



OPTION AND PURCHASE AGREEMENT

EXPLANATORY NOTES

USING THE EXPLANATORY NOTES

The Explanatory Notes are intended to provide more detailed explanations of certain clauses in this **sample agreement** or to give more detail about the law involved.

The Explanatory Notes **DO NOT** form part of the agreement and should not be included in your final redrafted agreement.

The Explanatory Notes are not intended as legal advice and should be considered information only. You should contact Arts Law for specific legal advice.

PARTIES

The agreement should clearly identify the name and address, and preferably the telephone and fax numbers, of the persons or organisations entering into the agreement (**parties**). Throughout the rest of the agreement, the parties are referred to or "defined" by shorthand terms for ease of reference, for example Producer. Other terms could be used, or the parties could simply use their own names.

If a party has an Australian Business Number (**ABN**), Australian Company Number (**ACN**) or Australian Registered Body Number (**ARB**), the number must be included. The ABN is important for GST purposes.

If either party is a company, its Australian Company Number (**ACN**) and the address of its registered office must be stated.

BUYING THE FILM RIGHTS TO AN EXISTING WORK

Under the *Copyright Act 1968* (Cth), the author of a literary or dramatic work (such as a book, play or screenplay) has the right to control reproduction, adaptation and publication of that work. This means that film makers who want to adapt an existing work into a film must buy the rights. If they do not, they risk an action for copyright infringement. A copyright infringement claim may succeed even if the film differs significantly from the original text provided that the author can prove that the film maker



had access to the original text and drew on the author's skill and labour. For further information contact Arts Law.

If an author succeeds in proving that a film infringes copyright in the author's existing work, the author may be entitled to a share of royalties from the film, or even to prevent the film being shown. There need not even be a great likelihood of success for someone to sue once the film has gone big – any chance at a bite of the profits will attract potential claimants. Given these dire consequences, it is not surprising that many film studios return unsolicited scripts unopened. It is also not surprising that film funders will require budding producers to have "cleared" all possible copyright claims on the film and to warrant (i.e. promise) that they have done so before funding is invested.

There are various alternatives for clearing the relevant rights. For example, if the work is merely one of a number of existing sources consulted for a documentary, the producer may simply ask the author to sign a "quit claim". A "quit claim" (otherwise known as a release) involves the author promising not to sue in exchange for a small fee and perhaps a credit. However, where one particular work inspires the film, the standard industry method of securing the rights is the more elaborate Option and Purchase Agreement.

HOW DOES AN OPTION AND PURCHASE AGREEMENT WORK?

An Option and Purchase Agreement is really one agreement attaching another agreement:

1. **"Option" Agreement**, by which the copyright owner (**Author**) gives the Producer (**Producer**) the option (i.e. the right) to buy the rights to the film (**Film**) within a certain limited period; and
2. **"Purchase" Agreement**, which is the actual purchase of the Film rights. Once the Producer decides to exercise the option, the Author must sign the Purchase Agreement and sell the Producer the rights to make the Film.

The Option Agreement provides for a mechanism in order to prevent any difficulty which could arise if the Author does not sign the Purchase Agreement upon exercise of the Option, for example because the Author has died after entering into the Option Agreement but before the exercise of the Option. Under the Option Agreement, the Author appoints the Producer as the Author's attorney for the purpose of signing the Purchase Agreement, on the Author's behalf, if the Author does not sign the Purchase Agreement as required upon exercise of the Option.

Why start with an option? In order to make a film it is necessary to work up a script treatment suitable to approach film funders. This takes time and money. If the film is based on an existing work, it is not worth starting to develop a script unless the Author promises not to go and give the film rights away to someone else in the meantime. This guarantee is the "option" period. The "option" gives the Producer the time to develop the script and approach funders. This option period is usually for one or two years. The Author cannot grant anyone else a similar option during this period. In exchange for granting the option, the Producer agrees to pay the Author a certain sum. If the Producer decides not to proceed, the Producer lets the option period expire and the Author is free



to give the rights to someone else. The Option Agreement is discussed in more detail below.

