2010-2011

THE PARLIAMENT OF THE COMMONWEALTH OF AUSTRALIA

HOUSE OF REPRESENTATIVES

TAX LAWS AMENDMENT (2011 MEASURES No. 7) BILL 2011

EXPLANATORY MEMORANDUM

(Circulated by the authority of the
Deputy Prime Minister and Treasurer, the Hon Wayne Swan MP)

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Glossary

The following abbreviations and acronyms are used throughout this explanatory memorandum.

Abbreviation	***Definition***
ABR	Australian Business Register
APRA	Australian Prudential Regulation Authority
ATO	Australian Taxation Office
CGT	capital gains tax
Commissioner	Commissioner of Taxation
DGRs	deductible gift recipients
FMD	farm management deposits
FMD Regulations	*Income Tax (Farm Management Deposits) Regulations 1998*
GST	goods and services tax
GST Act	*A New Tax System (Goods and Services Tax) Act 1999*
ITAA 1936	*Income Tax Assessment Act 1936*
ITAA 1997	*Income Tax Assessment Act 1997*
NSWCA	New South Wales Court of Appeal
PAYGI	pay as you go instalments
Review	*Australian Independent Screen Production Sector Review*
SDT	special disability trust
TAA 1953	*Taxation Administration Act 1953*
TOFA	taxation of financial arrangements
TOFA Act	*Tax Laws Amendment (Taxation of Financial Arrangements) Act 2009*

General outline and financial impact

Film tax offsets

Schedule 9 to this Bill amends Division 376 of the *Income Tax Assessment Act 1997* to make a number of changes to the film tax offsets.

Changes affecting the producer offset include:

- amending the qualifying expenditure threshold for feature films, single episode dramas and documentary programs to $500,000;
- disallowing eligibility for those documentaries which receive financial assistance under the Producer Equity Program;
- allowing additional screen production costs to be claimed as qualifying expenditure;
- allowing television series to benefit for their first 65 broadcast hours;
- allowing films with qualifying expenditure of less than $15 million to use actual exchange rates rather than existing averaging rules;
- removing the 20 per cent cap on development expenditure or remuneration provided to the principal director, producers and principal cast associated with the documentary;
- allowing certain distribution and marketing costs to be included in qualifying expenditure;
- allowing short-form animated documentaries access to the offset; and
- excluding goods and services tax (GST) from an amount of expenditure for the purpose of applying the offset.

Changes affecting the location and post, digital and visual effects offsets include:

- increasing the rate of the location offset from 15 per cent to 16.5 per cent;
- increasing the post, digital and visual effects offset from 15 per cent to 30 per cent;
- permitting some additional screen production costs to be claimed as qualifying expenditure; and
- excluding GST from an amount of expenditure for the purpose of applying these offsets.

Date of effect: The amendments as they relate to the producer offset apply to:

- films for which production assistance (other than development assistance) has been approved by the film authority on or after 1 July 2011; or
- in any other case, films for which production expenditure is first incurred in, or in relation to, pre-production of the film on or after 1 July 2011.

The amendments as they relate to the location offset apply retrospectively to films commencing principal photography or production of the animated image on or after 10 May 2011.

The amendments as they relate to the post, digital and visual effects offset apply retrospectively to post, digital and visual effects production that commence on or after 1 July 2011.

Consistent with the 2011-12 Budget, the net retrospective application dates benefit affected taxpayers.

Proposal announced: This measure was announced in the 2011-12 Budget and in the Minister for the Arts' Media Release No. SC056/2011 of 10 May 2011.

Financial impact: This measure is estimated to increase expenditure on the film tax offsets by $8 million over the forward estimates.

2011-12	***2012-13***	***2013-14***	***2014-15***
–	$2m	$3m	$3m

Compliance cost impact: This measure is expected to reduce compliance costs for affected taxpayers.

Chapter 1
Removing tax issues facing special disability trusts

[Deleted]

Chapter 2
Pacific Seasonal Workers — reduction in marginal tax rate

[Deleted]

Chapter 3
Taxation of financial arrangements and pay as you go instalments

[Deleted]

Chapter 4
Commissioner's discretion to extend time for notifying taxation of financial arrangements transitional elections

[Deleted]

Chapter 5
Farm management deposits

[Deleted]

Chapter 6
Extend the temporary loss relief for merging superannuation funds by three months

[Deleted]

Chapter 7
Penalty notice validation

[Deleted]

Chapter 8
Public ancillary funds

[Deleted]

Chapter 9
Film tax offsets

Outline of chapter

9.1 Schedule 9 to this Bill amends the *Income Tax Assessment Act 1997* (ITAA 1997) to make a number of changes to the film tax offsets, with the aim of delivering support more efficiently and effectively to companies benefiting from these offsets.

Context of amendments

9.2 In the 2011-12 Budget, the Government announced a package of measures to reform and strengthen the Australian screen production industry. The package is designed to support the industry at a time when it is striving to meet the challenges of a changing global environment.

9.3 These amendments are a result of the *Review of the Australian Independent Screen Production Sector* (Review), conducted by the Office for the Arts in 2010. An extensive range of domestic and international stakeholders were consulted as part of the Review.

9.4 Companies may be entitled to one of three refundable tax offsets in relation to 'qualifying Australian production expenditure' they incurred in making films.

9.5 The relevant provisions are contained in Division 376 of the ITAA 1997.

9.6 The three tax offsets are:

- the producer offset, which is available for Australian expenditure incurred in making an Australian film;
- the location offset, which is available for Australian expenditure incurred in making a film; and
- the post, digital and visual effects offset, which is available for Australian expenditure incurred on post, digital and visual effects production for a film.

