USING TAX INCENTIVES TO ENCOURAGE INVESTMENT IN THE AUSTRALIAN FILM INDUSTRY

Braedon Clark
Darwin College
Cambridge

In light of the recent adoption of Film Licensed Investment Companies by the Commonwealth Government, this article examines the operation and effect tax incentives have had on indirect investment in the Australian film industry. The article looks at whether there is a need for tax incentives, the policy justifications for providing tax incentives and which type of incentive is most effective.
This article argues for an expansion of tax incentives to encourage private investment in the Australian film industry. An increase in investment may well promote the quality, creativity and commercial viability of Australian films.

1 INTRODUCTION

The recent success of the Australian film industry, coupled with the growing demand for domestic films, suggests that this industry may be evolving out of its infancy. The film industry requires significant funding, both from the government (direct funding) and from individual investors (indirect funding). Direct funding of $120 million was provided by the Commonwealth Government in 1996-97.[1] Indirect funding in comparison was insignificant. The imbalance in financial assistance of the Australian film industry caused the Minister for Communications and the Arts to commission Mr David Gonski, to review the assistance provided to the industry. His suggestions are radical and innovative. He proposes the creation of Film Licensed Investment Companies and a removal of the current tax incentives under Division 10BA of the Income Tax Assessment Act 1936 (Cth) ("ITAA").[2] The Commonwealth Government has partially adopted these proposals for a two year trial period to assess their impact on the industry.

---

1 Gonski D, *Review of Commonwealth Assistance to the Film Industry* (January 1997, Department of Communications and the Arts) at 27.

2 Ibid at 9.

This article will consider whether tax incentives should be used to promote the film industry, whether a direct subsidy or tax incentive is the more efficient way to encourage investment, and which method of tax incentive should be adopted by the Australian Government.

This article argues for the expansion of incentives for motion picture production. It examines and rejects the Film Licensed Investment Company approach, and suggests the introduction of a tax credit for "qualifying labour costs", to encourage the production of domestic and foreign films in Australia. This suggestion is consistent with the government's objective to build on local creativity, expertise and the strength of the Australian film industry.

2 SHOULD TAX INCENTIVES BE USED TO PROMOTE THE AUSTRALIAN FILM INDUSTRY?

> The use of state tax policy as a tool for economic development is not new. For hundreds of years, national governments have deployed tariffs to provide protective advantages for local enterprises.[3]

When deciding if tax policy should be used as an incentive to promote an industry, it is important to discern between

> cases where economically inefficient investments are undertaken purely for tax reasons, and the situations where tax incentive provide important encouragement to economically worthwhile investments.[4]

In deciding whether a particular type of tax incentive should be provided to a particular industry, Senator Edward M Kennedy once suggested to the United States Congress a three-part test first proposed by Professor Stanley S Surrey of Harvard University, Faculty of Law.

1. Are there sufficient policy reasons to justify federal expenditures in this area, whether through tax expenditures or direct subsidies?
2. If there is a need for federal expenditures, can it be done most effectively and efficiently through direct subsidies or through tax expenditures?
3. If tax expenditures are the best method, is the particular form of expenditure the fairest and most efficient distribution of the tax subsidy?

---

3 Smith A, *An Inquiry into the Nature and Causes of the Wealth of Nations* (Edwin Cannan 1925) at 418.

4 Mogulescu M, "The Tax Reform Act of 1976 and Tax Incentives for Motion Picture Investment: Throwing out the Baby with the Bath Water" (1985) 58 *Southern Californian Law Review* 839 at 842.

This test is useful in determining whether an industry should be receiving support, and whether the proposed method of support is effective. As Professor Surrey stated:

> We thus can put the basic question of whether we desire to provide that financial assistance at all, and if so in what amount - a stock question any budget expert would normally ask of an item in the regular budget. We can inquire whether the program is working well, how its benefits compare with its costs; whether it is accomplishing its objectives - indeed, what are its objectives? Who is actually being assisted by the program, and is that assistance too much or too little? Again, these are stock questions directed by a budget expert at existing programs. They all equally must be asked of the items and programs in the Tax Expenditure Budget.[5]

In evaluating the impact of tax incentives on the Australian film industry, this article will apply the above three-stage test.