The second part of the agreement (which is contained in Annexure 1 to the Option Agreement) is the **Purchase Agreement**. The Purchase Agreement includes an assignment of the Author's copyright on terms and conditions which the Producer and the Author negotiate at the time of signing the Option Agreement.

The Producer and the Author sign the Purchase Agreement only when the Producer decides to exercise the option. However, as the terms of the Purchase Agreement were agreed when the **Option Agreement** was signed, they cannot be changed unless both parties agree.

The Purchase Agreement is discussed in more detail below.

OPTION AGREEMENT – EXPLANATORY NOTES

GRANT OF OPTION (CLAUSE 1)

Clause 1 provides that the Author grants the Producer an exclusive and irrevocable option (**Option**) against payment of the agreed option fee (**Option Fee**) which the Producer agrees to pay the Author for the grant of the option. The amount of the Option Fee must be inserted in this clause. The amount paid will depend on the reputation of the Author and the nature and the budget of the project.

Under principles of contract law, the Option Agreement will not be enforceable unless the Producer transfers some valuable consideration (i.e. a fee or some other form of compensation) to the Author upon entering into the agreement. The consideration can be nominal, for instance \$10, as in the dollars options mentioned below, but it must in any event move (i.e. be transferred) from the Producer to the Author.

There are several ways in which the Option Fee may be paid. For example, the Author may be paid a lump sum – in which case the sample requires only the inclusion of the agreed amount. Alternatively, the Option Fee may be paid as a percentage of the total fee agreed for the purchase of the rights to make the Film, with the amount of the first Option Fee (and possibly later fees) credited against the total purchase fee. The parties will have to amend the Option Agreement if they intend to have the Option Fee as a percentage of the total fee agreed for the purchase of the rights to make the Film.

Often, the parties agree to a rather low option fee but a higher fee for the exercise of the option (see clause 3) and a higher purchase fee under the Purchase Agreement.

Some current industry guides are outlined below, which may be used as a basis for negotiation.

The Australian Society of Authors suggests a fee in the range of \$500 – \$1000 for each option period, or 5% of the total fee agreed for the purchase of the film rights, payable for each option period. As a general practice, the bigger the film's budget the higher the fee – up to \$5000.



The Australian Writers Guild suggests the following fees where the project is a telemovie or a feature film:

- Telemovie: \$1,000 – \$3,000 for six month initial period and the same again for a further six months.
- Feature: 5%-10% of total fee for 12 months.

So called "dollar options" may also be negotiated, where the Producer pays a nominal amount to the Author to get a project going.

The Author is entitled to keep the Option Fee as well as any Extension Fee under clause 2 if the Producer does not exercise the Option.

OPTION PERIOD (CLAUSE 2)

Clause 2.1 specifies the length of the first option period (**Initial Option Period**). This is usually six to twelve months.

Clause 2.2 contemplates an extension of the Initial Option Period. This clause must be completed if the parties agree that the Producer may extend the Initial Option Period (**Extended Option Period**), possibly against payment of a fee (**Extension Fee**). Clauses 2.3 and 2.4 set out the mechanism to obtain an Extended Option Period. In order to extend the Initial Option Period, the Producer must notify the Author in writing and pay the Extension Fee.

Funding bodies may have their own requirements or guidelines for the lengths of option periods. For example, Screen Australia generally requires an Initial Option Period of one year plus the option to extend for two further years, i.e. a total of three years. State funding bodies may also have minimum option periods. Check with the relevant body in your State. See **Useful Organisations** for contact details.

EXERCISE OF THE OPTION (CLAUSE 3)

Clause 3 sets out the procedure which the Producer must follow to exercise the Option to purchase the rights to make the Work into the Film.

Under clause 3.2, the Producer must pay an exercise fee to the Author when the Producer exercises the Option. The exercise fee is separate from the Option Fee. The parties must determine the amount of the exercise fee, which is usually higher than the Option Fee as the Producer effectively secures the rights in the Work when the Producer exercises the Option.

Clause 3.3 requires the Author to deliver to the Producer two signed copies of the Purchase Agreement once the Option is exercised. The Producer may then be required to have the documents stamped and pay stamp duty to the relevant Office of State Revenue. The Producer should then return the original stamped Purchase Agreement to the Author as quickly as possible. See further discussion of Stamp Duty below.