9.7 The producer offset was established in 2007 by Division 376 to provide support for the domestic film and television industry. The producer offset delivers support for Australian film and television productions through the tax system.

9.8 This Schedule makes a number of amendments to the producer offset in order to more efficiently and effectively deliver government support to Australian screen producers.

9.9 The Government supports offshore production through two tax offsets.

- The location offset is designed to encourage large-scale film and television production to Australia and provide greater economic, employment and skill development opportunities.
- The post, digital and visual effects offset is intended to provide further incentive for offshore productions to contract Australia's post, digital and visual houses.

9.10 The amendments in this Schedule also provide some enhancements to the location and post, digital and visual effects offsets. This includes allowing some additional expenditure to be claimed as qualifying expenditure and an increase to the rate of the offsets.

9.11 Expenditure on a film is ***production expenditure*** where it satisfies the general test of being incurred in making the film or being attributable to the use of equipment or other facilities for, or activities undertaken in, making the film (section 376-125).

9.12 Production expenditure is a general concept with a list of specifically excluded expenditure items. However, some of these excluded items may be given production expenditure status if they are sufficiently connected to Australia to qualify as 'qualifying Australian production expenditure'.

9.13 The amount of each of the three film tax offsets is expressed as a percentage of a company's 'qualifying Australian production expenditure'. 'Qualifying Australian production expenditure' is a subset of a production company's overall 'production expenditure'. The amount of 'qualifying Australian production expenditure' is determined as part of the certification process for the film.

9.14 ***Qualifying Australian production expenditure*** is defined as production expenditure on a film that is linked to the provision of goods and services provided in Australia or the use of land or goods located in Australia in making the film. Qualifying Australian production expenditure has certain statutory inclusions and exclusions in its meaning. Various inclusions and exclusions apply generally (that is, for all of the tax offsets) and individually (that is, differently for each tax offset) (sections 376-145 to 376-180).

9.15 Division 376 sets out the minimum expenditure thresholds which apply for the offsets and for different types of films. A company's 'qualifying Australian production expenditure' on a film must be at least as much as the relevant threshold for the film to be eligible for a tax offset.

9.16 In determining an amount of expenditure for the purpose of applying the film tax offsets, the expenditure is taken to include the goods and services tax (GST).

Producer offset

9.17 The rate of the producer offset is 40 per cent of 'qualifying Australian production expenditure' for feature films or 20 per cent of 'qualifying Australian production expenditure' if the film is not a feature film.

9.18 For the film authority to issue a company with a producer offset certificate, it must be satisfied that the minimum expenditure threshold for a feature film and single episode program, other than a documentary, is $1 million (column 3 of items 1 and 2 in the table in subsection 376-65(6)). A 'per hour' expenditure threshold of $800,000 also applies to single episode programs other than documentaries.

9.19 There is no minimum total 'qualifying Australian production expenditure' requirement for documentaries (column 3 of items 3, 6 and 8 in the table in subsection 376-65(6)).

9.20 Financing expenditure does not count as production expenditure (item 1 in the table in section 376-135).

9.21 A film which is a series or a season of series benefits from the producer offset for their first 65 episodes of content (paragraphs 376-55(2)(b) and (c)).

9.22 In calculating an amount for all film tax offsets, a company's 'qualifying Australian production expenditure' is to be translated to Australian currency at the average of the exchange rates applicable during the period that 'qualifying Australian production expenditure' is incurred on the film (item 9B in the table in subsection 960-50(6)).

9.23 For the purposes of the producer offset, a 20 per cent cap limits the amount that can be claimed as qualifying Australian production expenditure on development expenditure and expenditure on remuneration provided to the principal director, producers and principal cast associated with the film (paragraph 376-170(4)(b)). Expenditure incurred in relation to distributing the film is excluded from the general test of production expenditure (paragraph 376-125(4)(c)).

9.24 Publicity and promotion expenditure, that is, marketing costs, are generally excluded from production expenditure (item 5 in the table in section 376-135).

9.25 Short form animated dramas are eligible for the producer offset. If the film is a short form animated drama, it must be a drama program comprising one or more episodes which are produced wholly or principally for exhibition together, for a national market or national markets under a single title (subsection 376-65(4)).

Location offset

9.26 The rate of the location offset is 15 per cent of qualifying Australian production expenditure (section 376-15).

9.27 Financing expenditure does not count as production expenditure (item 1 in the table in section 376-135).

Post, digital and visual effects offset

9.28 The rate of the post, digital and visual effect offset is 15 per cent of qualifying Australian production expenditure (section 376-40).

9.29 Financing expenditure does not count as production expenditure (item 1 in the table in section 376-135).

Summary of new law

Producer offset

9.30 A company can be eligible for the producer offset for a feature film and single episode program, other than a documentary, if it incurs at least $500,000 total qualifying Australian production expenditure. There is no longer a ‘per hour’ threshold for single episode programs other than documentaries.

9.31 A company can be eligible for the producer offset for a documentary if it incurs at least $500,000 total qualifying Australian production expenditure and at least $250,000 per hour.

9.32 A company in receipt of financial assistance from the film authority's Producer Equity Program for the making of a documentary film is ineligible for the producer offset for that film. If a company re-edits a film that has been granted such assistance, the re-edited version will be considered the same film and not be eligible for the producer offset.

