



**SUBMISSION TO THE
DEPARTMENT OF FOREIGN AFFAIRS AND TRADE**

**AUSTRALIA MALAYSIA FREE TRADE AGREEMENT
SCOPING STUDY**

NOVEMBER 2004

Introduction

We refer to the public invitation for submissions in relation to the Malaysia Free Trade Agreement Scoping Study: Industry Consultations Issues paper.

The Australian Film Commission (AFC) is a statutory authority that aims to enrich Australia's cultural identity by fostering an internationally competitive audiovisual industry, developing and preserving a national collection of sound and moving images, and making Australia's audiovisual heritage available to all Australians. The AFC has a longstanding interest in the outcome of trade negotiations, as they affect trade in audiovisual services and the development of the creative industries in Australia.

We welcome the opportunity to comment on the proposal for a Free Trade Agreement with Malaysia, and thank the Government for seeking our input, and look forward to involvement in further stages of negotiation. Should any further clarification or comment be required, please contact Kim Ireland, AFC Director of Policy, Research and Information.

Malaysian Media Industry – a snapshot

With a population of 25 million people the Malaysian industry is on a scale with that of Australia. Film production has occurred continuously since the thirties and Malaysia produces about 15 feature films annually, although this increased to a record number of 26 in 2003. Malaysian films have an average budget of about \$US 2.3 million. Most Malaysian films are not exported.

The National Film Development Corporation of Malaysia (FINAS) is the equivalent of the AFC and the Film Finance Corporation, Australia (FFC), but also with responsibilities to regulate film production and screenings and provide training and studio facilities. FINAS administers the Entertainment Tax Scheme that collects a percentage of domestic box office and redistributes it to producers and the Compulsory Screening Regulation that ensures that Malaysian films must be screened for a minimum period of time. FINAS also provides production investment for producers.

Censorship is much stricter than in Australia and a number of films that circulate freely in Australia have been banned in Malaysia.

There are six free to air television channels and over 70 subscription channels. Malaysia produces between 300 – 400 television dramas and serials a year apart from the in-house productions made by the individual television stations.

The Malaysian Communications and Multimedia Commission (MCMC) is the single regulator responsible for telecommunications, broadcasting and postal services. It administers the Communications and Multimedia Act 1998, which introduced co-regulation and a degree of regulatory forbearance designed to promote competition and development: see Appendix II. Under the Act content regulation is undertaken by a system of co-regulation between the MCMC and Communications and

Multimedia Content Forum of Malaysia which represents the broadcasters, telecommunications service providers and advertisers.

The Content Forum is registered with the MCMC and develops codes which deal with matters such as 'the representation of Malaysian culture and national identity.' This code still appears to be in the process of development, but previously the national content requirement was that sixty per cent of television programs be broadcast in the national language.

Treatment of Cultural Industries

As can be seen from the above the Malaysian government has in place a range of measures designed to promote the development of Malaysian culture and national identity.

The AFC proposes that a Free Trade Agreement between Australia and Malaysia should exclude cultural industries including all audiovisual services, as was the case with the FTA between Australia and Singapore. The annex to that agreement states that:

Australia reserves the right to adopt or maintain any measure relating to:

- the creative arts,¹ cultural heritage² and other cultural industries, including audio-visual services, entertainment services and libraries, archives, museums and other cultural services;
- broadcasting and audio-visual services, including measures relating to planning, licensing and spectrum management, and including:
 - services offered in Australia;
 - international services originating from Australia

¹ *Creative arts include: the performing arts – including theatre, dance and music – visual arts and craft, literature, film, television, video, radio, creative on-line content, indigenous traditional practice and contemporary cultural expression, and digital interactive media and hybrid arts work which uses new technologies to transcend artform divisions.*

² *Cultural heritage includes: ethnological, archaeological, historical, literary, artistic, scientific or technological moveable built heritage, including the collections which are documented, preserved and exhibited by museums, galleries, libraries, archives and other heritage collecting institutions.*

This is the approach which will most clearly ensure that the freedom of Australia to act in relation to its cultural policy is not constrained by entering into an agreement with Malaysia. As a very minimum we would support the positive list approach taken in the recent agreement with Thailand, where Australia made no commitments in relation to culture and audiovisual.

Australia-United States Free Trade Agreement Not a Model

The AFC would be strongly opposed to any proposal that the recently concluded Australia-United States Free Trade Agreement be used as a model for the development of a Free Trade Agreement with Malaysia. The treatment of cultural industries in this agreement should not be taken as a precedent for other agreements and is specific to the relationship between Australia and the US.