As a result of the irrevocable appointment in clause 3.3, the Producer is authorised to sign the Purchase Agreement if the Author does not sign it upon exercise of the Option, for instance because the Author is sick and incapable of signing the Purchase Agreement.



GOODS AND SERVICES TAX (CLAUSE 4)

The parties to the agreement must consider their obligations with respect to taxation and other statutory fees and charges.

GST is a general tax on goods and services supplied in Australia. Most supplies for arts businesses made for consideration (e.g. money or payment in kind) will be subject to GST. Clause 4 provides that payments are *exclusive* of GST. If this does not suit your situation, you will need to consider an alternative clause.

You should obtain specific professional advice on your GST and tax position and obligations under the agreement and generally.

For more information contact the Australian Taxation Office on 13 28 66 or visit the website www.ato.gov.au. In addition, the Australia Council for the Arts has published [*Artefacts: the Arts and Tax - a practical tax workbook for the arts sector*](#) which can be downloaded free from the Australia Council website.

WARRANTIES (CLAUSE 5)

A covenant is a formal agreement and a warranty is a promise in the strongest terms. Producers need to be able to guarantee to funding bodies, distributors and other investors that they have all of the rights needed to fully exploit the Film without risk of litigation from any third party, in particular without any claim for copyright infringement.

The covenants and warranties in clause 5 are intended to ensure that the Author is free to enter into the Option Agreement with the Producer, and to grant the Producer the option to acquire the film rights. The Author promises to the Producer that the Author will not make and have not already made, any grant of film rights to any other person.

If the film rights are owned by someone other than the owner of the copyright in the Work, for example by a publisher), the covenants and warranties should be amended accordingly and the Producer should obtain a quit claim from this party.

RIGHT TO ASSIGN (CLAUSE 6)

Clause 6 allows the Producer to assign (i.e. transfer) the Producer's rights to another party, although the Producer remains obliged to pay any option fee due and must notify the Author of any assignment. In line with a recommendation of the Australian Writers Guild (AWG), any assignment is, however, subject to the Author's prior written consent, which should not be unreasonably withheld.

DEVELOPMENT DURING THE OPTION PERIOD (CLAUSE 7)

Clause 7 gives the Producer the right to prepare written adaptations of the Work in the form of film treatments, synopses or draft screenplays to show to third parties such as film finance bodies.

The Author should be aware that the Producer is under no obligation to use the Author to write any such material. The Producer may want to get feedback or comments from



the Author in relation to adaptations of the Work, development of characters or storyline. If so, the parties should include a clause to that effect in the Option Agreement. Consultation often happens in this way; but an author is almost never given any real control over script development.

If the Author writes any material for the Film, the parties should enter into a separate writer's agreement for this purpose. The AWG publishes and sells a sample agreement between author and producer for the writing of a screenplay. See **Useful Organisations** for contact details.

CREDIT AND MORAL RIGHTS (CLAUSES 8 AND 9)

Moral rights are personal rights of an artist, provided for under Part IX of the *Copyright Act 1968* (Cth). They cannot be bought or sold (assigned). They belong to an artist regardless of whether the artist is still the copyright owner. Moral rights apply to artistic, literary, dramatic and musical works and films. Since 26 July 2007 moral rights have also existed for performers in live performances (so far as the performance consists of sounds) and sound recordings of those live performances.

In Australia, there is no need to "assert" your moral rights. However, this is required in some other countries, including the United Kingdom and New Zealand. You should include a clause dealing with this if your work is likely to be sold or distributed in these countries.

In Australia there are 3 moral rights, namely the right of a creator:

1. to be named as the work's author or creator (*the right of attribution*);
2. not to have his/her work (falsely) attributed to another (*the right against false attribution*); and
3. to protect his/her work from unauthorised alteration, distortion or other derogatory treatment that prejudices his/her honour and reputation (*the right of integrity*).