9.33 For all film tax offsets, certain financing expenditure incurred in Australia can be claimed as qualifying Australian production expenditure in relation to the financing of the film. This includes any of the following:

- insurance related to making the film;
- fees for audit services and legal services provided in Australia in relation to raising and servicing the financing of the film; and/or
- fees for incorporation and liquidation of the company that makes or is responsible for making the film.

9.34 For the producer offset only, additional financing expenditure incurred in Australia can be claimed as qualifying Australian production expenditure in relation to the financing of the film. This includes:

- fees in obtaining an independent opinion of a film's qualifying Australian production expenditure.

9.35 For the producer offset only, expenditure incurred in Australia in relation to offsetting carbon emissions created during making the film can be claimed as qualifying Australian production expenditure.

9.36 A film which is a series or a season of a series will benefit from the producer offset for their first 65 commercial hours of content.

9.37 For the producer offset only, films with qualifying Australian production expenditure of less than $15 million are able to translate expenditure incurred in a foreign currency at the exchange rate applicable at the time when expenditure is incurred on the film.

9.38 For the producer offset only, the 20 per cent cap which limits the amount that can be claimed as qualifying Australian production expenditure on development expenditure and expenditure on remuneration provided to the principal director, producers and principal cast associated with a documentary is removed.

9.39 For the producer offset only, certain expenditure incurred in relation to distributing the film can be counted as qualifying Australian production expenditure. This will include any of the following expenditure in delivering or distributing the film:

- acquiring Australian classification certificates;
- sound mix mastering licenses;
- re-versioning the film in Australia;
- freight services provided by a company in Australia for delivery of contracted deliverables in relation to the film; and/or
- storing the film in a film vault in Australia.

9.40 For the producer offset only, certain publicity and promotion expenditure on publicist services provided in Australia, promotional stills, trailers and press kits (with Australian-owned copyright) that is incurred after the film's completion but prior to the end of the income year in which production is complete can be counted as qualifying Australian production expenditure.

9.41 Short-form animated documentaries will be eligible for the producer offset.

9.42 In determining an amount of expenditure for the purpose of applying the producer offset, the expenditure is taken to exclude the GST.

Location offset

9.43 A company benefits from an increase to the location offset from 15 per cent to 16.5 per cent.

9.44 For all film tax offsets, certain financing expenditure incurred in Australia prior to the end of the income year in which the film is complete can be claimed as qualifying Australian production expenditure in relation to the financing of the film. This will include any of the following:

- insurance related to making the film;

- fees for audit services and legal services provided in Australia in relation to raising and servicing the financing of the film; and/or

- fees for incorporation and liquidation of the company that makes or is responsible for making the film.

9.45 In determining an amount of expenditure for the purpose of applying the location offset, the expenditure is taken to exclude the GST.

Post, digital and visual effects offset

9.46 A company benefits from an increase to the post, digital and visual effects offset from 15 per cent to 30 per cent.

9.47 For all film tax offsets, certain financing expenditure incurred in Australia prior to the end of the income year in which the post, digital and visual effects work is complete can be claimed as qualifying Australian production expenditure in relation to the financing of the film. This will include any of the following:

- insurance related to making the film;

- fees for audit services and legal services provided in Australia in relation to raising and servicing the financing of the film; and/or

- fees for incorporation and liquidation of the company that makes or is responsible for making the film.

9.48 In determining an amount of expenditure for the purpose of applying the post, digital and visual offset, the expenditure is taken to include the GST. Comparison of key features of new law and current law

New law	***Current law***
A company is eligible for the producer offset for feature film and single episode programs, other than documentaries, if it incurs at least $500,000 qualifying Australian production expenditure on that production.	A company is eligible for the producer offset for feature film and single episode programs, other than documentaries, if it incurs at least $1 million of qualifying Australian production expenditure on that production.
The ‘per hour’ threshold for single episode programs, other than documentaries, no longer applies.	There is a ‘per hour’ threshold of $800,000 for single episode programs other than documentaries.

New law	***Current law***
A company eligible for the producer offset for a documentary must meet minimum expenditure thresholds of $500,000 and $250,000 per hour.	There is no minimum expenditure threshold for documentaries other than the per hour threshold requirement of $250,000.
Companies who are in receipt of funding from the Screen Australia's Producer Equity Program for a film are ineligible for the producer offset for that film.	No equivalent.
Certain financing expenditure counts as qualifying Australian production expenditure of a company on a film, including any of the following: • insurance related to making the film; • fees for audit services and legal services provided in Australia to the company in relation to raising and servicing the financing of the film; and/or • fees for incorporation and liquidation of the company that makes or is responsible for making the film.	Financing expenditure did not count as production expenditure on a film.
For the producer offset only: • fees in obtaining an independent opinion of a film's qualifying Australian production expenditure; and/or • expenditure on offsetting carbon emissions.	No equivalent.
A company is entitled to the producer offset for a series or season of a series which must be at least two episodes and no more than 65 commercial hours of content.	A company is only entitled to the producer offset for a series or season of a series which must be at least two episodes and no more than 65 episodes.
For calculating the amount of the producer offset, films with qualifying Australian production expenditure of less than $15 million are to use actual exchange rates at the time when expenditure in a foreign currency is incurred on the film.	For calculating the amount of the offset, the exchange rate used is the average rate of exchange for the period during which qualifying Australian production expenditure is incurred.

