

# "You've Got A Friend" Official International Co-productions

**Therese Catanzariti and Caroline Verge join forces to show that in the world of film it is better to have friends than to go "Hans" Solo.**

International co-productions are made pursuant to international agreements on the basis that the film industries of two countries will benefit from closer mutual co-operation in the production of films.

## INTERNATIONAL AGREEMENTS

There are currently treaties with Canada<sup>1</sup>, UK,<sup>2</sup> Ireland,<sup>3</sup> Israel,<sup>4</sup> Italy,<sup>5</sup> and Germany,<sup>8</sup> a memorandum of understanding with New Zealand,<sup>6</sup> and an administrative arrangement with France.<sup>7</sup>

## CO-PRODUCTION GUIDELINES

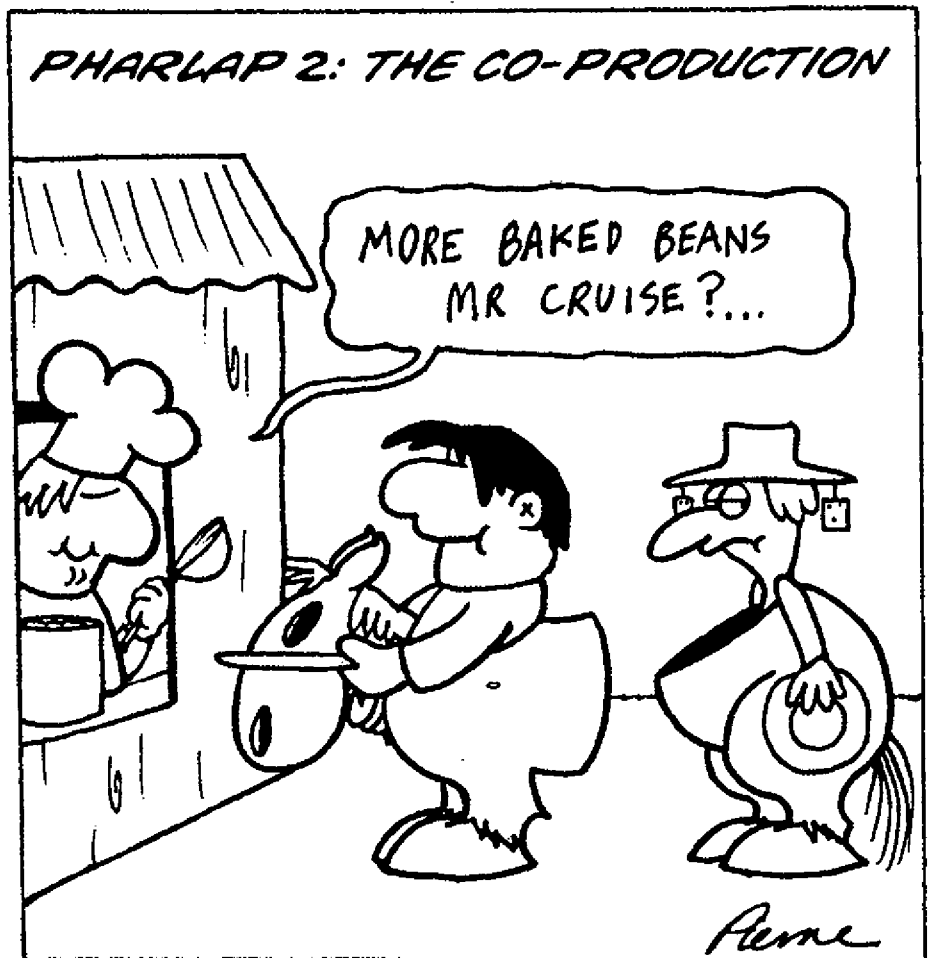
The international agreements provide that each country's competent authority may formulate guidelines which are framed to achieve the general aims and objects of the international agreement, and each competent authority may apply its policies and guidelines in deciding whether to grant or refuse an application.

Australia's competent authority is the Australian Film Commission ("AFC"). The AFC has formulated its own guidelines, which are available at <http://www.afc.gov.au/services/funding/guides-co-prod/icpg1.html>.

