



ASIC

Australian Securities & Investments Commission

REGULATORY GUIDE 19

Film investment schemes

Chapter 7 — Securities (Part 7.12)

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From 5 July 2007, this document may be referred to as Regulatory Guide 19 (RG 19) or Policy Statement 19 (PS 19). Paragraphs in this document may be referred to by their regulatory guide number (e.g. RG 19.1) or their policy statement number (e.g. PS 19.1).

Editor's note: See RG 136.30–RG 136.66 for information about how this guide applies to managed investment schemes.

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Purpose

RG 19.1 In this guide the ASC sets out its policy on the exercise of its powers in relation to the fundraising provisions of the Corporations Law (Law) where these apply to film investment schemes. The statement indicates the extent to which the ASC will be prepared to exercise its discretionary power under s1084 of the Law to exempt promoters of such film investment schemes from compliance with Div 2, 3, 5 and 6 of Pt 7.12 of the Law. The statement also refers briefly to the licensing policy of the ASC in relation to the promoters and marketers of film investment schemes. This statement should be read in conjunction with the relevant Class Order executed by the ASC ([CO 92/260]).

Background

RG 19.2 It is the view of the ASC that the interest which an investor acquires under a film scheme in return for making the investment in the development or production of the film is a “participation interest” and, therefore, a “prescribed interest” as defined in s9 of the Law. The interest acquired is usually an interest in the copyright in the finished film and the right to participate in the proceeds from the marketing of the finished film by way of recoupment of investment and participation in profits.

RG 19.3 Unless the issue or offer of, or invitation to subscribe for or buy the prescribed interest is an excluded issue, offer or invitation, it will be subject to the provisions of the Law. Accordingly, a promoter of a scheme under which regulated issues, offers or invitations will be made must comply with the provisions of Pt 7.12 and, if applicable, the licensing provisions of Pt 7.3 of the Law. In particular, the promoter must:

- (a) be a public corporation;
- (b) enter into an approved deed;
- (c) appoint an approved trustee or representative;
- (d) lodge a prospectus and have it registered by the ASC; and
- (e) if necessary, hold a restricted dealer’s licence.

RG 19.4 In some instances the interest in a film scheme will not be a prescribed interest because it is an interest, or included in a class of interests, declared by the Regulations to be an exempt interest for the purposes of Ch 7 of the Law. The issue or offer of, or invitation to

subscribe for or buy such an interest will not be subject to the provisions of the Law.

RG 19.5 In other instances, an issue or offer of, or invitation to subscribe for or buy a prescribed interest in a film scheme will not be regulated because it is an excluded issue, offer or invitation under s66 of the Law or is declared to be an excluded issue, offer or invitation under the Regulations. Some relevant situations where this would be the case include those where:

- (a) at least \$500,000 is, or is to be, subscribed by each person to whom the issue, offer or invitation is made;
- (b) the offer or invitation is made or issued to an executive officer of the relevant corporation or of a related body corporate;
- (c) the securities are issued or allotted to an executive officer of the corporation by which the securities are issued or allotted; or
- (d) the issue, offer or invitation is made to a person who, for the purposes of investment in securities, controls an amount of not less than \$10,000,000.

In these situations, only the provisions of Pt 7.11 will be applicable.

RG 19.6 Where an offer of, invitation to subscribe for or buy an interest in a film investment scheme is made to an offeree outside Australia, the offer is not regulated by the Law. The offer or invitation is “made” in the country in which it is received. Thus, if an offer or invitation is communicated by a promoter from within Australia and received by a person, corporation or other body in another country, for example, the United States of America, the offer, or invitation is “made” in the United States of America and is not regulated by Ch 7. Promoters should be aware however that the issue of interests in a scheme to persons outside Australia (as opposed to the “offer” of or invitation to subscribe for or buy), if made in or from Australia, would probably attract the operation of the Law, in particular Ch 7.

The nature of film investment

RG 19.7 The Australian film industry is characterised by ongoing participation by film distributors and broadcasters. Investment by these bodies is often sought by producers so as to enable them to secure an assured outlet or market for completed films. Distributors and broadcasters on the other hand often seek to invest in film production for the purpose of securing suitable Australian product for distribution or broadcast. In addition, distributors and

broadcasters can also be motivated by the opportunity to exercise some artistic and financial control over the individual product where they have made a commitment to purchase that product or provide distribution or broadcasting services.