3 POLICY JUSTIFICATIONS FOR PROVIDING TAX INCENTIVES FOR INVESTMENT IN THE FILM INDUSTRY

There are three main policy reasons to support the motion picture industry:

1 Economic risks and benefits;
2 Cultural benefits; and
3 Pro-competitive reasons.

3-1 Economic risks and benefits

Investment risk

The film industry in Australia is a high-risk industry. Most films produced in Australia are only marginally profitable. Eighty percent of films released each year in the United States lose money. The Vice President of the Bank of America in 1981 was even more blunt: "[T]ake any 10 pictures and 7 will lose money, 2 will break even and 1 will make money".[6]

David Gonski, in his review of the Australian film industry, commented that 90% of Australian films return no more than what is invested.[7] Films are a volatile investment. Even films such as *Lightning Jack*, that were supported

5 Surrey S, "Pathways to Tax Reform" (1973 Harvard University Press) at 35-36.
6 Above n 3 at 846.
7 Above n 1.

by large underwriting firms, failed to secure a substantial profit for distribution to investors.

Direct economic benefit

The benefits of this industry are primarily that it is a labour intensive industry and film budgets provide immediate economic benefit to the local region where a film is shot and produced. In the United States approximately 70% of the average film budget goes into salaries, providing jobs in an industry in which unemployment generally exceeds 50%.[8] This would not be dissimilar to the position in Australia. In recent years Australia has also seen the development of Warner Brothers' studios on the Gold Coast and the Fox studios in Sydney. The direct effect of these developments is that local technicians and actors are employed on a wide range of productions and gain skills that they otherwise would only have learned from outside Australia.

There has been sustained growth in foreign film production in Australia. The recent production of *The Matrix* and the current production of *Mission Impossible 2* are examples. The value of foreign production in Australia for 1994-95 was approximately $150 million and the vast majority of this money flows directly into the local economy.[9]

3-2 Cultural reasons

Films play a significant role in shaping how people, both domestically and abroad, view our country. In a pluralistic nation, it is important that there be a variety of cultural images available. The Commonwealth Government has outlined cultural objectives in its latest attempt to lure capital into the film industry. These objectives aim to support films that promote cultural diversity and the Australian identity.

David Gonski suggests that at the end of the 20th century film has emerged as the most accessible of all cultural activities and as a medium in which the perspectives of all countries are most easily displayed.[10] He suggests a vibrant film industry can play a key role in:

- Defining and exploring what it is to be Australian;
- Encouraging national maturity and independence through a developed awareness of self-capacity;
- Promoting a more inquisitive, imaginative and thoughtful society;
- Projecting diverse images of Australia;

---

8 Above n 3 at 839.
9 Above n 1 at 26.
10 Above n 1 at 15.

- Providing an historical record of contemporary issues and events in Australian life.[11]

Without incentives to produce a wider range of subjects and themes, only the most overtly commercial pictures are likely to be made. The effect is that mainstream films will dominate; other groups in society may be unrepresented and the creative range of topics will be reduced.

3-3 Pro-competition reasons

Even in Australia the film industry is highly concentrated. It is not best for society to have a small group of companies monopolising the film images available to the Australian people. As Gonski states:

> The film industry is a global industry dominated by the USA. The high cost of producing local programs for a small domestic market contrasts with the relatively low cost of screening US film and television programs. This high cost is compounded by the high-risk involved in production with only approximately one in ten feature films returning their original investment.[12]

The industry is dominated by films produced in the United States. The domestic film industry in Australia is also centralised, and government policy limits funding to films that are both commercially viable and portray Australian culture. An industry in its infancy needs widespread funding and greater competition to improve in quality. The film industry is becoming more and more a global industry and the quality of our domestic films must be able to compete with that of the United States if Australian films are going to secure a market share.

4 INCENTIVE OR SUBSIDY?

4-1 Introduction

The three policy reasons mentioned above provide a positive response to the first test proposed by Surrey and Kennedy. The second test looks at whether a direct subsidy provided by the government or the use of tax incentives is the most effective and efficient method to support an industry. There are many arguments advocated for and against the use of tax incentives.

---

11 Ibid.

12 Above n 1 at 34.

4-2 Arguments against the use of tax incentives

Professor Surrey argues in his article "Tax Incentives as a Device for Implementing Government Policy: A comparison with Direct Government Expenditures"[13] that there is a presumption in favour of direct subsidies when implementing government policy in industry.[14] This presumption is based on his arguments that incentives are less equitable, regressive and handled by administrations and tax committees that have little expertise in non-tax policy.