"Derogatory treatment" in relation to an artistic work is defined in the Copyright Act as:

- (a) *the doing, in relation to the work, of anything that results in a material distortion of, the destruction or mutilation of, or a material alteration to, the work that is prejudicial to the author's honour or reputation; or*
- (b) *an exhibition in public of the work that is prejudicial to the author's honour or reputation because of the manner or place in which the exhibition occurs; or*
- (c) *the doing of anything else in relation to the work that is prejudicial to the author's honour or reputation."*



Sometimes contracts ask creators to waive (i.e. give up) their moral rights. Arts Law recommends that artists refuse to agree to any term whereby they give up their moral rights. The Copyright Act does not specifically allow for the "waiver" of moral rights. However, it does contemplate that artists can give consent in writing to the future infringement of their moral rights. Arts Law considers that general consents or purported waivers of moral rights in relation to all copyright works could potentially breach the Australian Consumer Law. A moral rights consent that is unfair may also be open to attack under various state legislation regulating contracts and industrial relations.

In some circumstances it may be necessary or appropriate for an artist to consent to certain acts or omissions in respect to his/her moral rights. For example, the Author may consent to not being attributed or to the Producer altering the Work in some way. You should always carefully consider any consent and seek advice if you are uncertain of the terms of the consent.

Clause 8 implements the moral right of attribution by providing that the Author should be credited in the manner agreed by the parties. Clause 8.3 provides for a partial waiver of the Author's right of attribution where the Producer, without fault, fails to credit the Author.

Clause 9 deals with the Author's moral rights generally. Under clause 9.1, the Producer agrees to be bound by the "Industry Accord on provisions which by consent may be incorporated in contracts" (**Accord on Moral rights**), which is reproduced in the Schedule to the Option Agreement. The Industry Accord on Moral Rights is a voluntary film industry standard (available for download from the Screen Australia website at www.afcarchive.screenaustralia.gov.au/downloads/moralrights_industryaccord.pdf) which acknowledges an author's moral rights, but provides for the author's consent to certain acts which would, in the absence of consent, infringe those moral rights. Under clause 9.2, the Author gives a specific consent to certain acts in relation to the Work to avoid a classification of those acts as infringement of the Author's moral rights.

The individual himself/herself must consent to an act which infringes an individual's moral right. Clause 9.3 deals with the situation where the Author does not hold the moral rights in the Work by providing for the Author's warranty that the Author has obtained the required consent from each individual who contributed to, and has moral rights in, the Work.

FAILURE TO EXERCISE THE OPTION (CLAUSE 10)

If the Producer does not exercise the Option, the Option Agreement terminates and the Author may sell the film rights to any other interested party.

Under clause 10.2, the Author may buy out the adaptations of the Work prepared by the Producer at an agreed sum if the Option Agreement terminates because the Option is not exercised.



If the Work optioned is unpublished and contains material or ideas that the Author wishes to remain confidential, an additional confidentiality clause is recommended. A sample clause is:

"If the Producer does not exercise the Option, the Producer will not make any further use or disclose to any third party any idea or material contained in or based on the Work without obtaining the prior written consent of the Author."

See Arts Law's information sheet [Protecting your ideas](#) for further information on confidentiality.

DISPUTES (CLAUSE 11)

It is almost never worth going to court to resolve a dispute, but not every problem can be solved easily. Clause 11 provides that a party which wants to access the dispute resolution procedure in the contract must first send a written notice of the dispute to each other party. This starts a timetable for resolving the dispute. The parties must make a good faith effort to sort out their dispute themselves, but if that isn't successful must then attend a mediation arranged through the Arts Law mediation service (at least one party must subscribe to access this service). Compared to litigation and arbitration, mediation is an informal and less expensive dispute resolution process, in which an independent person helps the parties in conflict to formulate their own solution. For more information see Arts Law's information sheet: [Mediation and the Arts Law Mediation Service](#).

The Arts Law mediation service expects that the parties will be able to agree on the person to be appointed as the mediator. If however that is not possible, the contract provides that the Arts Law Centre will appoint a mediator. Instead of the Arts Law Centre, the parties may wish to nominate another independent body within their industry such as [INSERT RELEVANT PEAK BODY NAVA or APRA]. Only after the parties have attempted mediation, can the dispute be the subject of court proceedings.

