



New Zealand
FILM COMMISSION



Te Tumu Whakaata Taonga

Te Tumu Whakaata Taonga o Aotearoa

The New Zealand Film Commission

Terms of Trade

December 2018 v 1.0

This document sets out the terms under which Te Tumu Whakaata Taonga The New Zealand Film Commission (the NZFC) does business with feature film producers. It is important you read and understand this document before you apply for feature film production financing.

The Terms of Trade details:

- the NZFC-related costs and requirements you will have to account for in your planning and include in any application for financing;
 - information on the NZFC contracting process; and
 - the NZFC's expectations when we make an investment in a film.
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Introduction

Te Tumu Whakaata Taonga The New Zealand Film Commission (the NZFC) invests in films as part of our contribution to a successful screen industry. We have a responsibility to invest taxpayers' money wisely, which is why we require film makers to meet certain terms and conditions.

This document sets out our Terms of Trade. It outlines the core terms on which the NZFC provides discretionary production financing.

Successful applicants for NZFC financing will be required to enter into a legally binding financing agreement with the NZFC. The NZFC Financing Agreement will reflect both these Terms of Trade and any project-specific conditions for the NZFC's investment.

Disclaimer

The NZFC may vary the Terms of Trade and Feature Film Production Financing Guidelines (Production Guidelines) at any time. When we receive an application, the Terms of Trade and Production Guidelines that are current at the time of receiving the application will apply.

Neither the Terms of Trade nor the Production Guidelines constitute an offer capable of acceptance by any person. Neither document creates any form of contractual, quasi-contractual, restitutionary or promissory estoppel rights, or rights based on similar legal or equitable grounds, whether implied or otherwise.

Please note: These Terms of Trade do not apply to the NZFC's actions in its capacity as:

- a) The administrator of the New Zealand Screen Production Grant; or
- b) The competent authority for the purposes of certifying official co-productions.

Contact our Production Executive who will be able to connect you to the right person in our team. Email production@nzfilm.co.nz or phone 0800 659 754.

CHAPTER 1: PRODUCTION REQUIREMENTS

This chapter sets out the NZFC-related costs and requirements you will have to account for in your planning and include in any application for financing.

Budget

<u>Development Costs</u> <u>Delivery Items</u> -NZFC -Distributor / Sales Agent / Broadcaster <u>Test Screening Costs</u> <u>Closed Captioning</u> <u>Marketing and Publicity</u> <u>Contingency</u> <u>Overheads and Fees</u>	<u>Rights Acquisition</u> <u>Legal Fees</u> <u>Financing Fees</u> -NZSPG Audit Fees <u>Insurance</u> <u>Bond / Completion Guarantor Requirements</u> <u>Foreign Currency Hedging</u> <u>Reallocation of Budget Items</u> <u>Budget Underspend</u>
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Production Schedule

<u>Test Screening</u>

Deliverables

Finance Plan

<u>Nature of NZFC Investment</u> <u>Private Investment</u> <u>New Zealand Screen Production Grant</u> <u>(NZSPG)</u>	<u>Market Money</u> <u>In-Kind Deals / Sponsorship</u> <u>Deferrals</u> <u>Tax</u>
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Recoupment

<u>NZSPG Films</u> <u>Non-NZSPG Films</u>	<u>NZSPG Overage</u> <u>Collection</u>
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Budget

It is important that the following items are appropriately covered in your production budget.

Development Costs

All development funding is provided as a grant as from 17 November 2018. This is not retroactive. If this funding is incorporated into the production budget as a separate line item, it can be attributed as producer equity in the recoupment schedule. It may have a position in the waterfall pari-passu with NZFC equity, but is not able to have a premium.

Historically, NZFC has funded development as a loan. In these cases the development loan and any interest and/or premium will be repayable no later than the first day of principal photography. Our current practice for the repayment of any NZFC development loan is to charge interest of 5% per annum, or a flat rate of 10% if the development loan has exceeded 12 months.

In the NZFC Financing Agreement we require a warranty from the production company that any development loan and/ or grant/ was spent in accordance with the Development Loan Agreement.

Any actual monies paid to non-related parties for development costs of the producer that have not been covered by development financing to date may also be included in the budget. Similar to grant development funding it may have a position in the waterfall pari-passu with NZFC equity, but may not have a premium or interest cost.

Delivery Items

- **Delivery items required by the NZFC**

A comprehensive list of deliverables the NZFC requires as an investor is set out on page 10-11. The cost of creating these materials needs to be included in the budget.

- **Delivery items required by the distributor / sales agent / broadcaster:** All costs for delivery items required by your distributor/sales agent/broadcaster needs to be included in the budget (except for any items they agree to pay for). Your sales agent, distributor and broadcaster will generally require the completed film to be provided in particular formats, along with publicity materials and documentation. You must review your sales agency agreement, distribution agreement, and/or broadcaster licence very carefully to ensure you have budgeted for and can deliver

all required items (including documentation). If you do not have a sales agent or distributor attached at the time of application you still need to budget for what these items are likely to cost when you attach market partners at a later date.

- **Maori/English Translations:** Translations should be budgeted to ensure that authentic essence of the film is captured and also for sales and distribution in other countries.

Closed Captioning

Closed Captioning is a requirement for all films with NZFC investment. Closed captioning is also now a requirement for streaming distribution. Consequently, you should budget approximately \$2,000 to cover these costs.

Marketing and Publicity

At a minimum, your marketing and publicity budget should include:

- unit publicist;
- stills photographer;
- cost of the trailer;
- key art e.g. poster design; and
- EPK/DVD footage.

However, if the distributor or sales agent is paying for the trailer and key art, and you are able to provide us with written confirmation of this from the distributor or sales agent, then you do not need to include these items in your budget.