New law	***Current law***
For documentaries, under the producer offset, the 20 per cent cap will be removed.	There is a 20 per cent cap which limits the amount that can be claimed as qualifying Australian production expenditure on development expenditure and/or remuneration provided to the principal director, producers and principal cast associated with the film.
For the purposes of the producer offset, any of the following expenditure incurred in distributing the film by a company will also be qualifying Australian production expenditure: • acquiring Australian classification certificates; • sound mix mastering licenses; • re-versioning the film in Australia; • freight services provided by a company in Australia for delivery of contracted deliverables in relation to the film; and/or • storing the film in a film vault in Australia.	Distribution expenses are excluded from production expenditure on a film.
For the purposes of the producer offset, marketing costs on publicist services provided in Australia, promotional stills, trailers and press kits (with Australian-held copyright) that is incurred after the film's completion but prior to the end of the income year in which production is complete will be allowed.	Publicity and promotion expenditure are excluded from production expenditure on a film, other than expenditure on Australian copyrighted material incurred before completion of the film.
Short-form animated films are eligible for the producer offset.	Short-form animated dramas are eligible for the producer offset.
GST is now excluded in determining an amount of expenditure for the purposes of these offsets.	GST is not currently excluded in determining an amount of expenditure for the purpose of these offsets.
The amount of the location offset is 16.5 per cent of the company's qualifying Australian production expenditure.	The amount of the location offset is 15 per cent of the company's qualifying Australian production expenditure.

New law	***Current law***
The amount of the post, digital and visual effects offset is 30 per cent of the company's qualifying Australian production expenditure.	The amount of the post, digital and visual effects offset is 15 per cent of the company's qualifying Australian production expenditure.

Detailed explanation of new law

Changes to producer offset

Minimum expenditure threshold

9.49 For Screen Australia to issue a company with a producer offset certificate, it must be satisfied that the film meets certain minimum expenditure requirements. The minimum expenditure thresholds differ depending on the format of the project. The minimum expenditure threshold for the producer offset for a feature film and single episode program, other than a documentary, is reduced from $1 million of qualifying Australian production expenditure to $500,000. The 'per hour' threshold for single episode programs (other than documentaries) no longer applies. ***[Schedule 9, items 12 to 14, subsection 376-65(6)]***

9.50 A new minimum expenditure threshold of $500,000 for a documentary is introduced. The minimum qualifying Australian production expenditure to be spent per hour of the film will remain at $250,000. ***[Schedule 9, items 15, 17 and 18, subsection 376-65(6)]***

Example 9.1

Acme Film is a company based in Australia.

From December 2011 to June 2012, Acme Film incurs $800,000 of qualifying Australian production expenditure in making a feature film.

Because Acme Film's qualifying Australian production expenditure on this film is at least $500,000, Acme Film meets the expenditure threshold for the producer offset for its work in making the film.

If the minimum threshold had instead remained at $1 million of qualifying Australian production expenditure, Acme Film would not have met the expenditure threshold for the producer offset.

Example 9.2

Marina Documentary is a company based in Australia.

In January 2012, Marina Documentary incurs $300,000 of qualifying Australian production expenditure in making a single episode documentary about Australian cruise ships.

Because Marina Documentary's qualifying Australian production expenditure on this documentary is less than $500,000, Marina Documentary is not eligible for the producer offset for its work.

If the threshold for a documentary had not been introduced, Marina Documentary would have met that eligibility criterion for the producer offset. This is because any amount of qualifying Australian production expenditure in making a documentary would have been eligible for the producer offset.

Ineligibility for the producer offset

9.51 Those documentaries that do not meet the new expenditure threshold of $500,000 may be eligible for financial assistance under Screen Australia's Producer Equity Program. A company in receipt of this financial assistance is ineligible to apply for the producer offset for the same film. ***[Schedule 9, item 7, paragraph 376-55(4)(g)]***

Example 9.3

Further to Example 9.2.

As noted in Example 9.2, Marina Documentary is not eligible for the producer offset because its qualifying Australian production expenditure on this documentary is less than $500,000.

Marina Documentary instead receives financial assistance under Screen Australia's Producer Equity Program. This direct support from Screen Australia reduces the administrative burden on small production companies.

Because Marina Documentary is in receipt of this financial assistance, Marina Documentary will not be eligible to apply for the producer offset for this documentary. This is still the case even if Marina Documentary eventually incurs qualifying Australian production expenditure on this documentary of an amount equal to or greater than $500,000.

Permitting certain financing expenditure

9.52 There is a general test for what constitutes production expenditure. Production expenditure of a film is so much of a company's expenditure as it incurs in, or in relation to, making the film; or as is reasonably attributable to the use of equipment or other facilities for making the film or to activities undertaken in making the film. There are a number of specific exclusions that are not eligible to be included as production expenditure.

9.53 Production expenditure for a film also includes some specific expenditure that may not meet the general test of production expenditure.

9.54 Qualifying Australian production expenditure for a film is the production expenditure for the film to the extent to which it is incurred for, or is reasonably attributable to:

- goods and services that are provided in Australia;
- the use of land located in Australia; or
- the use of goods that are located in Australia at the time they are used in making the film.

This broad test connects particular items of production expenditure to Australia.

9.55 All qualifying Australian production expenditure is included in production expenditure, even if it would not otherwise come within the scope of production expenditure.

9.56 Expenditure incurred in relation to the financing of a film is not production expenditure. This specifically includes interest, or other returns, on amounts invested in the film and costs connected with raising and servicing finance for the film.