He identifies five main disadvantages of tax incentives:

1 Tax incentives are regressive by nature;
2 Tax incentives create windfalls;
3 Tax incentives are more difficult to develop and control;
4 Tax incentives distort the choices of the marketplace; and
5 Tax incentives keep tax rates high.

These alleged disadvantages will now be discussed.

Tax incentives are regressive by nature

The argument that tax incentives are regressive is based on the rationale that tax incentives inequitably benefit high income earners.[15] A person paying a higher rate of tax will benefit to a larger extent from accelerated depreciation, an allowable deduction greater than 100% and a tax credit. This is because they have the ability to invest the money, and greater sums of money. A taxpayer paying 48.5% in tax is clearly going to achieve a greater benefit from a tax incentive than a taxpayer paying 20%.

Tax incentives create windfalls

Professor Surrey claims that most tax incentives create mere windfalls that encourage taxpayers to do what they would have done anyway.[16] This may be true in certain industries. However, in the film industry or similar high-risk industries, it is unlikely that the lure of a tax incentive operates only for those who would have invested in the film industry nonetheless.

---

13 Above n 5.
14 Ibid.
15 Ibid at 720-725.
16 Ibid at 719-720.

Tax incentives are more difficult to develop and control

The claim that tax incentives are more difficult to regulate than a subsidy is based on the assertion that tax incentives are regulated by government departments, normally the Revenue, who have little knowledge of non-tax commercial issues and industry policy.[17] Professor Surrey suggests that government departments would most likely fail to consider the substantive areas involved in a tax incentive program. However, using a tax incentive as distinct from a direct subsidy promotes private decision-making with a greater influence from entities with expertise in the relevant industry. Therefore, in an industry such as the film industry where creativity should be encouraged, governmental regulation may be dampening free expression.

Tax incentives distort the choices of the marketplace and produce unneutralities in the allocation of resources

The use of any tax incentive distorts the choices of the marketplace. This is not necessarily a disadvantage. This argument is only valid if the incentive creates an unfavourable result, for example, if the incentive is drafted too widely and allows for investment in industries for which the incentive was not intended, or promotes avoidance schemes.

Tax incentives keep tax rates high

The argument that tax incentives maintain high levels of taxation is based on the view that tax incentives maintain a narrow tax base. Professor Surrey asserts that the loss of tax in implementing tax incentives is not accurately recorded, and it does not have a positive effect on the overall economic policy of taxation.[18]

If these are the main disadvantages of using tax incentives, what are the advantages?

4-3 Arguments supporting the use of tax incentives

Tax incentives encourage the private sector to invest

The greater the lure, the greater the investment. This is especially true when a government is attempting to lure investment into a high-risk industry, such as the film industry.

---

17 Ibid at 728-732.
18 Ibid at 726.

Tax incentives promote private decision-making rather than government-centred decision-making

If the process of decision-making is removed from the government, then more accurate and informed decisions will be made on the support and growth of an industry. There is an argument that tax incentives "can bring into play previously unused or under-utilised resources most efficiently".[19] To promote an industry, non-governmental decision-making processes should be encouraged. This is preferred to centralised, uninformed governmental decision-making. This view is supported in the United States Joint Economic Report of 1969. Here Senator Ribicoff, quoting Norman Ture, wrote:

> Recognition that tax incentives can account for real Federal expenditures should not obscure the fact that such programs can eliminate the need for additional bureaucratic apparatus while promoting the use of private capital and initiative toward socially useful projects.[20]

Tax incentives promote creativity in the film industry and provide a wider investment base

When the government takes a direct role in funding forms of cultural expression in society it restricts the creativity of the industry through regulation. This may be seen as government dampening free expression. Currently in Australia, the Film Finance Corporation is the principal arm of the government assisting Australian film productions. This funding is regulated on cultural, audience and commercial criteria,[21] which restricts the scope of government assistance. This article suggests that such an approach is insular and does not promote a wide base of investment. Further, limiting funding on the basis of cultural expression is parochial and restricts creative exercise in the Australian film industry.

4-4 Incentive or subsidy for encouraging investment in the Australian film industry?