GENERAL PROVISIONS (CLAUSE 12)

Clause 12.1 defines the relationship between the Author and the Producer as one of independent contractor as distinct from, among other things, one of employment. It indicates the intention of the parties but may not be legally effective if the Author is in reality an employee or partner of the Producer.

Clauses 12.2 and 12.3 deal with confidentiality and representations regarding the Work or the likelihood of the Work being developed.

Clause 12.4 specifies how notices under the Option Agreement can be given, and when they are considered to be served (i.e. given).

Clause 12.5 is included to ensure that the parties entering the Option Agreement will solely be responsible for their obligations. If any responsibilities are to be delegated or subcontracted, the subcontractors and their obligations should be first agreed to. Clause



6, which allows the Producer to assign the benefit of the Option Agreement and/or of the Purchase Agreement under certain conditions, is reserved.

A legally enforceable agreement can comprise both written and verbal (oral) terms. Oral terms can be expressly stated or implied from the circumstances. In the interests of certainty, clause 12.6 seeks to ensure that the written agreement contains all relevant terms. Anything that might have been canvassed during negotiations which is not actually set out in the Option Agreement will generally be excluded by this clause. However, there are exceptions, for example, where terms cannot be excluded by statute and where one party has made deliberate or negligent misrepresentations on which the other party relied in entering the Option Agreement.

Clause 12.7 addresses possible future changes to the law in favour of Indigenous rights. It provides that the parties to the Option Agreement will comply with the law as enacted.

Clause 12.8 requires any changes to this Option Agreement to be in writing signed by both parties. This avoids confusion over the terms of the agreement and prevents a party arguing that an agreement was varied orally.

Clause 12.9 specifies that the validity of the Option Agreement as a whole and of its individual clauses is not affected by the invalidity of any clause, unless that invalidity has an impact on any other clause.

Amend clause 12.10 to state the appropriate governing law for the Option Agreement and the place where possible litigation should be conducted if the parties fail to resolve any conflict under clause 11. This is particularly important if the Option Agreement is between people in different States or different countries where laws may vary.

SIGNING THE AGREEMENT

If you are an individual, sign your name and write in the date of signing where indicated at the bottom of the agreement. This is sometimes called "executing" the agreement.

If a company or association rather than an individual is a party to the agreement, the organisation's rules and relevant laws determine who is authorised (for example a director, a secretary), and how many authorised signatories (for example two directors, or a director and a secretary) are required, to sign the agreement. It may also be necessary to stamp or "affix" the document with the company's or association's seal if this is required under its constitution or articles of association. In that situation, replace the existing wording "Signed for and on behalf of ..." as follows:

"The Common Seal of the [party] was fixed to this agreement ..."

If someone else is signing on behalf of either party as that party's agent, you should insert the following sentence into the signature section:

"I am the authorised agent for ..."



If any of the parties is under the age of 18, that party's parent or legal guardian needs to sign the agreement "on behalf" of the child. This does not mean that the parent or legal guardian becomes a party to the agreement in the parent's or legal guardian's own right.

If there is a change to the agreement at the last minute before signing, you can either type up a new agreement, or make the change in handwriting and have each party initial next to the change before signing at the bottom of the agreement. You may also wish to initial each page in order to make sure no new pages can be inserted after you have signed, but this is not strictly necessary.

KEEP RECORDS OF YOUR AGREEMENT

Signing the agreement is evidence that you agreed to its written terms. You will usually be bound to perform the agreement as it is written. For this reason it is a good idea to get the same number of identical originals of the agreement as there are parties to it and have all originals signed by all parties. Each party then keeps a fully signed copy. At the very least, however, make sure you have a copy of the original agreement so that you can remember what you have signed.

STAMP DUTY

Stamp duty is a tax which is enforced and collected by State and Territory governments on certain instruments (i.e. documents) and transactions relating to property such as partnership interests or shares, or in some cases, intellectual property such as copyright. You should check with the office of state revenue in your State or Territory as to what stamp duty, if any, may be payable on your document or transaction.