The NZFC also offers financial assistance for the domestic distribution of New Zealand feature films in New Zealand. These grants are normally applied for by the film's distributor when the film is completed. Please refer to our website for more information

<http://www.nzfilm.co.nz/distribution/new-zealand/film-distribution-grants>.

Contingency

The NZFC and any completion guarantor will need to approve the level of contingency allowed in the budget. The industry norm for contingency is 10 % of the below-the-line budget.

Overheads and Fees

Production company overheads and above-the-line fees (e.g. script development, writers, directors, producers, and key cast) should be relative to the film's budget, be consistent with

industry norms, and should reflect the level of experience for relevant personnel. If your film qualifies to access the NZSPG, please ensure your budget complies with the NZSPG requirements, particularly in regards to the caps on qualifying expenditure around financing costs and any fees related to financing the film.

Please refer to our website for more information <http://www.nzfilm.co.nz/funding/feature-films/production-funding/new-zealand-screen-production-grant>

Rights Acquisition

Any music and/or footage clearance fees, and any fees associated with the use of underlying materials, needs to be budgeted for. All rights should be cleared and paid for worldwide, in all media, in perpetuity, and for out-of-context use.

Legal Fees

You need to make adequate provision in the budget for the production's legal fees (generally no less than 2% of the production budget). This needs to cover the preparation and negotiation of Chain of Title documents and legal opinion, production contracts (e.g. cast and crew contracts, music licenses, footage licenses), leading and managing the closing process, negotiating the terms of the NZFC Financing Agreement and ancillary contracts on the producer's behalf for closing, and providing general legal advice to the production during production and delivery including negotiation of market agreements. Given the nature of the work involved, we recommend you engage an entertainment lawyer for specialised advice.

Financing Fees

The budget must include provision for interest and any legal and/or administration fees charged by your NZSPG lender or any other lender.

NZSPG Audit Fees

For NZSPG films, you will need an audit. You should allow at least \$15,000 in your budget for this. If you are seeking a Provisional NZSPG Certificate for your NZSPG Lender, the Lender will usually require an auditor's expenditure certificate, which may cost an additional \$1,500-\$3,000.

Insurance

All films with NZFC investment require insurance that is relative to the risks and the budget of the film. The cost of these insurances must be covered in the film's budget.

Each certificate of insurance must include:

- Wording the NZFC as a Loss Payee or Additional Insured, as follows: “*The New Zealand Film Commission and its officers, agents, directors, employees, successors and assignees*”
- Wording to ensure the policy will not be changed without prior notice, as follows: “*This policy shall not be cancelled, terminated or modified during the period of coverage unless thirty (30) days prior written notice is given to the New Zealand Film Commission*”.

For films with budgets of \$1 million and above, comprehensive insurance is required, as follows.

- General film production package, including:
 - content media cover (film negative and faulty camera stock and processing or digital equivalent);
 - film producers’ indemnity;
 - extra expense;
 - money;
 - motor vehicles;
 - miscellaneous equipment;
 - costumes, sets and wardrobe (except where not applicable – e.g. documentary with no drama element);
 - employers’ liability (if applicable); and
 - travel insurance (if applicable).
- Key Elements (if applicable)
- Public liability and statutory liability (during film production)
- Errors and Omissions (E&O) including title clearance and coverage for plagiarism and defamation – with a term and amounts (deductibles, claim aggregates) that satisfy the requirements of your sales agent and/or distributor. You will need to consult with the NZFC about when coverage is required to start as it will be different for different projects. The NZFC generally requires that E&O coverage starts from the first day of principal photography, or on delivery, and in either case continues at least three years after the earliest delivery date (with an option to renew for one year). Coverage amounts should be equivalent to at least AUD\$1,000,000 per claim and AUD\$3,000,000 in aggregate, with deductibles of equivalent to AUD\$10,000 per claim.

For lower-budget features and documentaries:

- A scaled-down schedule of insurances that is appropriate and proportional to the risk and the budget, as agreed with the NZFC.

Bond / Completion Guarantor Requirements

The NZFC requires an independent completion guarantee (or 'bond') for all films with NZFC investment of \$500,000 or more, and/ or budgets over \$1 million. A full letter of offer must be included in every production funding application, or else it cannot be considered. The cost of engaging the completion guarantor must be covered in the budget.

Foreign Currency Hedging

Where the budget or finance plan contains foreign currency items, we expect you to take out forward cover, if an exchange risk exists. The NZFC will not cover foreign exchange shortfalls.

Reallocation of Budget Items

The NZFC Financing Agreement contains restrictions on the reallocation of budget items, as follows.

The producer may reallocate below-the-line items (without the need for consent) to meet the requirements of production, provided:

- each reallocation does not exceed 1% of the total budgeted cost; and
- such reallocations do not affect the approved cash flow or reduce the estimated QNZPE (in the case of NZSPG films).

There must be no reallocation (unless the NZFC and completion guarantor consent) of:

- above-the-line costs;
- company overheads; and
- delivery material costs.

Budget Underspend

The NZFC generally expects any underspend of the films budget to be allocated 50% to the producer and 50% to the recoupment waterfall. This may differ if a NZSPG lender is involved.

Production Schedule

The production schedule must set out realistic timings for the various stages of production, from closing and pre-production, through to complete delivery.

Test Screening

- The parties will co-operate to organise and carry out a comprehensive test screening, at the NZFC's cost, and on terms approved by the NZFC. The results of the test screening programme will be available no less than 10 business days prior to the due date for final cut, as set out in the approved production schedule. The results will be evaluated by the parties, and taken into account in the event that there is a substantial disagreement between the NZFC and the producer with respect to elements of the fine cut.
- The NZFC will pay for any test screening but the production has to factor the cost of the DCP into the film's budget.

See the *Test Screening information sheet* for more detail.