Professor Surrey is adamant. "I stress strongly that the advantages must be clear and compelling to overcome the losses that accompany the use of the tax incentive, even the well structured incentive."[22]

---

19 Joint Economic Commission 1969, HR Rep No 142, 91st Cong, 1st Sess 20.

20 Ibid.

21 Above n 1 at 34-35.

22 Ibid.

This article suggests that the above arguments provide clear and compelling reasons for incentives to be used. The decisions regarding which films deserve support and considerations of content, are matters solely for those with an interest in the industry. This view is supported by Miles Mogulescu in his article "The Tax Reform Act of 1976 and Tax Incentives for Motion Picture Investment: Throwing out the Baby with the Bath Water."[23] He suggests four more arguments that support the use of tax incentives in the film industry.

1. If there is direct funding by the government of cultural expression, the government will control that expression;
2. Tax incentives would be less costly;
3. Taxation is only deferred, all revenue eventually returns to the revenue; and
4. Tax incentives are indiscriminately available, as distinct from direct government funding.

The Australian Government introduced tax incentives to promote investment in the film industry in 1981 and current government policy continues to support the use of an incentive-based system. The current policy is based on the following six principles:

1. Encourage a higher level and broader base of private investment in the industry;
2. Increase the diversity of funding avenues for film and television production;
3. Increase the diversity of the production slate, as the FFC is limited by guidelines and funding constraints;
4. Reduce reliance on the government;
5. Government support should not be ongoing but rather act as a catalyst; and
6. Compliance requirements should not be unduly excessive or burdensome.

This article suggests that incentives are the preferable type of tax policy for encouraging investment in a high-risk industry like the film industry. This answers the second part of the Surrey/Kennedy test. Let us consider the third test and which type of incentive is the most effective.

23 Above n 4 at 842.

5 MOST EFFECTIVE INCENTIVE?

There are three main types of tax incentive used by industrialised nations:

1. An up front deduction-based system, such as accelerated depreciation;
2. A tax credit incentive scheme; and
3. Tax exemption or relief.

The first type of incentive is a favourite of the Australian Government, the second is seen in Canada and the third in Ireland.

5-1 Types of tax incentive used in Australia

> Seeing a particular need to boost investment in film and television production, in 1978 the Government introduced tax incentives for film production. These incentives played an important role in the resurgence of the Australian film industry.[24]

The Australian Government has encouraged indirect support of film production since the early 1980s. In the 1990s direct subsidy has emerged as the dominant support measure, with indirect assistance being substantially reduced.[25] Investment in the film industry in 1996-97 was more than $140 million,[26] and direct subsidies represented around 85% of this. The relative value of direct and indirect assistance has not always been this way.

Tax incentives were first introduced for investment in the film industry in 1981 by the then Federal Treasurer, John Howard. These incentives were in Division 10B and 10BA of the ITAA 1936. The incentives provided for a 150% deduction and a 50% tax exemption on profits arising from an investment. The deduction and exemption have now been scaled down to 100% and 0%. The recent deceleration in film production in Australia encouraged the government to implement a new style of incentive called Film Licensed Investment Companies.

Division 10B

This division provides a deduction to an investor who develops or purchases a unit of industrial property. This includes a patent, copyright or registered design. The deduction may only be claimed if the industrial property is used to produce assessable income. Therefore if the copyright is a film, the film

---

24 Above n 1 at 39-40.
25 Ibid at 39.
26 Ibid at 27.

must be shown to an audience.[27] The deduction is available over the effective life of the asset. Copyright in Australian films has an effective life of two years enabling a 50% deduction in each year. As an investor, you may opt to deduct your investment in a film under either Division 10B or 10BA, as the two divisions are mutually exclusive.[28] Division 10B is not commonly used by private investors.

Division 10BA

Division 10BA was introduced by Act 111 of 1981, following an election announcement by the then Prime Minister that there would be significant taxation concessions granted to the investors in Australian films.[29] This division applies to contracts entered into on or after 1 October 1980 and provided for a 150% deduction of the qualifying capital expenditure on the production of an "Australian film". Since its introduction, the deduction has been reduced on four occasions. It is now a 100% deduction.