Intellectual Property (IP) Protection

The Issues Paper notes that Australia and Malaysia are both signatories to the Trade-related aspects of intellectual property rights (TRIPS) Agreement of the World Trade Organisation (WTO). However, despite this formal commitment to IP protection the reality is that high levels of piracy continue to be a problem in Malaysia. The US Trade Representative's most recent Special 301 Report on the approach of countries to intellectual property protection says that:

...while Malaysia is publicly committed to strong IPR protection and enforcement, it remains the world's largest exporter of pirate entertainment software. Piracy rates remain high for optical media (especially entertainment software) and books, and the substantial export of illegal goods continues.

Although the audiovisual trade between Australia and Malaysia is not great, the lax nature of the enforcement procedures in the country do not act as an incentive to future growth. We suggest that this should be an issue for discussion in the negotiations and Australia should explore with Malaysia whether there might be any co-operative arrangements that could be undertaken that would assist in improving the situation.

E-commerce

We note that in both the Singapore and Thai agreements Australia has not adopted the definition of e-commerce that is included in the agreement with the US. We recognise that cultural goods and services such as books, video, DVD, music and downloadable films are now traded via e-commerce with few, if any, barriers.

However, we remain strongly of the view that these goods and services do not lose their cultural characteristics because of the means by which they are traded.

The AFC argues that the measures that Australia currently has in place to support its cultural policy for the audiovisual sector does not represent any barriers to the development of e-commerce.

Appendix I

Overview of Malaysian Cinema Regulations

Source: *AFMA International Market Fact Book 2003*

Box Office

Malaysia has a total of 223 screens at 67 sites of which multiplexes take up 161 screens and 29 sites. In the 2001 calendar year, 273 new films were released on the Malaysian market. Less than 10% of these were local productions.

Quotas (last updated December 2002)

Cinema Market

Whilst no import quotas exist on foreign films, the Compulsory Screening Regulation requires exhibitors to allocate a minimum of one week per year for screening of local productions.

Television Market

The maximum amount of foreign programming allowed on terrestrial television is 60%. The national content requirement is that 60% of all television programs be broadcast in the national language.

Video market

No quotas currently exist.

Advertising

All commercials must be made in Malaysia with directors, artists and technical/production crew sourced locally. At least 60% of the scenes must be shot locally. Commercials must also obtain Made in Malaysia approval from the Ministry of Information and approval from the censorship board.

Regulations

Cinema Market (Last update: September 2002)

There are no restrictions on importing English-language films to Malaysia, as long as they comply with domestic censorship guidelines (see below). All imported positive release prints, negatives, and video masters are duty free. The origin of the films is irrelevant. No sales tax is imposed on the above items.

The import duty on publicity materials and advertising accessories ranges from 0% to 20%, depending on the materials imported. Goods of ASEAN origin enjoy preferential import duty rates. An additional sales tax of 10% may be applied.

Television Market (Last update: December 2002)

The Malaysian government has a complete ban on foreign companies taking equity in terrestrial TV operations.

The Ministry of Information is centrally responsible for regulating broadcasting in Malaysia. However commercial television licenses are issued by the Multimedia Ministry. All television stations must comply with the Multimedia Ministry and the government censorship board.

Video Market (Last update: November 2002)

As an anti-piracy measure, it is a legislative requirement that entertainment media and business software for sale and distribution in Malaysia be 'stickered'. The compulsory stickering program is administered by the Malaysian Ministry of Domestic Trade and Consumer Affairs (MDTCA). As a condition of their importation into and distribution within Malaysia, optical disc products, audiocassettes and video cassettes must be affixed with stickers.

Censorship (Last update: December 2002)

Cinema Market

Censorship restrictions in the Malaysian market differ significantly from the Australian market. This disparity between cultural and political sensitivities has in the past resulted in restricted market access for Australian productions.

The Ministry of Information strictly censors all films and associated publicity material. In addition to sex, violence, race, foul language and glorification of crime, issues such as offensive political or religious content and internal security are deemed inappropriate for general release.

The classification system reflects this:

G – General Public

SG – Film containing non-excessive violence or horrifying scenes

SX – Film containing non-excessive sex scenes

PA – Film containing elements touching on politics

PL – Film containing violence, extreme horror, and sexual elements OR those touching on politics , religion or social elements

The censorship guidelines for local productions stipulate, in summary:

1. Male artists should not have hair below the collar.
2. Female artists whose background may be deemed 'immoral' will be banned
3. Male and female artists involved in immoral behaviour will have films banned
4. Too much violence or sex in a film will result in its being banned.
5. Drama productions which clash with religious doctrine will be banned

Television Market

Television falls under similar censorship guidelines, although television guidelines are stricter with respect to sex and violence.