Deliverables

NZFC investor materials (**this list may be updated prior to contracting**)

1. An inventory from the laboratory or post-production facility where all master materials are held.
2. Confirmation that all final digital intermediate data, final audio print masters, stems are stored on LTO tape held at a laboratory or post-production facility, and that an access letter is in place in respect of the LTO tape.
3. Evidence showing that Errors and Omissions Insurance is in place (including an insurance certificate, copy of the insurance policy and receipt for premium payment) and is in accordance with the Errors and Omissions Insurance Requirements.
4. Access letter for each laboratory or post-production facility giving the NZFC access to feature, trailer and promotional (clips/teasers) masters (including LTO tape referred to in para 2 above).
5. Delivered to the NZFC on **hard drive** (with folders and files clearly labelled):
 - (a) 1 x HD Apple Pro Res 4.2.2 HQ of each of the feature film and the trailer, to be delivered in the original aspect ratio 10bit with 5.1 audio;
 - (b) 1 x H.264 HD QT original aspect of the feature film and the trailer with stereo audio;
 - (c) key stills: 10x TIFF and JPEG files of the top 10 publicity stills (captioned with titles and character names);
 - (d) stills: 10x TIFF and JPEG files of Behind-the-scenes stills (captioned with crew names and scene or location if applicable);

- (e) key art: Poster high res, layered poster art work, logos, title treatment, and all key promotion and online art work i.e. flyers, Facebook banners etc.;
 - (f) final shooting script;
 - (g) export script and DVD or digital file with burnt in TCIP used in the creation of the export script if available, including Maori/English translations to ensure authenticity in export where appropriate;
 - (h) press kit as a PDF and also as Word doc;
 - (i) electronic press kit which includes trailer(s) and selected scenes, in a format suitable for transmission;
 - (j) music cue sheet;
 - (k) closed caption files are required, and must be in sync with final delivered video masters;
 - (l) contact list for principal cast and crew;
 - (m) a copy of any legal opinion on chain of title documentation, and any additional chain of title documentation since production commenced including all licences (including music licences), releases etc. and principal cast and crew contracts, including composers;
 - (n) billing block: Final billing blocks (word doc) used for poster, video packaging, paid advertising, sales materials and trailers approved by all parties as well as any logos that the producer requires to be included;
 - (o) main titles and end credits (word doc): List of the main titles and end credits of the film, set out exactly as they appear on screen;
 - (p) statement of precise theatrical running time, original aspect ratio, producer, director, core cast members, company copyright, production company, and what the film was shot on;
 - (q) additional/alternate trailer and promotional clips and teasers, as available;
 - (r) signed Anti-Piracy Guidelines Agreement with completed screener log sheets attached (template at <http://www.nzfilm.co.nz/distribution/anti-piracy-guidelines>).
6. 1 x DVD and 1x Blu-ray copy of the Film (for NZFC viewing purposes).
 7. Hard copy posters x 3 of each version (as available).
 8. 1 x clone of the master DCP to be provided to the NZFC on its own hard drive, unencrypted or encrypted. If encrypted please advise the laboratory or post-production facility that can generate KDM when required.

Finance Plan

Your finance plan needs to include all sources of investment or financing being used to meet the film's budget. This may include other equity investments including private investment, loans to cash-flow the NZSPG and other elements (if applicable), market money (e.g. sales agent or distributor advance or minimum guarantee, and/or broadcaster licence fee), grants, any in-kind deals or sponsorships that contribute to the budgeted cost, any deferrals by cast or crew and any gap financing.

Generally speaking all elements of the finance plan must be paid or guaranteed at the time of financial close. The NZFC must approve the terms of all other investment or financing in any films we invest in.

Nature of NZFC Investment

The NZFC provides production financing as an equity investment, which means we will have a stake in the film and a recoupment and profit position for our investment.

Private Investment

The NZFC encourages private investment being made available to New Zealand productions. However, when seeking investment from the NZFC alongside independently-sourced private investment, it is important that we are comfortable with the terms of that investment.

If your finance plan includes other financiers, at the time you apply for production financing we would expect to see a letter of interest from those investors including the proposed terms on which they would be providing financing (e.g. equity investment, loan, grant) and any additional conditions of their financing.

For any productions with NZFC financing, we must approve the terms of all other investment in the production, including independently-sourced private investment.

It is generally acceptable that unrelated private investment plus a reasonable premium is to be recouped ahead of NZFC.

Please note that the NZFC requires that private investor finances are placed in full into the production account or a secure independent escrow account on financial close (i.e.

when the NZFC Financing Agreement and ancillary contracts are signed), or the producer must provide terms and evidence of an underwrite to be approved in advance by NZFC. You will need to budget for the costs associated with the set-up and administration of any escrow account.

Related party investment is not able to recoup ahead of NZFC and is not entitled to any premium. Related parties are any parties (or their companies, families and associates) that are receiving financial or other benefit from the production including fees, in-kind payments or credits.

New Zealand Screen Production Grant (NZSPG)

You may wish to seek financing of the anticipated NZSPG and you may include it in your finance plan to the extent that it is cashflowed. You may cash-flow the NZSPG from multiple sources. The NZFC requires approval over the party/parties cash-flowing any portion of the NZSPG, and the terms on which they will do so.

Market Money

Where your sales agent and/or distributor are offering a minimum guarantee or advance, this should be included in your finance plan. You should only include in the finance plan (and cash-flow arrangements) the net amounts being contributed towards the budget (for example, you should exclude any withholding tax being deducted from foreign sales advances or minimum guarantees). You should make arrangements to cash-flow to the production any portion of the minimum guarantee or advance that is not being paid on execution of the agency or distribution agreement. We may accept that minimum guarantees are paid in tranches and not cash-flowed where they are from a known entity or where the amount of the minimum guarantee is below \$50,000. The NZFC requires approval over the party/parties cash-flowing any portion of a minimum guarantee or advance, and the terms on which they will do so.

