producing assessable income to which section 26AG relates. The deduction allowable in a year of income will be limited to the amount of film income which is derived from the Film (subsection 124ZAO(2)). Any excess deductions may be carried forward indefinitely and offset against future income from the Film (subsection 124ZAO(3)).

133. Section 124ZAO will apply in relation to deductions in respect of the management fee, the ongoing management fee, loan establishment fees and interest.

## **Division 35 of the ITAA 1997**

134. Division 35 of the ITAA 1997 will not apply on the basis that any losses which may arise are attributable to a passive investment which does not constitute a business activity.

## **Section 79D**

135. Section 79D does not apply to deny or defer the deductions otherwise allowable.

## **Section 82KL**

136. Section 82KL will not be applied to deny deductions otherwise allowable.

## **Part IVA**

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

## **Assumptions**

138. 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 124ZAFB(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 by the Division 10BA Investor, being 30 June 2006. 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 124ZAD(1) by a person accepted by the Commissioner under subsection 124ZAD(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 a final certificate 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 2008;
- (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 expend the Underage in a manner that will preserve the status of the Film as a 'qualifying Australian Film'; and
- (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.

## Explanation

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### Corporations Act 2001

139. For this Ruling to apply, an offer for an interest in the Project must have been made to, and accepted by an Investor, who qualifies as a wholesale client as defined in section 761G of the *Corporations Act 2001*. Offers to wholesale clients do not require a prospectus or product disclosure statement.

140. An investor in the Project may be a person who is a wholesale client within the definition in section 761G. A person will be a wholesale client where the persons satisfies one of the following tests:

- the 'product value test' (paragraph 761G(7)(a));
- the 'individual wealth test' (paragraph 761G(7)(c); and
- the 'professional investor test' (paragraph 761G(7)(d)).

141. A participant in a managed investment scheme, referred to below as 'the person' or 'the person to whom the offer is made', will satisfy the 'product value test' where:

- the minimum amount payable for the interests in the project on acceptance of the offer by the person to whom the offer is made is at least \$500,000; or
- the amount payable for the interests in the project on acceptance by the person to whom the offer is made and the amounts previously paid by the person for interests in the project of the same class that are held by the person add up to at least \$500,000.

142. A participant in a managed investment scheme, referred to below as 'the person' or 'the person to whom the offer is made', will satisfy the 'individual wealth test' where, it appears from a certificate given by a qualified accountant no more than 6 months before the offer is made, that the person to whom the offer is made:

- has net assets of at least \$2.5 million; or
- has a gross income for each of the last 2 financial years of at least \$250,000 a year.

143. A participant in a managed investment scheme, referred to below as 'the person' or 'the person to whom the offer is made', will satisfy the 'professional investor test' where:

- the person is a financial services licensee; or
- the person controls at least \$10 million for the purposes of investment in securities.

## **Division 10BA**

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

144. 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.

145. 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).

146. The Tax Office view is that the 'directly expended' requirement is not met at the point in time when the Investors make payments to the Production Company in respect of the Budget for the Film. Rather, the extent of the application of the money by the Production Company 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.

147. 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 parties have agreed that any Underage will be retained by the Production Company as a success fee in a manner that will preserve the status of the Film as a 'qualifying Australian film'.

148. The Investors will pay the CC to the Production Company which will use 92% of total funds for application towards the production costs. In doing this, the Production Company is to ensure that this proportion of funds contributed by investors is only expended on items within the Film's production Budget.

149. 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) is considered inadequate in this regard.

150. 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***

151. 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).

152. 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 (for example, 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.

153. 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.

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

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

155. 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.

156. 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 fund would normally be required.

157. 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 2006, 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.

#### **Condition subsequent**

158. The issue of unconditional and irrevocable LofC by the Outside Issuance Date is a condition subsequent of the arrangement. If the LofC is not in place by the Outside Issuance Date then the Division 10BA deductions will cease to be allowable. The Outside Issuance date is nine months and one day after the date of the execution of the PSA. Where a tax return has been lodged claiming the deduction and the LofC is not in place by the Outside Issuance Date the return will need to be amended to remove the deduction.

#### **Relevant 24 month period**

159. The relevant 24 month period referred to in subsection 124ZAF(2) commences from the 30 June 2006, being the end of the financial year in which capital moneys were first expended by way of contribution to the cost of producing the film. This period does not change, notwithstanding the fact that the LofC may not be in place until some time after 30 June 2006.