PURCHASE AGREEMENT – EXPLANATORY NOTES

Once the Producer exercises the Option, the parties must delete the words "Annexure 1" from the completed Purchase Agreement and sign the document. The parties may want to print a new copy. As the terms of the Purchase Agreement were agreed upon entering into the Option Agreement, the Purchase Agreement cannot be amended **unless** both parties agree to the changes. Once signed, the Purchase Agreement becomes a second agreement between the parties, separate from the Option Agreement.

GRANT OF RIGHTS (CLAUSE 1)

Clause 1 sets out the rights in relation to the Work which the Author grants the Producer in order to make the Film. The Producer is entitled to reproduce and adapt the Work in order to prepare treatments and synopses of the Film and to exploit the Film in all forms (such as film and video) and by all means of communication (such as cinema, television and the internet). The Producer also acquires merchandising rights in relation to the Film. In addition, the Producer has the right to use the name, approved likeness and approved biography of the Author in relation to the Film and especially in relation to marketing the Film.



Clause 1.1.k provides for subsidiary rights, being sequel and remake rights (i.e. the rights to make further films beyond the Film, based on the Work and the Film) as well as spin-off rights (which include the rights to make television versions of the Film such as series, serials, mini-series and tele-features).

Clause 1.1.l covers new technology rights. With the rapid developments in digital technology and communication networks, film and video is increasingly viewed and communicated to the public via a computer database or the internet rather than the traditional exhibition or broadcast platforms. The Film may be incorporated into a multimedia project stored either in a CD ROM format or on-line. Accordingly, new technology rights (also called new media, multimedia, digital technology or electronic publishing rights) are very valuable rights for low budget projects as they provide a viable alternative or additional distribution platforms.

Subsidiary rights and new technology rights are a continual source of contention between writer and producer associations. Whether the Author grants such rights to the Producer will depend on the nature and budget of the project as well as the requirements of the Producer's financiers. Accordingly, the Producer must be aware of the financiers' requirements at the start of the negotiating process. For example, Screen Australia generally requires that the producer acquire merchandising, sequel, stage, novelisation and new technology rights in a work.

The parties should carefully examine the rights granted under clause 1.1 and delete any right which the Author does not want to grant or which the Producer does not want to acquire.

The purchase price under clause 3 will depend on the extent of the rights granted under the Purchase Agreement (see above). In particular, if the Author grants new technology rights, the Producer should consider offering the Author a percentage of profits received from this form of exploitation.

Clauses 1.2 and 1.3 concern the rights that the Author retains (or reserves) by in relation to the Work. The Author retains rights including the right to publish (or republish) the Work and to adapt the Work for stage and radio. Clause 1.3 restricts the Author from exercising such rights for a particular period (usually 3 to 5 years). The reasoning for these restrictions is to prevent the release of, for example, a play with the same name as the Film, which arguably could cause confusion or competition with the Film in the marketplace.

Publication rights

If the Author wishes to publish a novel of the Work during this restricted period, clause 1.3 should be amended to reflect this. Such a publication can be in the Producer's interest as it can further promote the Film. If the Work is not already published, this would allow the Author to publish the Work in book (or volume) form within the agreed number of years from the first release of the Film, and also to retain all subsidiary rights in relation to that publication. In this context, subsidiary rights are the rights to include the



Work in anthologies, to serialise the Work in newspapers and magazines, to have the Work translated and to reproduce the Work on cassette or CD.

COLLECTING SOCIETIES (CLAUSE 2)

Clause 2 ensures that the Author receives any payment owed. The *Copyright Act 1968* (Cth) has an equitable remuneration scheme for copying by educational institutions and government under which copyright owners of scripts in films or television shows are compensated for use of the work by educational institutions and governments. This scheme is administered by Screenrights. If screenwriters transfer their future educational, government and communication copying rights to Australian Writers' Guild Authorship Collecting Society Ltd (**AWGACS**), AWGACS can register, collect and distribute the equitable remuneration to the screenwriter.