## NATURE OF A CO-PRODUCTION

There must be a co-producer from each country who together contribute 100% of the cost<sup>9</sup> of the co-production, and all individuals participating in the making of a co-production must be nationals or residents of Australia. In exceptional circumstances where script or financing dictates, limited numbers of performers from other countries may be engaged subject to the approval of the competent authorities of both countries.<sup>10</sup>

Whether a person is a "national" or "resident" is defined in the relevant treaty or MOU.<sup>11</sup> Resident is usually defined in the treaties as "permanent resident". However, recent amendments to the



Migration Act 1958 removed the definition of "permanent resident". As such, the AFC interprets "permanent resident" to mean a person whose passport has been stamped that they are entitled to stay and work in Australia indefinitely. Note that because of obligations devolving from European Union law, any country in the European Union must treat the nationals or residents of another country in the European Union as if they were a national or resident of their country. For example, for the purposes of the Australian-Irish co-production treaty, a German national will count as an Irish national.

In general terms, the treaties and MOUs (other than the NZ MOU) require that the performing, technical and craft contribution of each co-producer to a co-production film is in reasonable proportion to each co-producer's financial

contribution.<sup>12</sup> Every treaty and MOU states that it is an over-riding aim of the agreement that there be an overall balance between the financial, creative, cast and technical contribution of each country. This is monitored by the competent authority in each country.

The competent authorities in each country have formulated their own guidelines to assess what "reasonable proportion" means. For the Australian co-producer, the AFC Guidelines state that the Australian co-producer's relative share of financing should be within 5% of the relative percentage of key participants who are Australian citizens or permanent residents,<sup>13</sup> the percentage of the budget spent on Australian elements of the co-production<sup>14</sup> and the relative percentage of other cast and crew<sup>15</sup>.

A co-producer's share of financing can be equity investment by the co-producer itself, financing by way of a co-producer contributing distribution advances or licence fees, financing by way of loan, or financing by way of a co-producer contributing equity investors such as Division 10BA investors.<sup>16</sup>

The relative percentage of key participants from each co-producer's country is determined by a points system.<sup>17</sup> There are a total of 12 points for live action drama and animation, and 10 points for documentaries. For example, for live action drama, the points are allocated to the writer, director, director of photography, composer, editor, production designer and each of the four major cast roles.<sup>18</sup> Additional points can be approved on a project by project basis, for example choreographers in the case of musicals.

The Australian elements of the co-production may include cast, crew, facilities and materials, per diems of all Australians and their cost of travel and accommodation, whether incurred in Australia or not. The Australian producer can also include a percentage of contingencies, the cost of insurance, the completion guarantee and legal costs.<sup>19</sup>

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### **APPLYING FOR CO-PRODUCTION STATUS**

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The application must include the following documents:<sup>20</sup>

#### **Application Form**

The Australian co-producer will need to complete an application form, which is available on line at <http://www.afc.gov.au/resources/online/download.html#official>

#### **The Chain of Title for the Script**

Only projects initiated, developed or scripted by nationals or residents of the co-production countries may qualify as official co-productions.<sup>21</sup> This not only includes the script of the co-production, but also any underlying work such as an original novel or stage play, original treatment or bibles. The only exception is that underlying material may be sourced from a third country if it is in the public domain in the co-producing countries. This means that a film based on a Shakespeare play may qualify as a co-production, but a film based on a Toni Morrison novel will not.

#### **Two Copies of the Script**

The applicant should be aware that the AFC will read the script. In part, this is to confirm that the nominated four lead

cast are in fact the four lead cast on a line count. If the co-producers consider that some different test should be used to identify the leads (for example number of shooting days), this must be stated in the application.

#### **One paragraph synopsis**

A one paragraph synopsis should be provided.

#### **Presentation credits**

In part, this is to confirm that the film is in fact a co-production between two bona fide co-producers rather than one producer engaging the other producer to provide production services or second unit work, or a producer from a third country, such as the United States, engaging the two producers to provide production services or second unit work. If the co-producers are bona fide co-producers they will both receive credit as co-producers, and no third party will receive credit as a producer.

#### **Budget**

The budget should show Australian elements and costs stated separately or highlighted. Note that the full budget and the Australian breakout budget must be in the same currency, although this need not be Australian dollars.

#### **Producer's Undertaking**

This includes a personal undertaking from the Australian co-producer that it will give the AFC a final cast and crew list, ensure that there is a separate credit that the film is an official co-production, and obtain the AFC's written approval before changing any of the details on which the co-production status was approved. These details include the principal cast and crew, overall balance of nationalities of cast and crew, budget payments, locations and financial and distribution arrangements.

