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DEPARTMENT OF THE ENVIRONMENT, WATER, HERITAGE AND THE ARTS

Minister Garrett (Decision)
 cc: Secretary, Deputy Secretary
 through: FAS(CD)

Brief No: C08/23892
 Division/Agency: CD
 Public Affairs Consulted: Yes

MEDIA ENTERTAINMENT AND ARTS ALLIANCE CONCERNS WITH FOREIGN ACTOR CERTIFICATION GUIDELINES

Purpose: For you to write to the Media Entertainment and Arts Alliance (MEAA) indicating your support for MEAA and the Department meeting to resolve differing views on the application of the *Guidelines on the Entry into Australia of Foreign Actors for the Purpose of Employment in Film and Television Productions* (the Guidelines).

Background: MEAA has written to you twice in recent months about concerns with the Department's application of the Guidelines. On 26 May 2008 (C08/11735) it wrote concerning its objection to certification of a foreign actor and most recently on 5 September 2008 (C08/23892) concerning its disagreement with the Department's interpretation on what forms of assistance would constitute government subsidisation of a production.

Issues/ Sensitivities: MEAA is a strong advocate of a rigid interpretation and application of the Guidelines in all cases. MEAA has obtained legal advice supporting its view of what constitutes a government subsidised production. s42

s42

The Guidelines were drafted in the early 1990s and have not been substantively updated. Since then the Australian film and television industry has experienced many significant economic and technological changes which have led to changes in the way in which films are financed and made. A greater range of production genres not explicitly covered by the Guidelines (eg documentaries, reality programs, etc) are now being made and in many cases Australian producers are seeking to import foreign actors to present, host or otherwise appear in them. There have also been significant changes to the nature of Government assistance (eg introduction of the Producer, Location and PDV Offsets, phase out of 10B/10BA schemes, etc).

The Department believes the Guidelines need to be reviewed to provide greater clarity on the treatment of foreign actors seeking to enter Australia to perform and appear in film and television productions. We have informally raised this idea with MEAA which has acknowledged the Guidelines would benefit from greater clarity in a number of areas.

In any review of the Guidelines, it would be essential to ensure that they operate in a manner which is consistent with the Government's policy intent of supporting and encouraging a sustainable industry, increased private investment in Australian film and television productions and the provision of opportunities for Australian actors and crew to secure employment. The Guidelines should also recognise the changed global environment in which the Australian film industry now sits while continuing to comply with the requirements of the Migration Regulations.

As a first step, the Department proposes to meet MEAA and commence a process of reviewing, and where necessary revising, the Guidelines. This process would also involve consultation with other relevant stakeholders such as the Screen Producers Association of Australia, the

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Department of Immigration and Citizenship (DIAC) and Screen Australia. A summary of the sorts of provisions in the Guidelines that should be reviewed is at Attachment A.

To initiate the process we propose that in your response to MEAA's letter of 5 September 2008 you indicate that you have asked the Department to contact MEAA and work through and seek to resolve the differing interpretations of the Guidelines. A letter to this effect is at Attachment B.

The Department will separately approach other relevant stakeholders to provide them with the opportunity of contributing to the review.

We will brief you on any proposed amendments to the Guidelines that emerge as a result of this consultative process.


MEAA would also like to meet with you. We suggest this might be best left until after the Department attempts to reach agreement with MEAA on revisions to the Guidelines.

Recommendation/s: That you:

- | | |
|---|---------------------------|
| 1. agree the Department initiate a process to review and revise the Guidelines as necessary | 1. Approved/ Not approved |
| 2. sign the letter to MEAA at <u>Attachment B</u> | 2. Signed/ Not signed |

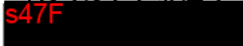
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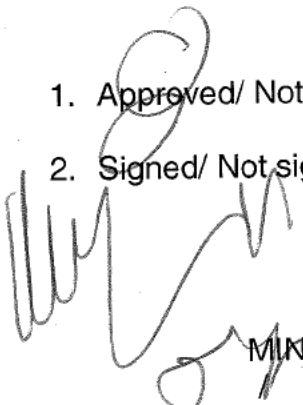
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Consultation: Legal Group, MEAA, DIAC

Attachments: A Summary of provisions in the Guidelines for review
 B Letter to MEAA