9.57 For the producer offset, certain financing expenditure incurred in Australia prior to the end of the income year in which the film is complete can be claimed as qualifying Australian production expenditure. ***[Schedule 9, item 20, section 376-135]***

9.58 This will include any of the following:

- insurance related to making the film ***[Schedule 9, item 22, subsection 376-150(1)]***;
- fees for audit services and legal services provided in Australia in relation to raising and servicing the financing of the film ***[Schedule 9, item 22, subsection 376-150(1)]***;

- fees for incorporation and liquidation of the company that makes or is responsible for making the film ***[Schedule 9, item 22, subsection 376-150(1)]***; and/or
- fees in obtaining an independent opinion of a film's qualifying Australian production expenditure ***[Schedule 9, item 23, subsection 376-170(2)]***.

Example 9.4

Ting Films is a special purpose vehicle company established in Australia to carry out the making of a feature film.

In September 2011, costs are incurred in setting up the special purpose vehicle company specifically to produce the film that is applying for the film tax offset. The costs in establishing a special purpose vehicle company is a one-off claim for the making of the particular film and cannot be claimed as qualifying Australian production expenditure in context of another film.

In November 2011, Ting Films incurs insurance expenditure that is related to the making of a feature film. The types of insurance purchased by Ting Films include film producer's indemnity; extra expense insurance; negative film risk; and weather insurance. For these purposes insurance expenditure is deemed to include completion guarantor fees.

In December 2011, Ting Films also incurs fees for an audit of the whole production expenditure (not just qualifying Australian production expenditure) and legal fees in relation to a Production Investment Agreement and a distribution agreement. All audit and legal fees are incurred directly by Ting Films and are not in respect of fees that are paid to absorb a third party's legal or audit fees expenses.

In June 2012, Ting Films incurs expenditure in relation to liquidating the special purpose vehicle company established in September 2011.

The financing expenditure incurred by Ting Films in relation to these insurances, fees for audit and legal services, and fees for setting up and liquidating the special purpose vehicle company are able to be claimed as qualifying Australian production expenditure if it is incurred prior to the end of the income year in which the film is complete. This means that a film tax offset applies to these particular types of financing expenditure.

If these types of financing expenditure were not specifically included as qualifying Australian production expenditure, the expenditure incurred by Ting Films on insurances, fees for audit and legal services, and fees for setting up and liquidating the special purpose vehicle company would be excluded from being claimed as qualifying Australian production expenditure.

Example 9.5

Vinnie Productions is a company based in Australia.

Vinnie Productions incurs expenditure in relation to a qualifying Australian production expenditure opinion fee. A qualifying Australian production expenditure opinion fee is a fee for obtaining an independent opinion of a film's qualifying Australian production expenditure to meet financing requirements. A qualifying Australian production expenditure opinion fee is a type of financing expenditure.

In paying the qualifying Australian production expenditure opinion fee, the producer of the film receives a letter of advice to demonstrate to cash flow providers and investors what the expected qualifying Australian production expenditure of a film is.

The qualifying Australian production expenditure opinion fee is incurred directly by Vinnie Productions, that is, it is not a fee incurred by a third party but absorbed by Vinnie Productions.

The qualifying Australian production expenditure opinion fee incurred by Vinnie Productions is able to be claimed as qualifying Australian production expenditure. This means that the producer offset applies to this particular type of financing expenditure.

If fees in obtaining an independent opinion of a film's qualifying Australian production expenditure were not specifically included as qualifying Australian production expenditure, the expenditure incurred by Vinnie Productions on a qualifying Australian production expenditure opinion fee would have been excluded from qualifying Australian production expenditure.

Offset carbon emissions

9.59 Expenditure incurred in Australia in relation to offsetting carbon emissions created during the making of the film can be claimed as qualifying Australian production expenditure. This expenditure can be incurred in paying an airline to offset carbon emissions or directly paying a recognised service supplier to offset carbon emissions created making the film. A recognised service supplier must be accredited at a national or state government level or comply with an industry standard. ***[Schedule 9, item 23, subsection 376-170(2)]***

Sixty-five commercial hours of content

9.60 Currently a company is only entitled to the producer offset for a series or season of a series which must be at least two episodes and no more than 65 episodes. The 65 episode limit is a cumulative cap on the support the producer offset will provide to a series. It recognises that once a series has been in production for such a number of episodes, it should be capable of being made without Australian Government support and effectively become self-sufficient.

9.61 The 65 episode limit is changed to allow a company to benefit from the producer offset for their first 65 commercial hours of content. When the 65 commercial hour limit has been reached, that series will be deemed completed and only qualifying Australian production expenditure on the episodes up to and including the 65th commercial hour are eligible for the producer offset. Further hours on episodes or seasons of the series are ineligible for the producer offset. ***[Schedule 9, items 5, 6, 25 and 27]***

9.62 The concept of a commercial hour recognises that programs are made of varying length and they may be transmitted to the public in different ways. For instance, a program of 52 minutes duration may be shown without interruption by one broadcaster, but be shown over a 60 minute programming slot by another broadcaster if the broadcast slot includes advertisements. In each case, such a program would be regarded as ‘one commercial hour’ in length.

Example 9.6

Childs Play is a company based in Australia.

Childs Play produces a television program for young children. Each episode has duration of 20 minutes but fills a 30 minute programming slot by the broadcaster because the broadcast slot includes advertisements.

Each episode of the television program is regarded as half a commercial hour in length.

Example 9.7

This example sets out a number of scenarios to illustrate the transition between the 65 episode limit and the new 65 commercial hours limit.

Scenario 1

An applicant has made a series consisting of 70 × 26 minute (commercial half hour) episodes, all completed prior to 1 July 2011. The series has been completed and the applicant will not make any further seasons of this series. The producer offset can only be claimed for the first 65 episodes of the series.