#### **Signed Co-Production Agreement**

The co-production agreement needs to include certain provisions that are listed in the relevant co-production treaty. For example a co-production agreement relating to an Australian - Canadian co-production must include provisions that a co-producer cannot assign or dispose of benefits except to a person who is a national or resident of the co-producer's country,<sup>22</sup> provide for sharing of copyright<sup>23</sup> and what happens in the event the co-production is not approved as an official co-production.<sup>24</sup> In contrast, the New Zealand and French MOUs have no requirements for co-production agreements.

Note that the Australian Film Finance Corporation ("FFC") requires co-production agreements to be unsigned when a project goes to the FFC board; therefore, the AFC will accept a deal memo (containing the provisions required by the treaties) or a settled draft in the first instance.

#### **Financing Agreements**

It is possible to submit an incomplete application to the AFC so that the AFC can start reviewing the application. However, all information needs to be provided well before the AFC Co-Production Committee considers the application.

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### **PROCESS**

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#### **Who Receives the Application?**

The co-production application must be submitted to the AFC.

The Legal Manager assesses the application for compliance with the guidelines and relevant treaty/MOU, and may ask the Australian co-producer for further information. An industry advisory panel is notified of the application. The application will then be submitted to the AFC Co-Production Committee.

#### **Australian Film Commission Co-Production Committee**

The AFC Co-Production Committee consists of a:

- CEO;
- Legal Manager;
- Director of Film Development and Marketing; and
- Director of Policy, Research and Information.

The AFC Co-Production Committee will consider the Legal Manager's comments on the application, and the comments of the industry advisory panel (if any) and will then decide whether to recommend to the AFC Commission that the application should be granted or refused. It may request further information from the Australian co-producer before making its recommendation.

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### **INDUSTRY PANEL**

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The industry advisory panel has a strategic role in relation to co-productions. The panel does not meet to consider each application and does not make recommendations to the AFC

Commission about whether the application should be granted or refused. However, members of the panel may make comments about a particular application to the AFC Co-Production Committee.

The AFC will notify the industry advisory panel about each co-production application and will send them a copy of the application and its recommendation to the AFC Commission.

The industry panel consists of representatives from:

- AGSC (Australian Guild of Screen Composers);
- ASDA (Australian Screen Directors Association);
- AWG (Australian Writers Guild);
- MEAA (Media Entertainment and Arts Alliance - the umbrella union covering cast and crew); and
- SPAA (Screen Producers Association of Australia).

Members of the industry advisory panel have been known to comment on an application if there is a wide discrepancy between fees paid to the Australian key cast and crew and those to the foreign key cast and crew, and if the co-production is perceived by the panel to be using the official co-production program to dress up as a co-production what would otherwise be an "offshore production" such as a Hollywood film entirely shot in Australia, second unit work, or a production services arrangement.

In part, this is because:

- if it is an offshore production rather than an official co-production, then a different industrial agreement may apply and the rates payable to the panel's members may be higher.<sup>25</sup>
- if it is an offshore production, then the Department of Immigration will only issue a visa sub-class 420 visa if a certificate is given by the Minister for the Arts and the Centenary of Federation. The Minister will only give a certificate in relation to non-government subsidised productions if reasonable opportunities have been provided to Australians to participate in all levels of production including consultation with MEAA.<sup>26</sup>

However, if it is an official co-production then the Department of Immigration will only consult with MEAA to confirm that it is an official co-production before issuing visas to cast and crew who are nationals or residents of the other co-producer's country. Furthermore, there is no limit on the number of actors from the other co-producer's country that may be imported to appear in an official co-production film; and

- an official co-production counts as Australian content,<sup>27</sup> and members of the panel are concerned that broadcasters will license the co-production instead of other wholly Australian television programs. In part, this is because members of the panel fear that a co-production may be fully financed without recourse to an Australian presale, then licensed to an Australian television broadcaster for a lower licence fee than a wholly Australian television program. Another reason is that a co-production film may have no (apparent) Australian on-screen elements.

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### COMMISSION DECISION

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The application and the AFC Co-Production Committee's recommendation are then submitted to the AFC Commission meeting.

The deadline for finalising a recommendation on a co-production is two weeks before the Commission meeting.

The AFC Commission will accept or reject the recommendation. The AFC decision is not official until the Commission minutes have been approved by the AFC Chairman. Approval is provisional until the AFC is notified that its counterpart competent authority has approved the film as an official co-production.

In all cases, Commission approval lapses if principal photography has not commenced within two years.