RG 19.8 Such control would be exercised by a distributor or broadcaster for the purpose of ensuring that the final product is a marketable one for its particular purpose and could be exercised, for example, by the investor requiring that certain criteria be met in relation to cast, direction, storyline and so on before agreeing to distribute or broadcast the film. Under normal circumstances, the meeting of such requirements would be a pre-condition to any agreement to distribute or broadcast and to any investment. In some instances, participation by the broadcaster or distributor in profits from the film beyond those made under the distribution or broadcast agreement within Australia may be incidental to the main purpose of the investment, ie the supply of product to enable a distributor or broadcaster to carry on its principal business. In this context, a bona fide distribution or broadcasting agreement may be subject to regulation under the prescribed interest and fundraising provisions of the Corporations Law, unless it falls within the exemptions listed in s66(3) of the Law.

RG 19.9 The ASC recognises that the terms of investment in film schemes vary from film to film. Deals are negotiated on an individual basis and the terms are likely to change during the course of negotiations until the final contracts are executed, particularly if the film is being financed by more than one investor. Documents are often brought into existence at a fairly early stage of negotiations which, on a broad view, may be regarded as offers of or invitations to subscribe for securities. The obligations to lodge (and if necessary register) a prospectus and enter into an approved deed are difficult to comply with in these circumstances because it is possible that several supplementary prospectuses and amendments to the deed will be required. Nevertheless, this, of itself, is insufficient reason for non-compliance with the Law.

Government investment in films

RG 19.10 A particular feature of the film investment industry in Australia is the participation of the Commonwealth and State Governments through several statutory authorities, government departments and wholly-owned companies including, in particular, the Australian Film Finance Corporation Pty Ltd (FFC). The FFC was established by the Commonwealth Government in 1988 as a company wholly owned by the Commonwealth and as the Commonwealth's

principal vehicle for film and television production assistance, following the winding back of the tax-based incentives of Div 10BA of the *Income Tax Assessment Act 1936* (Cth) (the ITAA). Additional government funds are also invested in film development and production (as well as other aspects of the film industry) through the following bodies:

- (a) Australian Broadcasting Corporation;
- (b) Australian Children's Television Foundation;
- (c) Australian Film Commission;
- (d) Film Australia Pty Ltd;
- (e) Film South;
- (f) Film Victoria;
- (g) New South Wales Film and Television Office;
- (h) Queensland Film Development Office;
- (i) South Australian Film Corporation;
- (j) Special Broadcasting Service Corporation; and
- (k) Western Australian Film Council.

For the purposes of this regulatory guide, each of these bodies, including the FFC, is referred to as a "government body".

RG 19.11 When the FFC invests in the production of a film, it usually provides 60% of the budget but no more. When a government body other than the FFC invests in the production of a film, it will often provide, either alone or with another government body, the major proportion of the finance required to produce the film and, in many cases, 100% of the finance. In many such cases therefore, the only persons to whom issues, offers or invitations (other than excluded issues, offers or invitations) likely to be made are the government bodies. In other cases the production cost may be raised from a combination of sources.

RG 19.12 Another feature of the film investment industry in Australia is the investment by government bodies in the development of films prior to production. This is usually by investment in script development but may also involve investment in budget preparation, location surveying and other aspects of development. Such development funding may be provided by a single government body or several government bodies working together. Other investors may be involved in the event of further development and production of the film.

Relief in respect of films financed by government bodies

RG 19.13 It is the view of the ASC that a government body does not require protection to the same extent as that provided by the Law to other bodies. These bodies are experienced in the film industry, can be expected to monitor closely the development and production of a film and may have been established with objectives which are not purely commercial.

RG 19.14 The ASC is prepared to exempt from compliance with the provisions of Div 2, 3, 5 and 6 of Pt 7.12 of the Law, a promoter of a film investment scheme where an issue of, offer for subscription or purchase of, or issue of invitations to subscribe for or buy, prescribed interests arising out of the film investment scheme is made to a government body or bodies.

Additional relief in respect of investment by film distributors and broadcasters

RG 19.15 The ASC is of the view that in certain circumstances distributors and broadcasters of films (ie persons whose ordinary business is or includes broadcasting or distributing films) do not require protection as investors to the extent provided to other unrelated bodies. The particular circumstances arise when they are already participating in the production or development of a film in the capacity of distributor or broadcaster.

RG 19.16 The ASC is prepared to grant relief from compliance with the provisions of Div 2, 3, 5 and 6 of Pt 7.12 of the Law, to a promoter of a film investment scheme in respect of offers of prescribed interests made to a film distributor or broadcaster arising out of the investment, where that distributor or broadcaster has an interest in licensing or otherwise exploiting the right to use the copyright to the film to which the investment relates. The exemption will only apply to schemes where a distributor or broadcaster has this bona fide collateral interest and involvement in the relevant film.