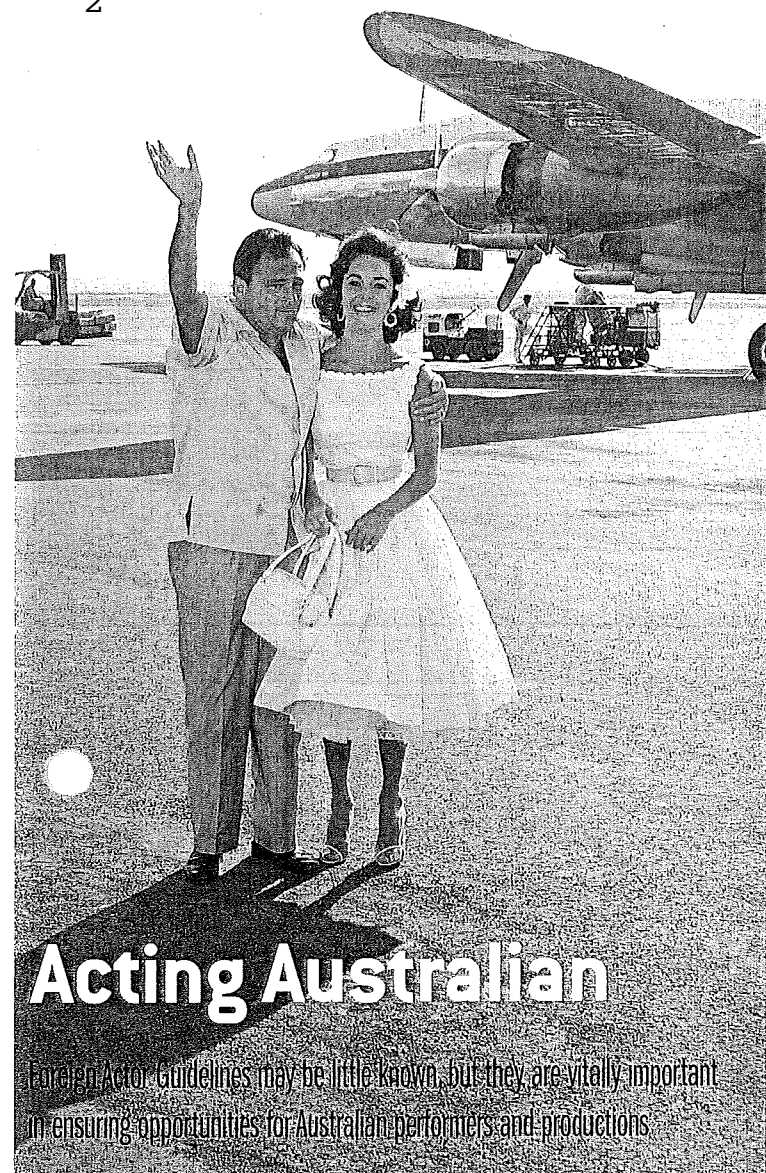
SUMMARY OF PROVISIONS IN THE GUIDELINES FOR REVIEW

Current provisions in the *Guidelines on the Entry into Australia of Foreign Actors for the Purpose of Employment in Film and Television Productions* that would be reviewed include:

1. **Scope of the Guidelines** – The Guidelines currently state that they apply to feature films, telemovies and miniseries. They do not indicate whether the Guidelines do/do not apply to other production genres including documentaries, reality programs, variety programs and so on. This has caused some confusion.
2. **Definition of “government subsidised”** – The Migration Regulations provide that film and television productions subsidised by government must meet the “Australian content criteria” set out in the Guidelines. The current definition makes reference to generic forms of support (eg investment, loans, etc) and to some now redundant forms of support (ie 10B scheme). There are two elements to this:
 - (i) a general tidying up of the definition to reflect changed forms of government assistance, which should be fairly straightforward.
 - (ii) agreement on what is and is not a form of government subsidy. This is a more complex issue that was raised in MEAA’s letter of 5 September 2008.
 - MEAA maintains that tax offsets such as the Producer Offset are a form of government subsidy and that any production accessing them should be treated as subsidised. Under the Migration Regulations all government subsidised productions are required to satisfy the requirements of the Australian content criteria set out in the Guidelines.
 - The Australian content criteria are designed to ensure that Australian actors have a reasonable opportunity to appear in local Australian productions and limit the number of foreign actors who can perform in lead, supporting and cameo roles in such productions to usually one, sometimes two, and in very rare cases three. Prior to the introduction of the Producer Offset, local productions tended to access a combination of direct government funding from the Film Finance Corporation, which meant they were government subsidised, coupled with the 10BA tax incentive.
 - Over time MEAA expects that with the uptake of the Producer Offset there will be declining levels of direct government support to Australian film and television productions. MEAA is therefore concerned that if the Producer Offset is not considered to be government subsidy then local productions relying on a combination of only private investment and the Producer Offset will avoid being bound by the Guidelines and the Australian content criteria for subsidised productions.
 - However, if MEAA’s interpretation of “subsidy” is adopted, all tax offsets would be similarly treated. This would mean productions with a reasonable expectation of accessing the Location Offset would also be required to comply with the Australian content criteria for subsidised productions. As the Location Offset is seeking to attract large budget offshore productions which usually employ more foreign actors in principal and supporting roles than the Australian content criteria would allow, the Department believes such an interpretation would significantly reduce the attraction of Australia as a destination for large budget offshore productions.

3. **Levels of production budgets set out in the Australian content criteria** – Prescribed production budgets set out in the Guidelines are intended to provide some assistance in determining the appropriate number of foreign actors who might be employed to work on subsidised productions. Film production budgets have grown considerably since the Guidelines were adopted so the levels of production budget, if still considered a useful indicator, should be reviewed to reflect current practices.
4. **Possible anomalies in the Migration Regulations** – The Regulations currently provide that the level of foreign investment in a non-government subsidised production must be greater than foreign actor fees for a certificate to be issued. We are aware of some instances of non-subsidised productions which are fully financed by local private investment and have no foreign investment being unable to apply for foreign actor certificates because the Migration Regulations do not contemplate this situation. In these circumstances, even when MEAA supports import of a foreign actor, we understand DIAC is required to issue visas under another visa classification.