Division 10BA provides a deduction in the year of investment if the following elements are satisfied:

1. The taxpayer must be a resident taxpayer;
2. The expenditure must be incurred;[30]
3. There is investment in a "Qualifying Australian Film" with "significant Australian content";[31] and
4. The expenditure must be "at risk".[32]

Due to the deceleration of the Australian film industry, the Department of Communications and the Arts retained Mr David Gonski, Chairman of Hoyts Pty Ltd, to review the Commonwealth assistance to the Australian film industry. Based on this review, the Commonwealth Government introduced a two year pilot scheme of Film Licensed Investment Companies. This policy is notably different from Division 10BA and David Gonski recommended a

---

27 Section 124L ITAA.

28 TR IT 2629.

29 *Butterworths* "Australian Income Tax Law and Practice" at 3564.11.

30 *FCT v Faywin Investments Pty Ltd* (1990) ATC 4,361 at 4,362:

> The requirement that monies be expended "directly" in production is no more than a requirement that there be a sufficiently close connection between the outlay and the production process.

31 Section 124ZAD; *McVeigh v Willarra Pty Ltd & Ors* (1984) ATC 4,947 at 4,948:

> In deciding whether a film has "significant Australian content" it is for the Minister to give priority to particular matters to which he may properly have regard under sec.124ZAD. ... A film may have "significant Australian content" even though it has significant non-Australian elements.

32 TR IT 2111 provides that there can be "no guaranteed return" on the investment.

complete removal of Division 10BA. However, Division 10BA remains for the time being.

Film Licensed Investment Companies

On 14 May 1998 the government established the Film Licensed Investment Companies scheme. The scheme provides tax concessions for investment in these companies for a period of two years. The tax benefit will end on 30 June 2001.

What Film Licensed Investment Companies ("FLICs") hope to achieve?

The introduction of the FLIC scheme is aimed at attracting greater controlled investment in high quality, commercially viable Australian films. The Commonwealth Government outlined the following main aims:

- To encourage investment in qualifying Australian films;
- To encourage the production of qualifying Australian films which portray Australian perspectives and Australia's cultural diversity;
- To encourage the production of Australian films which are of a high standard and are likely to be commercially successful;
- To support and promote the ongoing development of the Australian film industry through encouraging the use of Australia's creative resources and industry expertise; and
- To ensure that the level of Commonwealth assistance to the Australian film industry is quantifiable, accountable and transparent.

How will the scheme operate?

The Minister of Communications and the Arts will assess all applicants and issue three or four licenses. Investment in these companies will then be 100% deductible in the year of capital outlay. The board of each FLIC will determine which projects to finance in accordance with the objects of the Act.

What conditions must be satisfied for a licence to be granted?

The following conditions must be met before a company may be granted an investment licence:

1. The company must be an Australian registered company;
2. It must not have previously commenced business or borrowed money;
3. The central management and control must be ordinarily in Australia;

4 The Chair and all directors of the company must be Australian;
5 The memorandum and articles must provide that all shares be fully paid; and
6 It must at all times have less than a 33% foreign interest.

The FLICs must invest that money in commercially viable films that portray Australian perspectives and Australia's cultural diversity. The assessment of "qualifying Australian film" under the FLIC provisions is the same as under Division 10BA.

5-2 Impact of these incentives on the Australian film industry

Division 10B and 10BA

Upon the introduction of these tax incentives, private funding of the industry increased dramatically. There was private funding of $120 million in 1982, rising to over $180 million in the late 1980s.[33] The direct subsidy for training, development, production and marketing remained relatively static at $25 million.[34] This continued until 1988 when tax concessions were wound back and government funding measures for production were introduced.

There was widespread criticism of the inequitability and inefficiency of Division 10BA. These criticisms included:

- The funding of film projects was driven by financial factors, rather than the artistic and commercial potential of the film; and
- The overall quality of films made under this form of financing was poor.

Even considering the criticisms of Division 10BA and the ease with which the ITAA could be abused for financial benefits, the tax incentives were critical to the resurgence of the Australian film industry after limited activity in the 1960s and 1970s.[35] The introduction of tax incentives increased film production, particularly independent production, and the number of feature films produced in Australia rose from under 20 to over 40 films per year in the late 1980s. The reduction of tax incentives and the increase in government subsidy has resulted in only 16 feature films being produced in Australia in 1998.[36]

---

33 Above n 1 at 26.
34 Ibid.
35 Above n 1 at 39.
36 Above n 1 at 46.

Film Licensed Investment Companies

At present we know little about the effect of FLICs. They have not been overly successful; nor have they been failures. There are, however, a number of disadvantages of the FLICs and a number of reasons why the proposed FLIC scheme is inconsistent with the government's policy objectives.