In-Kind Deals / Sponsorship

In-kind deals and sponsorship with a recoupment or profit position is to be no better than alongside (pari passu pro-rata) the NZFC equity recoupment position. . If you propose to attach a recoupment or profit position to such arrangements, they will need to be at arms-length and on commercially reasonable terms. We may require verification by way of secondary quotes for comparable goods and/or services, or other documentation, to support the stated value of such arrangements. All non-monetary transactions must be supported by contractual agreements recording the transaction and the value associated with it.

Deferrals

Wherever possible, we prefer that producers complete their finance plan for the film without deferrals. If you are proposing to use above the line fees or company overhead deferrals to close a budget gap, these must not exceed 30% of the line item. These will be treated as related party investment and cannot recoup ahead of NZFC.

Tax

Regardless of a film's size, it is likely that specialist tax advice will be required to ensure adequate planning for the relevant tax implications, particularly if your finance structure is complex, and/or if part of your production financing comes from offshore sources.

The two taxes that most commonly need factoring into your finance plan at an early stage are GST and withholding tax.

- a) GST: We expect the Special Purpose Vehicle (SPV) production company making the film to be GST registered from the outset. The NZFC's practice is to attach GST to its equity investment. We will require a valid tax invoice for each instalment of our investment. In some instances, offshore finance will not have GST attached. The production cash-flow will need to be prepared with this in mind.
- b) Withholding tax: Sales advances and distributor minimum guarantees sourced from offshore will usually be subject to a withholding tax. Currently the Australian withholding tax is 5%. In most other offshore jurisdictions this percentage will be higher. Your finance plan should be based on the net amount received, not the gross amount offered.

Recoupment

The recoupment structure for a film determines to whom, and in what order, film income is distributed, and it is subject to our approval.

We are committed to producers receiving a share of film income, balanced with our ability to earn income from investment in the film. Generally, we expect to recoup our investment and receive a share of any profit alongside other government funding and similar equity investors including related parties.

NZSPG Films

For NZSPG films, we recognise that the producer must be entitled to receive a share of the net receipts from the production that is generally commensurate with the expected value of the NZSPG. The producer's NZSPG equity will be equivalent to the value of the final NZSPG paid in respect of the film. Except for films with a more complex financial structure (see more below), we agree that the producer may:

- Receive film income equal to the producer's NZSPG equity pro-rata alongside our equity, and
- Have a pro-rata share of the investors' 50% share of net profit (reflecting the NZSPG equity, in addition to the separate producer share of net profit).

For films with more complex financial structures, the recoupment structure (including the position of the producer's NZSPG equity) will be negotiated on a case-by-case basis between the financiers and the producers. These films generally have some or all of the following characteristics:

- budgets in excess of \$6 million;
- international financing;
- other equity investors; and/or
- official co-productions.

For specific advice on NZSPG, please contact the Incentives Team at the NZFC.

Non-NZSPG Films

For films that are not eligible for the NZSPG, the NZFC will give the producer a 40% corridor of our recoupment position. Once all parties have recouped their investment and the film is in net profit, income will be shared as follows:

- 50% to the producer
- 50% to the investors pro-rata pari passu, in proportion to their respective equity investments (not including premiums).

NZSPG Overage

NZSPG overage is any amount remaining after repayment of any loan(s) used to cash-flow the NZSPG, including any fees or interest relating to the loan(s). It is a condition of any NZFC co-investment with NZSPG that the NZSPG overage will be paid as per the recoupment waterfall.

Collection

The NZFC requires that it or a professional third party collection agent be appointed to collect and distribute all income in relation to the film. Where the NZFC is appointed, we will act as collection agent in accordance with our Collection Terms. A copy is available on request from our Business Affairs team. The NZFC can act as collection agent worldwide, or just in relation to New Zealand and Australia. Where a professional third party collection agent is appointed (worldwide, or for the world excluding New Zealand and Australia), the NZFC must approve the collection agent and its terms, and will be a party to the collection agreement.

CHAPTER 2: CONTRACTING

This chapter sets out what is involved in contracting with the NZFC.

<u>Overview</u> <u>Documents</u> <u>Contracts</u> <u>Special Purpose Vehicle (SPV) Production Company</u> -Setting up a SPV -Winding up a SPV <u>Cash Flow & Drawdown Schedule</u> -NZFC Delivery Holdback -NZFC Legal Variations <u>Holdback</u> <u>Chain of Title and Opinion</u>	<u>Cast / Crew Contracts</u> <u>Provisional Certification</u> -Co-Production Certification -NZSPG Certification <u>Post Production Facility Access</u> <u>Letter</u> <u>Health and Safety Report</u> <u>Cost Reports and Balance Sheet</u> <u>Other Financial Contracts</u> -Other Investor Agreements -Loan/Facilities Agreements	<u>Completion Bond and Related Documents</u> <u>Security for our Investment</u> -Assignment of Copyright -General Security Agreement -Bank Account Deed <u>Contractual Clauses</u> -Credits -Monitoring / Reporting <u>Pre-Closing Advances</u>
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Contracting

Overview

Once the NZFC Board approve an investment in a film the NZFC will issue a letter of conditional offer for the producer's counter-signature. The offer is valid for four months. This letter will identify the conditions that apply to the investment including (but not limited to) the key people, the financial structure, the various approvals required, and a pre-closing document checklist. It will also identify any conditions specific to the film that need to be met prior to contractual close being able to commence – known as the pre-closing conditions. These are specific to each project and could include approval of a further draft of the script, confirmation of finance plan elements and terms or any chain of title issues outstanding. If these pre-closing conditions are not met within the specified time-frame then the NZFC offer will expire.

If the pre-closing conditions are met and all elements of the finance plan are confirmed, the closing process can begin. The NZFC will prepare a contract to record the terms of our investment in the film, based on our standard form agreements. This NZFC Financing Agreement will take the form of either a Production Financing Agreement (PFA) or an Interparty Agreement (IPA). These agreements generally contain the same provisions, but the IPA covers additional matters that are relevant when the financing structure is more complex and/or more parties are involved in financing the film.