Scenario 2

> An applicant is making a season of a series where the season consists of episodes 52 to 70, each episode being 26 minutes (commercial half hour). Production commenced prior to 1 July 2011 and will be completed after this date. Because this season commenced production prior to 1 July 2011, the '65 episode limit' will be applied and the season can only claim qualifying Australian production expenditure opinion expenditure up to the 65th episode. However, the applicant can make a further season of this series and be eligible for the producer offset. In this case, episodes 66 to 70 cannot form part of the applicant's qualifying Australian production expenditure opinion claim for any season, and these episodes also will not be included in the commercial hour count. In other words, if the applicant starts a new season after 1 July 2011, the applicant will be deemed (at the outset) to have completed 32.5 commercial hours (65 ÷ 2) of the series, and will be eligible to receive the producer offset for another 32.5 commercial hours of the series produced after 1 July 2011.

Scenario 3

> An applicant has made a series consisting of 70 × 26 minute (commercial half hour) episodes, all completed prior to 1 July 2011. The applicant will make another season of this series after 1 July 2011. Episodes 66 to 70 were completed prior to 1 July 2011 and so cannot receive the producer offset and will not be included in the commercial hour count for the new season. Therefore the applicant will have been deemed to have completed 32.5 commercial hours (65 ÷ 2) of the series to date and will be eligible to receive the producer offset for another 32.5 commercial hours of content produced for the series after 1 July 2011.

Scenario 4

> An applicant will produce a new series with the first season being made after 1 July 2011. The producer offset will be capped at 65 commercial hours.

Exchange rate

9.63 In working out a company's production expenditure and qualifying Australian production expenditure, any expenditure incurred in a foreign currency must be converted into Australian dollars.

9.64 For the purposes of meeting a relevant minimum expenditure requirement for an offset, table item 9 of subsection 960-50(6) requires the amount that is relevant for the purposes of issuing a certificate for the producer offset to be translated to Australian currency at the time when principal photography commences or production of the animated image commences. For calculating the amount of the offset, the exchange rate used is the average rate of exchange for the period during which qualifying Australian production expenditure is incurred.

9.65 Films with a qualifying Australian production expenditure of less than $15 million are to use actual exchange rates at the time when expenditure is incurred on the film. ***[Schedule 9, items 29 and 30, subsection 960-50(6)]***

Example 9.8

Williams Productions incurs qualifying Australian production expenditure in a foreign currency. This expenditure is incurred on two occasions. The first is on 1 February 2012 in the amount of US$1 million. The second occasion is on 1 March 2012 in the amount of US$2 million.

In making the film, Williams Productions incurs a total qualifying Australian production expenditure of $14 million.

Any expenditure incurred in a foreign currency must be converted into Australian dollars in calculating Williams Productions production expenditure and qualifying Australian production expenditure.

Because Williams Productions has a total qualifying Australian production expenditure of less than $15 million, Williams Productions are to use the actual exchange rates at the time when expenditure is incurred on the film, that is, on 1 February 2012 and 1 March 2012.

If the film incurred a total qualifying Australian production expenditure of greater than $15 million, Williams Productions would be required to apply an average exchange rate for the whole period when qualifying Australian production expenditure was incurred.

Twenty per cent cap

9.66 The amount of expenditure that can be claimed as qualifying Australian production expenditure by a company in regard to development, remuneration for the principal director, the producers and producer’s unit and principal cast, is limited. These expenditures are intended to represent the stated ‘above the line’ costs for a film.

9.67 The qualifying Australian production expenditure that can be claimed on these costs is only up to a maximum of 20 per cent of a film’s total film expenditure (total budget). This does not mean that further expenditure on ‘above the line’ costs cannot be made, nor does it mean that expenditure that exceeds the cap will mean that the production cannot qualify for the producer offset. Rather, it means that any expenditure on ‘above the line’ costs that is greater than 20 per cent of the film’s total film expenditure will not be considered as qualifying Australian production expenditure and will therefore not be counted towards the expenditure threshold or the rebate amount for the production.

9.68 This 20 per cent cap is removed for documentaries. A company that makes a documentary can now claim as qualifying Australian production expenditure on development, remuneration for the principal director, the producers and producers' unit and principal cast without limit. ***[Schedule 9, items 24 and 26, subsection 376-170(4)]***

Example 9.9

> VIP Docs is a company based in Australia. VIP Docs makes a documentary about the history of Vietnamese cuisine.
>
> VIP Docs incurs $200,000 qualifying Australian production expenditure in remuneration costs for the principal director, the producers and principal cast. This equates to 35 per cent of their total film expenditure. These are examples of 'above the line' costs of a company. All of the expenditure incurred in relation to remuneration costs counts towards VIP Docs qualifying Australian production expenditure.
>
> If the film was not a documentary, the amount that could be claimed as qualifying Australian production expenditure by a company in regard to development, remuneration for the principal director, the producers and producer's unit and principal cast would be limited to a maximum of 20 per cent of a film's total film expenditure.

Distribution expenditure

9.69 There is a general test for what constitutes production expenditure. Production expenditure of a film is so much of a company's expenditure as it incurs in, or in relation to, making the film; or as is reasonably attributable to the use of equipment or other facilities for making the film or to activities undertaken in making the film.