AWGACS was established by the Australian Writers' Guild in 1996 as a non-profit collecting society, which registers, collects and distributes authorship monies collected by European collecting societies, to members, who are Australian and New Zealand scriptwriters of film and television. This includes European statutory monies conferred on the author of a script by the national legislation of European countries such as France, Germany, Switzerland, Holland and the United Kingdom. Statutory monies are collected for private copying (a levy collected by some European collecting societies for every blank video cassette tape sold), cable retransmission of free-to-air television, copying done by educational institutions, and video rental and lending.

PAYMENT (CLAUSE 3)

The Producer must pay the Author the agreed price (**Purchase Price**) to acquire the rights to make the Film. This usually comprises two elements: (1) the upfront fee; and (2) a share of the Producer's net profits once the Film has been distributed. Parties should proceed with caution in relation to this second head of remuneration, because very few Australian films ever make a net profit.

Generally, the upfront purchase price is calculated as a percentage of the total production budget for the Film. 2% to 3% tends to be the norm, but this can vary depending on the reputation of the Author and the popularity of the Work. The Australian Society of Authors recommends 2.5% of budget. Clause 3.1 has a mechanism that guarantees a minimum purchase price to the Author if at the time of signing the Purchase Agreement the Producer is uncertain what the total budget figure is.

The share of net profits awarded to the Author is usually 5%. The Australian Society of Authors suggests that the Author should aim for a percentage of the Producer's Gross Receipts (as defined in Schedule A) of 2.5%.

The Purchase Price under clause 3.1 is paid in two instalments: (1) an amount on signing the Purchase Agreement; and (2) the balance on commencement of principal photography, which is usually when the Producer starts to receive money from investors.



GOODS AND SERVICES TAX (CLAUSE 4)

The parties must consider their obligations with respect to taxation and other statutory fees and charges.

The Goods and Services Tax (**GST**) is a general tax on goods and services supplied in Australia. Most supplies for arts businesses made for "consideration" (eg. money or payment in kind) will be subject to GST. The clause in the agreement provides that payments are *exclusive* of GST. If a party has to pay GST, that party can add the GST amount to the amount payable under the agreement. If this does not suit your situation, you need to consider an alternative clause.

You should obtain specific professional advice on your GST and tax position and obligations under the agreement and generally.

For more information contact the Australian Taxation Office on 13 28 66 or visit the website www.ato.gov.au. In addition, the Australia Council for the Arts has published *Artefacts: the Arts and Tax - a practical tax workbook for the arts sector* which can be downloaded free from the Australia Council website www.ozco.gov.au.

WARRANTIES (CLAUSE 5)

See the Explanatory notes for the Option Agreement under this heading.

Clause 5.1.h imposes a general requirement on the Author that the Author does all things necessary to give effect to the rights granted to the Producer. For example, the Author may have to register the Work for copyright protection in some countries.

INDEMNITY (CLAUSE 6)

The effect of clause 6 is to make the Author liable to the Producer if a third party takes any legal action against the Producer as a result of a breach of any of the warranties given by the Author under clause 5. The Producer is entitled to be reimbursed for any loss actually and reasonably suffered as a result.

PRODUCER'S STATEMENT AND AUTHOR'S ACCESS TO ACCOUNTS (CLAUSES 7 AND 8)

Clauses 7 and 8 allow the Author access to the statements detailing the Producer's Net Profits and the ability to inspect relevant accounts of the Producer. The purpose of those clauses is to assist the Author determine any share of net profits the Author is entitled to under clause 3.3.

AUTHOR'S ACCESS TO PRODUCTION (CLAUSE 9)

Clause 9 provides for certain rights of the Author in relation to the production and distribution of the Film. Under clause 9.4, the Producer will use the Producer's reasonable efforts to arrange for the Producer's distributors to invite the Author to the Australian premiere of the Film. Although such a clause is common in agreements for



the purchase of film rights, the parties may wish to delete it depending on the particular transaction.

RIGHT TO ASSIGN AND ENCUMBRANCE OF RIGHTS (CLAUSE 10)

See the Explanatory notes for the Option Agreement under this heading (clause 6).