The review will ensure any revisions to the Guidelines comply with the requirements of the Migration Regulations.



Mike Todd and Elizabeth Taylor
arrive at Mascot Airport, 1957

Acting Australian

Foreign Actor Guidelines may be little known, but they are vitally important in ensuring opportunities for Australian performers and productions.

On any day of the week it is likely that out of every 10 actors, nine will not be employed in their career of choice. Unemployment among performers is one of the highest in our economy. In some ways this is the nature of the beast – it is essential that an over-supplied market be maintained if the industry is to produce actors for productions with such diverse requirements as *Neighbours*, *Romulus*, *My Father*, *Australia* and *Lucky Miles*. But it means that each and every work opportunity is critical in keeping actors off the bread line and, ultimately, from seeking other careers. One of the key regulations that maintains these opportunities for actor members of Equity – particularly in the offshore financed production sector – are the little known but vitally important Guidelines on the Entry into Australia of Foreign Actors for the Purpose of Employment. These guidelines – housed by the Department of the Environment, Water, Heritage and the Arts (DEWHA) – detail the circumstances under which productions may employ non-Australian screen performers. Under the Federal Migration Regulations, every producer seeking to import an actor must meet these guidelines. To meet the guidelines they must consult with the Alliance to put forward the case as to why an overseas actor has been provided an opportunity to work in Australia and an Australian has not. The guidelines include rules which ensure that, on government-subsidised productions, foreign investment is significantly high before a foreign actor can be engaged; that traditional Australians play traditional Australian characters; and that the casting of leading and major supporting roles accurately reflects the Australian characters portrayed. Producers need to undertake a comprehensive casting process to demonstrate that they have sought, and for some reason been unable to find, the right Australian actor for a role. The Alliance polices these

casting guidelines vigorously to ensure that productions have exhausted all Australian possibilities before resorting to a foreign actor. The guidelines are a part of the Commonwealth's broader immigration policy, which ensures that there is a genuine Net Employment Benefit for the Australian Entertainment industry when importing foreign personnel – from film and television actors to crew members, musicians, dancers and stand-up comedians. The Alliance is consulted on the entry of every foreign entertainment industry worker, and works hard to ensure that employment opportunities are afforded to our crew and performers, and that productions don't simply fly in, shoot and leave the country. The Foreign Actor Guidelines, which have been in place since 1991, were specifically developed to help the government achieve its cultural objectives in supporting the film and television production industry. That is, they ensure that "Australian industry personnel are given a fair chance in securing employment in film and television productions shot in Australia, and that Australian voices are heard in Australian productions".

However, in recent correspondence with the Alliance, the Minister for the Arts, Peter Garrett, has raised the possibility of reassessing the application of the foreign actor certification guidelines, in the light of the new Producer Offset tax rebate.

The Alliance believes the guidelines have been effective in ensuring Australian actors are provided with opportunities to work and that Australian faces and voices are seen in Australian film and television programs. In fact, the Alliance believes there are compelling reasons to tighten the guidelines to ensure that Australians continue to be afforded opportunities to work into the future. One of the key reasons for this is the potential rise of foreign producers attempting to exploit the new Producer Offset by re-badging their productions as Australian and seeking to use mostly foreign actors and crew. Another is the clear expectation that Australian taxpayers receive a cultural dividend from the money they provide to support the production industry.

One issue that requires clarity under the guidelines is wording to make it more appropriate to the new form of delivery of government support. The guidelines currently apply to both government-subsidised and non-government subsidised production. The Alliance believes that government subsidy refers to all government support, be it direct support (as in production funding) or indirect support (as through a tax offset). However, there are some who believe otherwise and are looking to use this as a loophole to avoid casting Australians. The Alliance takes the view that if there is any differentiation to be made, in terms of how productions are treated, it should simply be between Australian and non-Australian productions – regardless of the method of delivery of government support. The Alliance will also be seeking to ensure that television commercials and new media are included in the guidelines – DEWHA has been excluding television commercials for some time now, despite Alliance's protestations – and that budget thresholds used to calculate the level of foreign investment are readjusted in the light of inflation and other factors.

During the coming months the Alliance will make the case to government that the Foreign Actor Guidelines are needed now more than ever. They should be strengthened, not watered down, to ensure that Australian actors continue to be cast in all productions in Australia. In so doing, the guidelines and the Alliance will be able to continue to assist actors to stay in their chosen careers and earn a decent living.

The current guidelines can be found at:
www.arts.gov.au/film/film_foreign_actors_for_film_or_television
The Alliance's importation consultation process can be accessed at:
www.alliance.org.au/imports/

Drew MacRae is currently the Alliance's federal policy officer