#### **Partnership and assessable income**

160. The Investors in the Film 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). All amounts received by a Partnership of Investors in a Film, including amounts received on disposal of the Copyright of and associated rights in the Film, will be assessable income of the Investors under section 26AG in the income year in which they are received. 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.

**Section 8-1 of the ITAA 1997*****Management fee & ongoing management fee***

161. Subject to section 124ZAO (see paragraphs 168 to 169), the management fee and ongoing management fee are deductible in terms of section 8-1 of the ITAA 1997.

***Programme establishment fee***

162. The programme establishment fee is an expense of a capital nature and is therefore not deductible in terms of section 8-1 of the ITAA 1997.

***Interest******(i) Investors who use FFA Finance as finance provider***

163. Some Investors will elect to use finance their FCC through a loan facility from FFA Finance. Subject to section 124ZAO (see paragraphs 168 to 169) a deduction will be allowable under section 8-1 of the ITAA 1997 for interest incurred under the FFA Finance facility.

***(ii) Investors who DO NOT use FFA Finance as finance provider***

164. Investors who finance their investment through a loan facility with a bank or financier other than FFA Finance is outside the scope of this ruling. Product Rulings only deal with arrangements where all details and documentation have been provided to, and examined by the Tax Office.

**Section 25-25 of ITAA 1997**

165. The Loan Establishment fee payable to FFA Finance is a borrowing expense and is deductible under section 25-25 of the ITAA 1997 subject to section 124ZAO (see paragraphs 168 to 169).

166. The Loan Establishment fee is incurred for borrowing moneys that are used or are to be used during that income year solely for income producing purposes. The deduction is spread over the period of the loan or 5 years, whichever is the shorter. However, where the total amount of a borrowing expense is \$100 or less, the full amount of the borrowing expense may be deducted in the year in which it is incurred and/or paid.

167. The deductibility or otherwise of borrowing costs arising from loan agreements entered into with financiers other than FFA Finance is outside the scope of this Ruling.

## **Section 124ZAO**

168. With the exception of deductions under section 124ZAFA, section 124ZAO will operate to limit the amount of any deduction otherwise allowable in relation to the Film and in gaining or producing assessable income to which section 26AG relates. The deduction allowable in a year of income will be limited to the amount of film income which is derived from the Film (subsection 124ZAO(2)). Any excess deductions may be carried forward indefinitely and offset against future income from the Film (subsection 124ZAO(3)).

169. Section 124ZAO may apply in relation to deductions in respect of the management fee, ongoing management fees, loan establishment fees and interest.

## **Division 35 of the ITAA 1997**

170. Subsection 35-5(2) of the ITAA 1997 specifically provides that Division 35 of the ITAA1997, which regulates the deduction of losses from non-commercial business activities, is not intended to apply to 'activities that do not constitute carrying on a business, for example, the receipt of income from passive investment'.

171. The transactions covered by the Project amount to an acquisition of passive investments and the deriving of income from those investments. Hence, Division 35 of the ITAA 1997 does not apply to the Project.

## **Section 79D**

172. Section 79D does not apply where there are no 'foreign income deductions' (as defined in subsection 160AFD(9)).

173. The transactions covered by the Project do not give rise to 'foreign income deductions' because the deductions under Division 10BA do not relate to any 'assessable foreign income' (as defined in subsection 160AFD(9)). The income derived by the Investors under the draft HDA, and any other Distribution Agreements entered into by the Production Company, will have an Australian source and will not be 'assessable foreign income'.

174. The Investors have no beneficial interest in the Gross Receipts received from the Licensee or sub licensees. The Investors have no entitlement to any withholding tax credits deducted from amounts paid under the draft HDA or the Licence Agreement entered into by FFA Production.

## **Section 82KL – recouped expenditure**

175. Section 82KL has no application to Division 10BA arrangements and is therefore not relevant to any deductions properly allowable to the Investors under Division 10BA.

**Part IVA**

176. 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.

177. 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 Copyright 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**

178. 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.

179. 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* under which the Commissioner can remit, in appropriate circumstances, the whole or part of the charge.

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**Commissioner of Taxation**

7 December 2005

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