Video Market

Videocassettes and laser discs fall under the censorship regulations. Special attention is given to the censorship of violence, horror, religious slander and sex.

Taxes (Last updated: September 2002)

Entertainment Tax Scheme

The rate of Entertainment Duty is standardized at 25% of payment charged for admission to any place of entertainment and for the use of the facilities at any place of entertainment. This is collected by the national film development corporation (FINAS) and then redistributed to Malaysian producers.

Value-Added Tax

No Value-Added Tax (VAT) exists in Malaysia at present.

Withholding Tax

Since the repealing of the Cinematograph Film Hire Duty Act (1965) in 1997, film rentals paid to non-residents have been subject to withholding tax. Accordingly, rentals derived from feature films, films or video tapes or other means of reproduction, where such films have been or are to be used or reproduced in Malaysia, now constitute royalties under the Income Tax Act (1967).

Where such payments are made to non-residents, tax is withheld at the rate of royalties, which is 10% of the gross payments. Double tax treaties reduce this rate as follows: 0% (if approved royalty) for Germany, 8% for Ireland and the UK.

International Standing and Co-operation with Australia

Malaysia is a member of the recently formed Asian Film Commissions Network (AFCNet). Screen Digest recently ranked it amongst the top twenty countries by production investment in feature films.

Ranking by production investment in feature films¹ (Source: Screen Digest 2004)

Rank	Country	Investment \$US (mill)	Investment % share ²
18	Malaysia	62	0.3%
22	Australia	46	0.2%

Number of feature films¹ produced 1997-2003 (Source: Get the Picture 2004)

Country	1997	1998	1999	2000	2001	2002	2003
Australia	31	35	29	27	25	26	17
Malaysia	9	8	10	15	16	11	26

Notes:

¹Includes co-productions

²Proportion of total investment (US\$) by all reporting countries

Malaysia does not represent a significant export market for Australian feature films. In 2001/02 only three FFC-supported feature films were purchased, with sales ranging between US\$4 000.00 and US\$10 000 per title.

Prices paid for FFC-supported feature films in Malaysia (Source: Get the Picture)

Year	No. titles	No. buyers	Lowest (US\$)	Highest (US\$)
2001-02	3	3	4,000	10,000
1998-2000	20	5	1,500	15,000

Prices paid for FFC-supported mini-series for children in Malaysia

Year	No. titles	No. buyers	Lowest (US\$) Per half hour	Highest (US\$) Per half hour
1998-2000	8	5	100	1,000

Prices paid for FFC-supported tele-movies for adults in Malaysia

Year	No. titles	No. buyers	Lowest (US\$) Per movie	Highest (US\$) Per movie
2001-02	3	2	450	600

The AFC understands that a number of Malaysian films are produced in Australia each year. Some collaboration in the television commercial production sector has also taken place across the two territories.

Appendix II

Malaysian Communications and Multimedia Act 1998

Objects

(1) The objects of this Act are –

(a) To promote national policy objectives for the communications and multimedia industry;

(b) To establish a licensing and regulatory framework in support of national policy objectives for the communications and multimedia industry;

(c) To establish the powers and functions for the Malaysian Communications and Multimedia Commission; and

(d) To establish powers and procedures for the administration of this Act.

(2) The national policy objectives for the communications and multimedia industry are -

(a) To establish Malaysia as a major global centre and hub for communications and multimedia information and content services;

(b) To promote a civil society where information based services will provide the basis of continuing enhancements to quality of work and life;

(c) To grow and nurture local information resources and cultural representation that facilitates the national identity and global diversity;

(d) To regulate for the long-term benefit of the end user;

(e) To promote a high level of consumer confidence in service delivery from the industry;

(f) To ensure an equitable provision of affordable services over ubiquitous national infrastructure;

(g) To create a robust applications environment for end users;

(h) To facilitate the efficient allocation of resources such as skilled labour, capital, knowledge and national assets;

(i) To promote the development of capabilities and skills within Malaysia's convergence industries; and

(j) To ensure information security and network reliability and integrity.

(3) Nothing in this Act shall be construed as permitting the censorship of the Internet.

Section 213. Content code

(1) A content code prepared by the content forum or the Commission shall include model procedures for dealing with offensive or indecent content.

(2) The matters which the code may address may include, but are not limited to-

(a) the restrictions on the provision of unsuitable content;

(b) the methods of classifying content;

(c) the procedures for handling public complaints and for reporting information about complaints to the Commission;

(d) the representation of Malaysian culture and national identity;

(e) public information and education regarding content regulation and technologies for the end user control of content; and

(f) other matters of concern to the community.