When the NZFC decides to invest in a film, we will enter into formal contracts with the Special Purpose Vehicle (SPV) production company set up to produce the film. Generally, no production funding will be released by the NZFC until contracting is completed. The contracting stage ('closing') can take between six weeks to three months depending on the complexity of your financing and the number of parties involved. This time should be built into your production schedule. During this period, **we expect you and your legal team to lead the process** to ensure conditions are met and all required documents and information are provided so that the NZFC Financing Agreement and related contracts can be finalised and signed.

There are a number of background documents you will need to provide to the NZFC for review and approval. These generally relate to production matters, and are sourced or provided in the first instance by the producer.

In addition to the production documents required, there will be a number of contracts to be prepared, negotiated and signed by various parties, including the NZFC, the SPV production company, the other financiers involved in the project, the completion guarantor (if applicable) and any other parties (for example, the sales agent, distributor, broadcaster and/or production bank, among other possible parties). At the start of the closing process, each party (particularly the financiers and the completion guarantor, if applicable) will advise exactly what contracts they require, and the parties will establish who is responsible for preparing each contract.

The NZFC will need to review and approve all contracts - even contracts that are required by other financiers and that the NZFC is not party to.

Documents

As each project is unique, when we start the closing process for each film, we will issue a customised checklist outlining the documents that the NZFC requires. Each of these documents will

need to be reviewed and approved by the NZFC. As a result of our review, we may require changes to some of the documents provided. Note that other financiers may need different documents, so it is up to you and your legal team to formulate a complete checklist of documents required for closing that incorporates the requirements of each of your financiers.

Key documents the producer will need to provide or source are:

- final script (or treatment if a documentary);
- final budget;
- cash flow and drawdown schedule;
- production schedule;
- any cultural agreements or MOUs with Maori collaborators; Chain of Title and lawyer's COT opinion;
- cast/crew contracts;
- details of all insurances, including insurance certificates;
- provisional co-production certification (if applicable);
- provisional NZSPG certification (if applicable);
- post-production facility access letter;
- Health and Safety report;
- Cultural Plan and Reporting - for liaison, on set monitoring for reo/tikanga, translations and specialist advice; and
- up to date cost report and balance sheet with notes.

Contracts

As each project is unique, the contracts required for any given project will vary. When we start the closing process for each film, the various parties involved will advise exactly what contracts will be required, and which party is responsible for preparing each contract. However, most projects will require the following key contracts to be negotiated and signed alongside the NZFC Financing Agreement for the film's financial closing:

- other investor agreements (if not included in the primary financing agreement);
- loan/facility agreement (for cash-flowing of NZSPG and any market money);
- completion bond and related documents (e.g. Producer's/supervision deed, inducement letters, notices of assignment/deed of delivery and arbitration);
- bank account deed;
- security deeds;

- sales agency agreement;
- New Zealand or Australasian distribution agreement;
- broadcaster licence; and
- collection agreement/collection terms.

Special Purpose Vehicle (SPV) Production Company

Setting up a SPV

Once we make you a production offer, you will need to set up a limited liability company (often referred to as a 'special purpose vehicle' or SPV) whose sole activity is the production of the film. (This does not need to be in place during the application process).

The SPV must be:

- registered on the New Zealand Companies Register;
- trading in New Zealand; and
- have its central management and control in New Zealand.

All underlying film rights, including copyright and liabilities relating to the film, must be assigned to that company and we will enter into a financing agreement with that company.

The role of the SPV is to hold all of the contractual rights and intellectual property rights necessary to produce the film. A stand-alone, single purpose company structure is used to protect the production from the risk of third party liabilities that are not connected with the production, which could otherwise jeopardise the production and/or place the investors' finances at risk.

The person who is the main/lead individual producer (being the producer that the NZFC is primarily dealing with) must be a director of the SPV and must not be able to be replaced without prior written approval of the NZFC during production and up to two years following completion and delivery.

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Winding up the SPV

As part of the financing documentation, the SPV agrees to not assign or otherwise dispose of its rights or obligations without the NZFC's prior consent. However, the NZFC recognises that there is a compliance cost associated with maintaining the SPV indefinitely.

The NZFC generally has no objection in principle to allowing the SPV to transfer its rights and obligations in relation to a film to another company, and allowing the SPV to be closed down at any time from one year after complete delivery of the film.

Before transferring the rights and obligations, and *before* closing the SPV, the SPV must have the NZFC's prior written consent.

Where the NZFC gives its consent, that consent is given on behalf of the NZFC only. The SPV may have agreements with other parties, which place restrictions on, or require consent to, any transfer of rights and obligations and the closing down of the SPV. This may include other investors or financiers, sales agents, distributors, broadcasters, and any other parties the SPV has contracted with. The SPV must ensure it has complied with any restrictions on the transfer of rights and obligations and/or has the consent of any other parties whose consent is required in order to transfer its rights and obligations and close down the SPV.

Where the NZFC consents to the SPV transferring its rights and obligations and being closed down, the NZFC will provide an agreement to be signed by the SPV, the company taking on the rights and obligations, and the NZFC. Once that agreement is fully signed, the NZFC will not object to the removal of the SPV from the Companies Register (i.e. the closing down of the SPV).

The SPV will need to notify any interested parties (including the collection agent(s) for the film) of the transfer and the new notice and company details (including bank details for payment of receipts previously due to the SPV).

Please note that the following circumstances may impact on the NZFC's consideration of a request for consent to close the SPV:

- if a producer is self-distributing the film through the SPV (rather than through a parent company);
- if any gross receipts from exploitation of the film are payable to the SPV;
- if the SPV is in default under any agreement relating to the film;
- if the NZFC still has a general security interest over the SPV and any circumstances exist that require that the security interest remain in place; or

- if there are any other special circumstances which the NZFC considers may impact on whether the SPV should continue to be maintained.