CREDIT (CLAUSE 11)

See the Explanatory notes for the Option Agreement under the heading "Credit" and "Moral Rights" (clauses 8 and 9), in particular concerning the moral right of attribution.

Importantly, the Producer is under no obligation to make a film based on the Work. However, if the Producer does make the Film, the Producer is obliged to attribute the Author on every copy of the Film delivered to distributors and licensees and in all major paid advertising. Clause 11.1.a details the size, placement and description of the credit. Under clause 11.5, the Producer is also required to use the Producer's best endeavours to ensure that distributors and licensees similarly credit the Author.

Clause 11.3 limits the Producer's obligation to credit in relation to paid advertising so that it relates only to advertisements for the theatrical exhibition of the Film within 5 years of the release of the Film.

If the Producer fails to credit the Author as agreed in clause 11, and the failure is not within the exemption under clause 11.6 (i.e. if the failure to credit is due to the Producer's fault), the Author's only remedy will be damages. The Author is not entitled to seek an injunction (i.e. a court order) which could halt the distribution of the Film.

If there is a dispute and the Author is a member of the Australian Writers' Guild the matter can be referred to the Credit Arbitration Committee of that organisation. Otherwise, the disputes clause (clause 15) will apply.

REVERSION OF RIGHTS (CLAUSE 12)

The Author is able to reacquire all rights granted under the Purchase Agreement if principal photography of the Film has not commenced within 5 years from the date of the Purchase Agreement. As a result of clause 12.1, the rights granted to the Producer under clause 1 will revert to the Author.

Under clause 12.4, the reversion of the Rights to the Author is subject to the rights of any third party. For example, if a third party financier, such as Screen Australia, has invested in the Film, the Author agrees to assume all obligations which the Producer has undertaken to that funding body. If, however, the Producer has funded the Film privately, the clause needs to be amended to set out a reimbursement of expenses and perhaps some fee to the Producer.

MAINTENANCE, PERFECTION AND PROTECTION OF COPYRIGHT (CLAUSE 13)

Clause 13.1 provides that the Author must maintain the copyright in the Work.

Under clause 13.2, the Author must take action to protect, vest or confirm the Rights granted to the Producer under the Purchase Agreement, but the Producer is allowed to



complete and sign documents on behalf of the Author for the purpose of protecting, vesting or confirming the Rights to the Producer.

MORAL RIGHTS (CLAUSE 14)

See the Explanatory Notes for the Option Agreement under the headings "Credit" and "Moral Rights" (clauses 8 and 9)

DISPUTES (CLAUSE 15)

It is almost never worth going to court to resolve a dispute, but not every problem can be solved easily. Clause 15 provides that a party which wants to access the dispute resolution procedure in the contract must first send a written notice of the dispute to each other party. This starts a timetable for resolving the dispute. The parties must make a good faith effort to sort out their dispute themselves, but if that isn't successful must then attend a mediation arranged through the Arts Law mediation service (at least one party must subscribe to access this service). Compared to litigation and arbitration, mediation is an informal and less expensive dispute resolution process, in which an independent person helps the parties in conflict to formulate their own solution. For more information see Arts Law's information sheet: [Mediation and the Arts Law Mediation Service](#).

The Arts Law mediation service expects that the parties will be able to agree on the person to be appointed as the mediator. If however that is not possible, the contract provides that the Arts Law Centre will appoint a mediator. Instead of the Arts Law Centre, the parties may wish to nominate another independent body within their industry such as Screen Producers Association of Australia or Screen Australia. Only after the parties have attempted mediation, can the dispute be the subject of court proceedings.

REMEDIES FOR BREACH (CLAUSE 16)

Clause 16 specifies the remedies available to each party in the event of a breach of the Purchase Agreement.

GENERAL PROVISIONS (CLAUSE 17)

See the Explanatory Notes for the Option Agreement under this heading (clause 12).

SIGNING THE AGREEMENT

See the Explanatory Notes for the Option Agreement under this heading.

KEEP RECORDS OF YOUR AGREEMENT

See the Explanatory Notes for the Option Agreement under this heading.

STAMP DUTY

See the Explanatory Notes for the Option Agreement under this heading.