9.70 The making of a film means the doing of the things necessary for the production of the first copy of the film.

9.71 For the purposes of the producer offset, the distribution of the film and its promotion are not necessarily part of actually making the film. Some costs of promotional material are now included in both qualifying Australian production expenditure and production expenditure; as some promotional activities can be occurring while a film is being made.

9.72 Certain expenditure incurred, prior to the end of the income year in which the film is completed, in relation to the distribution of the film will now count as qualifying Australian production expenditure.
[Schedule 9, item 19, paragraph 376-125(4)(c)]

9.73 This will include any of the following expenditure in delivering or distributing the film:

- acquiring Australian classification certificates;
- sound mix mastering licenses;
- re-versioning the film in Australia;
- freight services provided by a company in Australia for delivery of contracted deliverables in relation to the film; and/or
- storing the film in a film vault in Australia.

[Schedule 9, item 23, subsection 376-170(2)]

Example 9.10

DCR is a company based in Australia specialising in making films with significant Australian content.

DCR has just completed making a film and incurs certain expenditure in distributing the film prior to the end of the income year in which the film is complete.

DCR incurs qualifying Australian production expenditure in applying to the Classification Board for a censorship certificate for the purpose of distributing or broadcasting the film in Australia. Acquiring an Australian classification certificate is required prior to distributing or broadcasting a film.

DCR incurs qualifying Australian production expenditure in acquiring a Dolby™ license. A Dolby™ license is an example of a sound mix master license.

DCR incurs qualifying Australian production expenditure in re-versioning a film. Re-versioning a film includes activities such as creating audio descriptions of the film; creating a special version of a feature film so the film can be distributed on DVD (as opposed to in a cinema); or creating a different version so the film is suitable for overseas broadcasters, for example, language translation.

DCR incurs qualifying Australian production expenditure on freight services provided by a company in Australia for delivery of contracted deliverables in relation to the film, otherwise known as 'agreed deliverables'. 'Agreed deliverables' includes the physical items (specific formats of the film) that the producer and a distributor agree are necessary to be delivered to the distributor in order for the film to be distributed. An example of a deliverable is an 'interneg' which is required to make a print of the film

DCR incurs qualifying Australian production expenditure on storing the film in a film vault in Australia. Storing the film in a vault is storing the original master versions of the film in safe and secure conditions so that the film can be preserved, copied and accessed as necessary.

All of the listed distribution costs in this example are specifically included types of qualifying Australian production expenditure allowed under the producer offset.

If these specific distribution costs were not included as qualifying Australian production expenditure, DCR would not be able to claim such distribution costs as they do not relate directly to making the film.

Marketing costs

9.74 Expenditure that relates to publicising or otherwise promoting the film (press expenses, still photography, promotion, video tapes, public relations and other similar expenses) is excluded from production expenditure, even if it is incurred during production, unless it is qualifying Australian production expenditure.

9.75 Certain publicity and promotion expenditure on publicist services provided in Australia, promotional stills, trailers and press kits (with Australian-owned copyright) that is incurred after the completion of the film but prior to the end of the income year in which production is complete can be counted as qualifying Australian production expenditure. ***[Schedule 9, items 21 and 23, section 376-135 and subsection 376-170(2)]***

Example 9.11

Further to Example 9.9.

DCR completes the film on 24 May 2012.

DCR incurs qualifying Australian production expenditure on unit publicist fees and on a study guide on 15 June 2012, that is, after completion of the film. These marketing costs are incurred prior to the end of the income year in which the film is complete, that is, before 30 June 2012.

A unit publicist will often be on set throughout production and can remain working on publicity after a film is complete to prepare the film for release. A study guide is created to help teachers interpret films for school students and may be done after production is complete.

DCR will be eligible to claim the producer offset on the qualifying Australian production expenditure incurred on the unit publicist fees and on the study guide.

If the amendment had not been made to include marketing costs incurred after completion of the film but prior to the end of the income year in which production if complete, DCR would not be able to claim the marketing costs spent on unit publicists fees and on the study guide as qualifying Australian production expenditure.

Short-form animated documentaries

9.76 A short-form animated drama is eligible for the producer offset. A short-form animation is a program of one episode or a collection of episodes, predominantly utilising cell, stop motion, digital and/or other animation, of not less than one quarter commercial television hour in total duration. This means, for example, that a collection of six five-minute animated episodes (30 commercial minutes) would be regarded as a short-form animation, as the film will be at least one quarter of a commercial hour. A short-form animation is limited to a drama and therefore excludes a documentary.

9.77 A 'short-form animated drama' is replaced with 'short-form animated film' to include short–form animated dramas and documentaries. ***[Schedule 9, items 8 to 11 and 16, subparagraph 376-65(2)(c)(v), subsection 376-65(4), paragraph 376-65(4)(a) and subsection 376-65(6)]***

GST exclusion

9.78 In calculating a company's total production expenditure and qualifying Australian production expenditure, the GST-inclusive cost has previously been used to calculate the offset payable for a certified production. This was irrespective of whether the company was able to claim input tax credits under Division 11 of the *A New Tax System (Goods and Services Tax) Act 1999* (GST Act).

9.79 A company's production expenditure and qualifying Australian production expenditure on a film now excludes the GST. This is to address a situation of providing an offset (additional tax benefit) in respect of an amount not incurred but is reimbursed to the taxpayer. ***[Schedule 9, item 28, section 376-185)***

Example 9.12

NLR Films is a film production company based in Australia.

In May 2012, NLR Films contracts a digital effects company to perform some effects work for a large budget feature film, and incurs

$2.2 million of expenditure. This $2.2 million in expenditure is inclusive of the GST.