Cash Flow and Drawdown Schedule

Your cash flow schedule needs to reflect the actual cash needs of the production over the course of production and through until all budgeted costs are paid.

Your drawdown schedule sets out when each instalment or drawdown of finances is paid by the financiers to the production, and must be approved by the NZFC. The drawdown schedule should mirror the cash flow schedule – so that the production is calling on the financiers (other than private and related investors – see page 15) to contribute their investments only as and when those finances are required to meet production costs, with a bank account buffer of up to approximately \$200,000 (though this may vary for low budget or very large budget films). In some circumstances, gap or loan amounts may be drawn down to the production proportionately later, in order to minimise interest costs to the production.

Larger films may require drawdowns that are payable on fixed dates. In other cases the NZFC's drawdowns are triggered by specified milestones occurring (for example, the first day of principal photography, start of post-production etc.).

As a condition of the NZFC's payment of any drawdown, we must first receive a valid tax invoice for the drawdown, an up-to-date narrative production report, and an up-to-date cost report and balance sheet with notes, required at least 3-4 days prior to payment. In general, we expect you to structure your drawdowns to provide for weekly drawdowns from the

NZFC during production (with monthly drawdowns during pre-production and post-production), with payments to fall on a Thursday (which is our weekly payments processing day).

Except where arrangements with co-financiers or the completion guarantor require otherwise, the financing agreement provides that the NZFC may vary drawdown dates or amounts where the NZFC considers on reasonable grounds that there are sufficient finances in the production account to enable the producer to meet its immediate production costs and expenses. We will not delay any drawdown payment if it would increase the cost of any budgeted item, or the overall cost of production of the film.

The drawdown schedule must allow for the NZFC Delivery Holdback..

NZFC Delivery Holdback

The drawdown schedule must include \$30,000 of our investment as a delivery holdback, which will be paid as the final drawdown of our investment once you have completed delivery of all agreed delivery materials and provided a satisfactory final cost report and balance sheet.

Chain of Title and Opinion

The producer must have all underlying rights necessary to make and exploit the film. For closing, the NZFC requires evidence that all rights to the script and any other underlying material have been obtained by the producer, including where appropriate, copies of signed agreements (such as any option agreements, extensions of option agreements, writer's agreements, quit claims and deeds of assignment). For a feature documentary, the NZFC requires evidence of permission to film all key subjects.

The NZFC will also require the producer to provide a satisfactory chain of title opinion from a lawyer.

For more information on chain of title please refer to our *Chain of Title information sheet*.

Cast / Crew Contracts

Copies of contracts with writers, producers, director, key cast and crew, or documentary subjects must be provided as part of closing.

The NZFC expects that all cast members will be engaged using the Individual Performance Agreement agreed between SPADA and NZ Actors' Equity for New Zealand-based productions. Producers and crew are to adhere to the *Blue Book* as published by the NZ Film and Video Technicians' Guild Inc.

All cast and crew contracts should reflect that the SPV production company will have final cut.



Provisional Certification

- **Co-Production Certification (if applicable)**
 - Evidence that there is the appropriate authorisation in both territories.
- **NZSPG Certification (if applicable)**
 - Copy of the NZSPG provisional certificate.

Post Production Facility Access Letter

You will need to provide a post-production facility letter (sometimes referred to as a Laboratory Pledgeholder Agreement). We have a template form for this letter that we can provide on request. businessaffairs@nzfilm.co.nz.

Health and Safety Report

Every film production must ensure they comply with all health and safety laws and regulations. When setting up the SPV you must provide a Company Health and Safety Report www.screensafe.co.nz As part of the documentation required for closing, you will need to provide the NZFC with an independently commissioned health and safety report identifying specific hazards related to the script or treatment. The report must outline the steps to be taken to avoid or mitigate those potential hazards during the production.

Cultural Engagement

When working with Māori stories, crew and talent, a consultant/s in *te reo me ngā tikanga* may be required to ensure cultural practice and support can be provided to all involved in the production. It is important to consider and include these at the beginning of planning and have the important advice up-front in planning stages; especially if scripts are going to be in te reo or in locations involving Māori and/or their communities. Implications and investment: It would may be appropriate to provide insight into how your production will benefit the Māori film making industry or local communities through the narrative or production in those regions or local tribal communities. Please contact the Kaiwhakahaere at the NZFC.

Additional support can be found online at NZFC Rautaki Māori or Ngā Aho Whakaari – The Brown Book, Working with Māori in the Screen Industry/ Te Urutahi Kōataata.

Cost Report and Balance Sheet

For contractual closing, an up-to-date cost report and balance sheet must be provided within one week of the proposed closing date.

Other Financial Contracts



- **Other Investor Agreements:** where there are other financiers investing in the film, they will either be party to the primary NZFC Financing Agreement (the Production Financing Agreement or the Interparty Agreement), or will sign a separate financing agreement with the SPV production company. Where a separate investor agreement is used, the NZFC will not be a party to that contract, but will need to review and approve the contract, to ensure the terms are acceptable and consistent with the other closing contracts.
- **Loan/Facility Agreement (for cash flowing of NZSPG and any Minimum Guarantees (MGs) or advances):** Where the NZSPG or any market money is being cash flowed to the production by a commercial lender, they will require the SPV production company to sign a loan agreement or facility agreement that sets out the terms on which they are cash flowing and the requirements for repayment. The NZFC will not be a party to that contract, but will need to review and approve the contract to ensure the terms are acceptable and consistent with the other closing contracts.

Completion Bond and Related Documents

This includes the producer's/supervision deed, inducement letters, notices of assignment/deed of delivery and arbitration.

Where a completion guarantor is appointed, there will be a suite of contracts to record their obligations to the financiers and their relationship with the producer. The financiers will need to review and approve the terms of each of these contracts.