The AFC Commission is made up of a number of representatives from the Australian film and television industry as well as independent members of the public. The AFC Commission meetings are usually held every six weeks.<sup>28</sup>

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### ADVANTAGES OF OFFICIAL CO-PRODUCTIONS

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The international agreements provide that a co-production will be entitled to enjoy all of the benefits that national films enjoy.

#### Local Content

The co-production may count as local content for the purposes of the Australian free-to-air content quota, the Australian Content Standard.<sup>29</sup> In particular, Part 11, section 18 of the *Australian Content Standard* provides that a licensee's obligations are reduced to the extent to which the licensee broadcasts Australian official co-productions provided that it satisfies the same requirements that an Australian program must satisfy other than the requirement to be Australian. The licensee's obligations would include its obligations under section 10 to transmit first release Australian drama programs. As such, an official co-production which is a first release drama program would qualify notwithstanding that it is not *wholly* produced under the creative control of Australians.

The co-production may also count as local content for the purposes of pay television.<sup>30</sup>

#### Tax Incentives

The co-production may qualify for tax incentives as if it were a local film.

For example, a UK-Australian co-production feature film may qualify as a British film notwithstanding that it does not fall within the definition of "*British Film*" because the maker of the film is not British and less than 70% of the production cost is spent on film production activity in the United Kingdom<sup>31</sup>. As such the co-producers may be able to use the British sale and leaseback tax incentives to facilitate financing the film by assigning or licensing the film to British taxpayer/s who are entitled to write off the cost of the film against their taxes, in circumstances where the taxpayers get their money back by licensing the film back to the co-producers over 15 years.<sup>32</sup>

In addition, a UK-Australian co-production feature film may qualify as a "qualifying Australian film" for the purposes of Division 10BA of the *Income Tax Assessment Act 1936*, notwithstanding that it may not have significant Australian content.<sup>33</sup> As such, the Co-producers may also use the Division 10BA tax incentives to facilitate financing the film.<sup>34</sup>

## Government Assistance

A co-production feature film telemovie, mini-series or documentary which has been certified by the Department of Communications Information Technology and the Arts as a "qualifying Australian film" may also qualify for FFC funding.<sup>35</sup>

## FLIC Funding

A co-production feature film telemovie, mini-series or documentary which has been certified by the Department of Communications Information Technology and the Arts as a "qualifying Australian film" may also qualify for FLIC funding.<sup>36</sup>

## TRIPARTITE CO-PRODUCTIONS

Tripartite co-productions are contemplated by many of the treaties or MOUs, for example, providing that films can be made and processed in the third co-producer's country if there is a third country co-producer.<sup>37</sup>

However, there are currently no provisions in the treaties or memorandums of understanding which directly facilitate co-productions other than on a de-facto basis in respect of the European co-production arrangements. The draft German treaty however does provide that whereas the minimum contribution from each country must usually be 30%, where there is a third country co-producer involved, the minimum contribution from each country is only 20%.<sup>38</sup>

1 Films Co-Production Agreement between the Government of Australia and Canada dated 23 July 1990 available at [http://www.afc.gov.au/services/getting/copro/trty\\_cndn.pdf](http://www.afc.gov.au/services/getting/copro/trty_cndn.pdf) or <http://www.austlii.edu.au/au/other/dfat/treaties/1990/37.html>

2 Films Co-Production Agreement between the Government of Australia and the Government of the United Kingdom of Great Britain and Northern Ireland dated 12 June 1990 available at [http://www.afc.gov.au/services/getting/copro/trty\\_uk.pdf](http://www.afc.gov.au/services/getting/copro/trty_uk.pdf) or <http://www.austlii.edu.au/au/other/dfat/treaties/19910028.html>

3 Films Co-Production Agreement between the Government of Australia and the Government of Ireland dated 4 February 1998 available at [http://www.afc.gov.au/services/getting/copro/trty\\_ireland.pdf](http://www.afc.gov.au/services/getting/copro/trty_ireland.pdf) or <http://www.austlii.edu.au/au/other/dfat/treaties/19980022.html>

4 Films Co-Production Agreement between the Government of Australia and the Government of the State of Israel dated 25 June 1997 available at <http://www.austlii.edu.au/au/other/dfat/treaties/19980007.html>

5 Films Co-Production Agreement between the Government of Australia and the Government of Italy dated 28 June 1993 available at [http://www.afc.gov.au/services/getting/copro/trty\\_italy.pdf](http://www.afc.gov.au/services/getting/copro/trty_italy.pdf) or <http://www.austlii.edu.au/au/other/dfat/treaties/19930022.html>