RG 19.17 The ASC has executed a Class Order (see [CO 92/260]) exempting promoters in the circumstances described above, in relation to government bodies, distributors and broadcasters.

RG 19.18 Where no approved deed is required in respect of a scheme, the promoter of the scheme is not required to hold a dealer's licence by virtue of reg 7.3.11(1).

RG 19.19 The granting of an exemption will not be restricted to the promotion of a film which is an “eligible film” within the meaning of s124ZAA of the ITAA although, because of the restrictions placed on the investment powers of government bodies, this will often be the result.

Other film schemes

No class relief

RG 19.20 Since relief will apply only to offers, invitations and issues to government bodies, film distributors and broadcasters, an offeror will be required to comply with applicable provisions of Pt 7.12 if offers or issues are made to other persons, unless those offers, invitations or issues are excluded offers, invitations or issues. As noted in para 9 above, the ASC is aware of the practical difficulties facing a promoter of a film scheme in complying with the requirements of the Law. However, the ASC is not prepared to exercise its discretionary power under s1084 of the Law to exempt promoters as a class from compliance with the Law, except in the circumstances described in this guide, because it is concerned that adequate investor protection may not be provided.

RG 19.21 However, a promoter who believes that there are grounds upon which the ASC should exercise its discretion may still make an application for relief of a one-off nature under s1084(2) or 1084(6) of the Law. Such applications will be considered on an individual basis and may be made to any Regional Office.

Approved deed

RG 19.22 Subsection 1069(1) of the Law requires an approved deed to contain covenants to the effect of the matters set out in that subsection. The ASC is prepared to exercise its power under s1069(3) to make a declaration that a deed in respect of a film scheme need not contain covenants in relation to buy-back. (Pro Forma 21 may be used to declare that a prescribed interest scheme deed to produce Australian films is not required to contain a buy-back covenant.) The reasons for this are as follows:

- (a) exemption from buy-back is essential in order that the tax benefits under Div 10BA of the ITAA accrue to investors; and
- (b) the number of investors in a film scheme is usually not large and the contribution the investment of each investor makes to meeting

the budget of the film may be significant, hence the obligation to comply with a buy-back covenant could prejudice completion of the production of the film.

RG 19.23 With regard to para 22(a), it is the view of the ASC that the Commonwealth Government, through the ITAA, has expressly sought to encourage investment in film schemes by granting tax-related benefits, on the basis that this encourages the development of Australian culture and creative expression by providing active support for the local film and television industry. The criterion is not the gaining of tax advantages but the development of Australian culture.

~~Standard deed~~

~~RG 19.24—The ASC is prepared to assist in the development of a standard deed for use in film investment schemes. A promoter wishing to use a standard deed will be required to lodge it for approval with a schedule of the details of the particular film investment scheme (including details of the producer, the representative, the name of the film, the budget and other specified matters), which schedule will form part of the approved deed and the requisite fee (\$890 as at the date of this statement).~~

[10/4/1995

Approved representative

[RG 19.25 Under s1067(4), the ASC may, subject to such terms and conditions as it thinks fit, grant its approval to a person acting as representative for the purposes of a deed approved under s1067(2).

RG 19.26 A prospective representative should consult the ASC regarding its policy on the approval of trustees and representatives for film investment schemes. In exercising its power of approval, the ASC will pay particular attention to the requirement that the applicant has specialist knowledge and relevant experience in the area of film investment. The applicant will be required to lodge a statutory declaration to establish its independence from the management company/promoter.

RG 19.27 The ASC will be prepared to grant its approval to an appropriate government body (that is, the Australian Film Commission or one of the State film bodies) acting as representative. The government body will still be obliged to meet the requirements of the ASC as referred to in the policy on the approval of trustees and

representatives, although some aspects of the standard policy may not be applicable.

Licensing

RG 19.28 Section 780 of the Law requires a person who carries on a securities business to hold a dealer's licence. The ASC will grant a licence to a promoter of a film investment scheme where the requirements set out in s784 are satisfied in relation to the promoter. A licence may be issued either with respect to a particular film scheme, or on a continuing basis, depending on the requirements of the promoter and the view of the ASC.

RG 19.29 A securities dealer's licence is subject to various conditions which may include the lodgement of a security deposit of up to \$20,000 and the meeting of a net tangible asset test. On condition that a completion guarantee acceptable to the investors' representative and the ASC is entered into for the film in respect of which the licence is issued, or each film in the case of a licence issued on a continuous basis, the ASC will relax these other conditions.

RG 19.30 An application for a licence should be made in accordance with s782 of the Law.