Security for our Investment

When the NZFC invests in a feature film, we have certain structural and contractual requirements that are aimed at protecting that investment. While each project is unique, and additional requirements may apply in certain circumstances, our security requirements generally include the following:

- **Assignment of Copyright**

To provide security for the delivery of the film, the NZFC Financing Agreement provides that the SPV production company assigns to the NZFC an appropriate share (relative to the NZFC's investment) of:

- the copyright in the film; and
- the producer's right to net proceeds.

Copyright is automatically assigned back to the production company once the film is

delivered. However, we will retain security over the producer's right to net proceeds until we have recouped our investment.

- **General Security Agreement**

As part of the requirements for contractual closing, the NZFC requires the SPV production company to enter into a general security deed, granting the NZFC a security interest over all of its assets. Our security will be pro-rata and in order of priority as agreed with other investors and documented in the Interparty Agreement (if applicable). This:

- provides security for our investment against other parties who may have a claim on or interest in the SPV production company's SPV assets; and
- helps ensure the production company meets its obligations under the financing agreement and any other closing contracts.

- **Bank Account Deed**

Prior to production, the SPV production company's bank must be put on formal notice that we have a security interest over the assets of the SPV production company, including finances held with the bank. This must be done before production begins. We recommend that you discuss this specific requirement when selecting your production bank. The bank must:

- acknowledge the nature of the NZFC's security interest in writing;
- agree that it will not exercise any right of set-off against the production bank account; and
- if the completion guarantor issues a takeover letter, transfer all amounts to the completion guarantor's account and close the production account.

Contractual Clauses

Credits

You will be required to credit the NZFC in the following ways.

- In the opening credits before all other credits or logos: The NZFC's full screen animated logo including any logo soundtrack.
- In the main credits (wherever they appear - whether at the beginning or end of the film): The words "in association with the New Zealand Film Commission".
- In the closing/end credits (in sizes and presentations of equal prominence with other financiers): The NZFC's logo and/or name, and the logo of the NZ Lottery



Grants Board.

- In publicity material (including billing block on paid advertising and packaging of DVDs and videos but excluding certain excluded advertisements as defined in the NZFC Financing Agreement, the words “in association with the New Zealand Film Commission”.

Monitoring / Reporting

The NZFC Financing Agreement allows us to:

- receive a copy of, or electronic access to, weekly and monthly producer narrative reports, cost reports and balance sheets;
- receive a copy of, or electronic access to, daily call sheets, rushes, daily progress reports (DPRs);
- view and comment on the film at various stages of the edit;
- monitor the production and cash drawdowns from the production account; and audit the books and/or examine the financial statements of the production company.



The frequency of reporting and access to rushes will vary, at the NZFC's discretion, depending on the type of film and the scale of the production. For example on a feature documentary, where shooting tends to be more spread out, we would expect to see the reporting sit against specific production milestones.

- **Producer Narrative Reports**

We expect this to be an overview of the period, identifying progress the production is making, any financing partner engagement (i.e. sales agent or distributor) and any unexpected changes or challenges. Specific mention should be made in every report whether there have been any concerns or incidents regarding Health and Safety issues and Cultural Engagement. The producer's report should sit alongside the cost report and also speak to any movements within budget lines and contingency allocation.

- **Cost Reports**

The frequency will depend on the stage of production. On a drama we would expect to see cost reports fortnightly during pre-production, weekly during production and monthly during post-production. In the case of a co-production, we will expect to see the cost report from the co-producing country as well as the New Zealand cost report although at different time periods, production dependent.





- **Rushes**

On a drama shoot, we would expect to receive daily rushes (via a protected digital link) for the first two weeks. On a case-by-case basis this may move to weekly after the first fortnight. On a documentary, we would expect to review any set pieces or drama elements alongside any key interviews, as requested.

Pre-Closing Advances

We recommend that you allow at least six weeks prior to the start of pre-production for documenting the financing of your film. Where there is a complex financing plan, we recommend allowing two to three months. This period will usually ensure that all contracting is completed and the completion guarantee has been issued before you need to draw down any financing. We usually refer to a film as being 'closed' when this has occurred.

If the closing process takes longer than expected, you may need finances to keep the production moving before the film has closed. We may offer up to a total of \$300,000 plus GST in the form of a pre-closing advance (this includes any previously advanced NZFC development funds). Any amount will be offered at our sole discretion and as an advance on our equity investment rather than a loan, so will not incur any interest or premium.

Pre-closing Advances against production financing are designed to assist the producer in cash flowing early pre-production costs ahead of production financing. These advances are not generally intended to finance actual production shooting costs, company overheads or producer fees.

In order for the NZFC to consider a pre-closing advance request, the following documents must already be in place:

- the NZFC Letter of Conditional Offer has been counter-signed by the producer(s) and returned to the NZFC;
- the conditions precedent in the Letter of Conditional Offer have been met or waived by the NZFC;
- the producer has supplied a proposed production budget, cash flow and draw down schedule to the NZFC; and
- the SPV and separate production bank account has been established;

Pre-closing Advance finances will generally be expected to cover pre-production costs for no more than one month in advance. A request for a pre-closing advance must be accompanied by:



- producer's report on the current stage of the production, what the funds are needed for and the status of the contractual closing, and when they anticipate closing to be complete;
- pre-closing advance budget specific to the funds requested (with proposed expenditure referenced against the overall production budget);
- pre-closing advance schedule specific to the funds requested; and
- an up-to-date cost report for the film.

When exercising our discretion around whether or not to agree to a pre-closing advance, we may have regard to:

- whether the production is fully financed and whether there are legally binding written agreements in place for all financing;
- the ability of the other financiers to pay;
- whether the terms of the other finance are acceptable;
- whether the completion guarantor has issued a letter of intent to bond and whether it is confident that there are no reasons for it not to issue a bond upon closing;
- an external legal adviser's assessment of the risk of the film not closing;
- the level of NZFC development financing previously received by the production; and
- whether we are confident in all other respects that there are no impediments to closing.