[dfat/treaties/19960022.html](http://www.austlii.edu.au/au/other/dfat/treaties/19960022.html)

6 Memorandum of Understanding between the Australian Film Commission and the New Zealand Film Commission dated 23 December 1994 available at [http://www.afc.gov.au/services/getting/copro/mou\\_nz.pdf](http://www.afc.gov.au/services/getting/copro/mou_nz.pdf)

7 Administrative Arrangement Governing Franco-Australian Film Relations between the Australian Film Commission and the Centre National de la Cinematographie dated 15 May 1986

8 The agreed text of the draft treaty is available at [http://www.afc.gov.au/services/getting/copro/trty\\_germany.pdf](http://www.afc.gov.au/services/getting/copro/trty_germany.pdf)

9 Article 3.2(a) of AFC Guidelines

10 Article 3.2(b) of AFC Guidelines. Note that a further requirement of the Australian Canadian treaty is that the co-producer must demonstrate that any third country performer must substantiate that the performer is internationally recognised. The AFC is developing guidelines as to how a co-producer demonstrates that a third country performer is "internationally recognised", largely based on the US visa requirements for performers

11 Article 3.2 of AFC Production Guidelines

12 Annex 7 Australian-Canadian Treaty; Annex 4 Australian-Irish Treaty; Article 4 Australian-French MOU; Article 4 Australian-German Treaty; Annex 4 Australian-Israeli Treaty; Annex 7 Australian-Italian Treaty.

13 Article 4(b) AFC Guidelines - the Australian co-producer's financial contribution must not exceed the percentage of Australian key participants by more than 5%

14 Article 3.4(b) AFC Guidelines

15 Article 3.4(a)(ii) AFC Guidelines

16 Article 2.1 of the previous AFC co-production guidelines provided that the Australian co-producer could obtain its contribution from any bona fide source *except* from the other co-producer's country. However, the current AFC Guidelines do not limit the co-producers' source of funding.

17 Article 4 of AFC Guidelines

18 Article 4.1(a) AFC Guidelines

19 Article 3.4(a)(iii) AFC Guidelines

20 Article 5 AFC Guidelines

21 Article 3.1 AFC Guidelines

22 Annex 2 to the Australian Canadian treaty

23 Annex 11(e) Australian Canadian treaty

24 Annex 11(b) to the Australian Canadian treaty

25 For example, in relation to performers, an official co-production or bona-fide unofficial co-production is subject to the Australian Television Repeats and Residuals Agreement 2000 whereas an offshore production is subject to the Offshore Television Repeats and Residuals Agreement 2000

26 Migration Regulations 1994 Schedule 2 Subclass 420.222(3); *Guidelines for Foreign Actors seeking employment in Australia* 17 August 2000 available at <http://www.dcita.gov.au/cgi-bin/trap.pl?path=3489>

27 see later - Part 7 Advantages

28 There is no meeting in January

29 The Australian Content Standard is available on line at [http://www.aba.gov.au/what/program/oztv\\_standard99.htm](http://www.aba.gov.au/what/program/oztv_standard99.htm)

30 section 102 of Broadcasting Services Act 1992 (Cwth) and in particular as amended December 1999

31 Schedule 1 of Films Act 1985

32 "Round Table - International Coproductions"

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33 "qualifying Australian film" "Australian film" in section 124ZAA of the Income Tax Assessment Act 1936 (Cwth)

34 For further details on Division 10BA of the Income Tax Assessment Act 1936 see the ATO booklet available on line at [http://202.59.33.56/content/individuals/downloads/TPRP\\_Australian\\_Film\\_Industry\\_Incentives.pdf](http://202.59.33.56/content/individuals/downloads/TPRP_Australian_Film_Industry_Incentives.pdf)

and the Department of Communications Film Tax Incentives Fact Sheet available on line at <http://www.dcita.gov.au>

35 Section 2.1 and section 8 of Australian Film Finance Corporation Investment Guidelines 2000/2001 available at <http://www.ffc.gov.au/invest.htm> Note that the FFC currently reserves only 10% of its investment budget for official co-productions, and requires at least an Australian writer or director and one lead cast member.

36 section 24 and section 6 "provisionally certified film" Film Licensed Investment Company Act 1998 (Cwth)

37 Annex 5 Australian-Canadian Treaty

38 Article 5 draft Australian-German Treaty

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