The operation of these companies is prima facie "in-house", restrictive and inconsistent with the objectives outlined by the government. The suggested advantages FLICs will have over the current regime are:

1 They are able to be capped to permit greater certainty so that the government may record the amount of revenue foregone;
2 They bring together those with film expertise and marketing and those with expertise in risk capital management;
3 They are transparent: the movement of money can be followed;
4 They are able to target effectively those projects which achieve the Commonwealth's cultural objectives;
5 They are relatively simple to administer;
6 There is minimal opportunity for abuse; and
7 They allow the development of a production slate rather than the current project-by-project basis.[37]

These listed advantages are glaringly inconsist with the government's objectives of promoting Australian multiculturalism and increasing funding for the industry. Firstly, Gonski mentions that the industry needs a "many doors" approach to funding.[38] This suggestion of having three FLICs provides for only three more "doors". Conversely, the expansion of tax incentives could provide for thousands of potential investors. Secondly, why are FLICs restricted to having Australian resident directors and a maximum foreign investment of 33%? It is conceded by all in the industry that foreign expertise exceeds that in Australia. In seeking to build the local industry, surely foreign investment and input should be encouraged. Gonski agrees: "[i]t is generally agreed that the use of Australia as a filmmaking location by foreign production companies should be encouraged."[39]

Other disadvantages of the FLICs are:

1 They are on a two year trial period. This is not sufficient time to fund and support a slate of films;
2 The up front deduction of 100% is no more than what is currently on offer under Division 10BA of the ITAA;

37 Above n 1 at 42.
38 Above n 1 at 46.
39 Ibid at 54.

3 The hands of the FLIC directors are bound by the requirement that investment is to be made in commercially viable films which portray Australian perspectives and Australia's cultural diversity;
4 The investors have no control of the money they invest;
5 The scope of funding will be restricted and fringe productions may receive less funding; and
6 The number of films produced per year will fall, leaving the industry producing a handful of highly successful films each year.

Thankfully, the FLIC regime is on trial. It will be interesting to observe the success of this proposal in the next two years. This article suggests that Division 10B and 10BA are the most effective type of incentive that the Australian Government has implemented. This conclusion is based on the amount of investment generated and the number of films produced from investments under Division 10BA.

5-3 Tax credit system: Canada

On 29 October 1997, Canada's Minister of Finance released draft amendments to the Income Tax Act (Canada). These amendments were the result of consultations with Canadian and United States film and television producers and will create a new film or Video Production Services Tax Credit for foreign-based film producers.[40]

Operation of the tax credit system

The tax credit operates to reimburse the producers up to 11% of the cost of "qualifying labour expenditure". "Qualifying labour expenditures" are amounts paid to Canadian resident employees or Canadian companies with resident Canadian employees who provide services to the production of the film.[41]

The provinces of Ontario and British Columbia have varied this tax credit slightly. In Ontario, there is a 15% tax credit if the labour cost is spent on Ontario residents. In British Columbia, this credit is raised to a maximum of 17%, however this province caps the credit where qualifying labour expenses exceed 48% of the production costs.[42]

---

40 See "Osler Updates" at: <http://www.osler.com/publications/Commentary/video_tax2.html> (at 7 March 2000).
41 Ibid.
42 Ibid.

The underlying political and economic objective of these credit incentives is to enhance Canada's reputation as the location of choice for Hollywood studios. These studios currently employ the services of thousands of Canadians. The government estimates that the new measures will provide over Can$55 million in industrial benefits to foreign owned studios which operate in Canada. The effect of this incentive is to enhance the skill level of Canadian workers and elevate the quality of the industry.

Impact of this incentive on the Canadian film industry

There has been a significant increase in the production of Canadian feature films since 1995 when the tax credit was introduced. The figures for production prior to 1995 are:

1991 – 36 films
1992 – 31 films
1993 – 35 films

In 1997-98 the number of films produced directly from government funding was seven; six in English and one in French. Films from the independent sector numbered 253; 187 in English and 66 in French. This dramatic increase in the number of independent films suggests that the tax credit has substantially increased production.