It may be a condition of any pre-closing advance that it is provided incrementally to the production and that the NZFC takes security over the film rights and the production company.

Once a request for a pre-closing advance has been approved, we will issue a pre-closing advance letter. The producer must then sign and return the letter to us, along with a tax invoice for the agreed amount. Generally the NZFC makes payment within seven working days of receiving the invoice and letter.

CHAPTER 3: MARKET EXPECTATIONS

This chapter sets out NZFC expectations in relation to getting the film in front of audiences.

Market Agreements

<u>Overview</u>	<u>Broadcaster Licence</u>
<u>Sales Agent</u>	<u>Holdbacks Across Various Agreements</u>
<u>Australasian Distributor</u>	

Additional NZFC Conditions of Investment

<u>Te Ahi Kā</u>	<u>NZFC VOD Player</u>
<u>NZFC Promotional & Exhibition Rights</u>	<u>Audience Research</u>

Market Agreements

Overview

The terms of any market agreements (e.g. sales agency agreement, distribution agreement, broadcast licence) must not conflict with one another in terms of territory licensed, rights licensed, or when the film may be released by each party.

Please note that before any market agreements are signed (including deal memos or MOU's), the NZFC needs to review and approve all aspects of each of these contracts (sales agency agreement, distribution agreement and broadcast licence) including the commercial terms proposed (e.g. payment triggers, splits, fees/commission, expenses, holdbacks etc.) and the legal terms (e.g. default and termination provisions, assignment, audit rights etc.) of the contracts.



Sales Agent

The sales agent should demonstrate genuine market confidence in the production and have terms that are acceptable to investors. The sales agent's terms are subject to NZFC approval as part of our decision to invest in a film (but we do not require to be party to the agreement).

Under that agreement, the NZFC must have the right to receive any sales and distribution reports or statements and to audit the sales agent, as well as the right to be consulted on and approve (alongside you) the sales strategy and budget. We will engage with you and your chosen sales agent to negotiate terms that are appropriate and acceptable for the particular project.

The producer will be primarily responsible for maintaining the relationship with the sales agent and any collection agent. This will include ensuring that the sales agent reports to us regularly on markets, sales, festivals, distribution, audits and royalties.

Australasian Distributor

The NZFC requires approval of the distributor for the film in New Zealand and Australia and the terms and conditions of any distribution agreement (but does not require to be party to the agreement). The NZFC must have a right to directly receive sales and distribution reports or statements, and to audit the distributor, as well as the right to be consulted on and approve (alongside you) the sales strategy and budget. The agreement must provide for a theatrical release in New Zealand. Please ensure any Australasian distributor is aware that if New Zealand and Australia are crossed in the distribution agreement, they will not be able to access the NZFC P&A grant.

Broadcaster Licence



The NZFC has approval of the broadcaster of the film in New Zealand and the terms of the broadcaster licence (but does not require being a party to the licence).

Additional NZFC Conditions of Investment

Te Ahi Kā

Te Ahi Kā literally means 'the home fire' – a term that epitomises our intention to be the ultimate and enduring home for New Zealand films. The key concept behind the philosophy is that the NZFC has a continuing role of guardianship for films we have invested in, ensuring these films will be seen and enjoyed by future generations, here and abroad.

As part of Te Ahi Kā, the NZFC will continue to seek and create opportunities for the films to be seen and enjoyed by future generations. We will ensure the materials for the films are



properly cared for and always able to be screened either theatrically (if feasible), online, on TV, or on platforms not yet imagined. Our goal is to ensure that the films we have invested in are accessible so audiences in New Zealand, Australia and (where possible) abroad can see our culture, our values and the work of New Zealand filmmakers.

To support this philosophy the following clause will be included in all standard NZFC Financing Agreements:

The parties each acknowledge and agree that, following the expiry or termination of any Distribution Agreement and any Sales Agency Agreement (or any replacement of either of them):

(a) If a commercial opportunity exists for the Film in respect of the available rights and territories, the Producer may negotiate and enter into an agreement, on terms pre-approved by NZFC, with the relevant replacement sales agent or distributor for some or all of those territories and rights; or

(b) If no commercial opportunity exists at that time, or if not all rights or territories are included in any agreement reached under paragraph (a) above, the parties intend that the relevant (or remaining) territories and rights for the Film will come within the NZFC's care under the NZFC's "Te Ahi Kā" philosophy, on the NZFC's standard Terms of Care, and agree that the Producer and the NZFC may enter into the Terms of Care in respect of the relevant territories and rights.

NZFC Promotional and Exhibition Rights

As a condition of NZFC investment, we require certain rights to use excerpts from the film to promote the NZFC, New Zealand films, New Zealand locations, and any filmmakers, cast and crew. We also require certain rights to show the film in its entirety, generally for NZFC screenings, for Parliamentary screenings, and for cultural events. The NZFC Financing Agreement sets out the detail of these requirements.

NZFC VOD Player

The NZFC's expectation is that all films it finances can be included in the catalogue of films available to purchase for viewing on the NZFC's Video on Demand platform *NZ Film on Demand*, provided that any such arrangement would not be detrimental to the film's commercial prospects. The producer agrees to consider and discuss with the NZFC in good faith the possibility of the film being included on *NZ Film on Demand* on the NZFC site. To that end, when negotiating and entering into any distribution agreements and sales agency agreements for the film, the producer will try to keep internet or VOD rights non-exclusive. When non-exclusive rights cannot be negotiated, please discuss alternative arrangements with the NZFC.

Audience Research

The NZFC may conduct research on the audience of the film in any manner the NZFC selects, and shall be free to use the outputs of such research at its discretion.