5-4 Tax relief: Ireland

Operation of the tax relief system

Under section 35 of the Irish Tax Act, Ireland introduced 100% tax relief for investment in films produced in Ireland. This relief has now been limited to 80% and is covered by s 481 of the Act. The cap on investment under this scheme was 7.5 million pounds. In an attempt to lure larger budget films back to Ireland, this limit was increased to 15 million pounds.[43]

Impact of this incentive on the Irish film industry

Tax relief for investment prompted marked growth in the Irish film industry. In 1993, funding under s 481 was 27.2% of total funding. This increased to 64.1% in 1996. Returns on s 481 investments to investors were 20 million

43 See "Welcome to the IFTN Handbook" at: <http://193.120.211.152/iftn/handbook/index2.htm> (at 7 March 2000).

Irish pounds in 1996 and the loss to the exchequer in tax foregone was 15.1 million.[44]

6 SUGGESTIONS

6-1 Introduction of a tax credit system

This article suggests the Australian Government introduce a similar tax credit to Canada. A tax credit of 20% available to all production companies should be implemented. A removal of Division 10BA would not be recommended. The effect of such a proposal would be to allow an up front deduction of 100% to compensate for the risk of investment, while preventing avoidance and encouraging a longer-term investment in Australia. The 20% tax credit is available to those investments where the product is successful.

The use of a tax credit will enhance the attractiveness of Australia as a location for the production of feature films. It will also enhance the creativity and skill of Australians working in the industry and inject direct economic benefits into the locality in which films are produced.

6-2 Removal of culture as a criterion if the current situation remains

The use of film as a cultural tool is substantial and effective. As Gonski states, film has emerged as the most accessible of all cultural activities and as a medium in which the perspectives of all countries are most easily displayed.[45] There are many positive reasons why the film industry should be promoting multiculturalism in Australia, yet the contention of this article is that an industry in its infancy should not be over-regulated. This article suggests that if FLICs and Divisions 10B and BA remain, the cultural element should be removed as a criterion for either direct or indirect funding.

The United States' film industry developed on a purely competitive and commercial foundation. It was not until the industry was firmly established that the six major production studios commenced producing films which represented American culture. During the infancy of the American film industry, the six major studios produced films which appealed to all levels of society.

This article recommends that the Australian position should mirror the early years of development in the United States. If tax policy is limited to a pro-

---

44 Ibid.

45 Above n 1.

competition base, then mainstream funding will be limited to quality productions. This will remove the pressure on independent producers to deliberately integrate an Australian perspective in order to secure funding. Broadening the scope of films in which Australians may invest may increase the number of feature films produced and augment the quality of local productions.

The removal of a cultural element would also simplify the tax incentives. As stated by the Tax Law Rewrite Project Team for the Inland Revenue in the United Kingdom: "If tax law is complex because the underlying policy it expresses is complex, making the underlying policy less complex would open the way to simpler and cleverer law."[46]

7 CONCLUSION

This article has outlined strong policy reasons for tax incentives for investment in film production. A high level of film production provides significant economic, cultural and pro-competition benefits for a country. Any proposed structure should be established to increase competition and quality in the production sector of the film industry in Australia. The film industry is high-risk. It is therefore difficult to attract capital unless incentives are provided. As the resurgence of Australian films in the 1980s and the growth of the Irish and Canadian film industries demonstrate, the use of tax incentives to promote investment in film production is effective.

Indirect funding through tax incentives is the most suitable and efficient method of funding this industry. Division 10BA of the ITAA may have been far from ideal, yet it did promote growth and quality in film production. The Australian position should not be following in the footsteps of the United States' industry. In the US, Congress passed the Tax Reform Act 1976. Despite its name, this Act did not reform the incentives for investing in the motion picture industry, but rather eliminated them entirely. The result of this action may be compared to the current position of the Australian film industry. As McCombs notes:

> This has resulted in a significant decrease in the level of production, particularly independent production, further concentration of economic and cultural power and a decrease in the range of cultural choices available to the public.[47]

---

46 "The Audience for Tax Legislation - Is it different from that other legislation and should it be considered to be the same for all sections or parts?" (1997) 3 *New Zealand Journal Of Taxation Law and Policy* at 187.

47 Above n 3 at 841.

If the Commonwealth Government is hesitant to re-introduce a workable tax incentive scheme because of fears of abuse, then perhaps it should be looking towards changing the common Australian policy on tax incentives. A move to a tax credit based incentive may assist in reducing abuse and promote long-term investment in commercially viable productions.