NLR Films is responsible for making the arrangements for all the post, digital and visual effects work on the film that is carried out in Australia.

Because NLR Films' qualifying Australian production expenditure on the film is not less than $500,000, NLR Films meets the expenditure threshold for the post, digital and visual effects offset.

In determining the amount of qualifying Australian production expenditure for the post, digital, and visual effects offset, NLR Films will only be able to claim the offset on the GST exclusive amount, that is, $2 million. The amount of the offset would be calculated at 30 per cent of the $2 million.

If the amendment had not been made to exclude the GST amount, NLR Films would have been able to claim the post, digital, and visual effects offset on the GST inclusive amount. The amount of the offset would have been calculated at 15 per cent (previous post, digital, and visual effects offset rate) of $2.2 million.

Changes to the location offset

Amount of the offset

9.80 The rate of the location offset is increased from 15 per cent to 16.5 per cent of the total of the company's qualifying Australian production expenditure on a film. ***[Schedule 9, items 1 and 3, paragraph 376-2(3)(b) and section 376-15]***

Example 9.13

Gomez Film is a company established in Australia to carry out the Australian component of a feature film, *The Three Chipotles*. This film is shot in 2012 in both Australia and Mexico, taking account of the requirements of the script.

In January 2012, Gomez Film incurs $50 million of expenditure in making the film, comprising $25 million of qualifying Australian production expenditure and $25 million of other production expenditure.

Because the amount of qualifying Australian production expenditure is a least $15 million, Gomez Film is eligible for the location offset for *The Three Chipotles*. The amount of the offset is calculated at 16.5 per cent of $25 million.

If the rate of the location offset remained at 15 per cent, the amount of the offset would have been 15 per cent of $25 million.

Financing expenditure

9.81 For the location offset, certain financing expenditure incurred in Australia prior to the end of the income year in which the film is complete can be claimed as qualifying Australian production expenditure. ***[Schedule 9, item 20, section 376-135]***

9.82 This includes any of the following:

- insurance related to making the film ***[Schedule 9, item 22, subsection 376-150(1)]***;
- fees for audit services and legal services provided in Australia in relation to raising and servicing the financing of the film ***[Schedule 9, item 22, subsection 376-150(1)]***; and/or
- fees for incorporation and liquidation of the company that makes or is responsible for making the film ***[Schedule 9, item 22, subsection 376-150(1)]***.

GST exclusion

9.83 In calculating a company's total production expenditure and qualifying Australian production expenditure, the GST-inclusive cost has previously been used to calculate the offset payable for a certified production. This was irrespective of whether the company is able to claim input tax credits under Division 11 of the GST Act.

9.84 A company's production expenditure and qualifying Australian production expenditure on a film now excludes the GST. This is to address a situation of providing an offset (additional tax benefit) in respect of an amount not incurred but is reimbursed to the taxpayer. ***[Schedule 9, item 28, section 376-185]***

Changes to post, digital and visual effects offset

Amount of the offset

9.85 The rate of the post, digital and visual effect offset is increased from 15 per cent to 30 per cent of the total of the company's qualifying Australian production expenditure on a film. ***[Schedule 9, items 2 and 4, paragraph 376-2(3)(c) and section 376-40]***

Example 9.14

KevTech is a visual effects company based in Australia.

In June 2012, KevTech performs some visual effects work for a feature film, and incurs $1 million of qualifying Australian production expenditure. KevTech is the company responsible for all the post, digital, and visual effects work in Australia for the film.

Because KevTech's qualifying Australian production expenditure on the film is at least $500,000, KevTech is eligible for the post, digital and visual effects offset. The amount of the offset is 30 per cent of $1 million.

If the rate of the post, digital and visual effects offset remained at 15 per cent, the amount of the offset would have been 15 per cent of $1 million.

Financing expenditure

9.86 For the post, digital and visual effects offset, certain financing expenditure incurred in Australia prior to the end of the income year in which the post, digital, visual effects work is complete can be claimed as qualifying Australian production expenditure. This will include any of the following:

- insurance related to making the film ***[Schedule 9, item 22, subsection 376-150(1)]***;
- fees for audit services and legal services provided in Australia in relation to raising and servicing the financing of the film ***[Schedule 9, item 22, subsection 376-150(1)]***; and/or
- fees for incorporation and liquidation of the company that makes or is responsible for making the film ***[Schedule 9, item 22, subsection 376-150(1)].***

GST exclusion

9.87 In calculating a company's total production expenditure and qualifying Australian production expenditure, the GST-inclusive cost has previously been used to calculate the offset payable for a certified production. This was irrespective of whether the company is able to claim input tax credits under Division 11 of the GST Act.

9.88 A company's production expenditure and qualifying Australian production expenditure on a film now excludes GST. This is to address a situation of providing an offset (additional tax benefit) in respect of an amount not incurred (reimbursed to) by the taxpayer. ***[Schedule 9, item 28, section 376-185]***

Application and transitional provisions

9.89 The amendments as they relate to the producer offset apply to:

- films for which production assistance (other than development assistance) has been approved by the film authority on or after 1 July 2011; or
- in any other case, films for which production expenditure is first incurred in, or in relation to, pre-production of the film on or after 1 July 2011.

[Schedule 9, subitem 31(3)]

9.90 The amendments as they relate to the location offset apply to films commencing principal photography or production of the animated image on or after 10 May 2011. ***[Schedule 9, subitem 31(1)]***

9.91 The amendments as they relate to the post, digital and visual effects offset apply to post, digital and visual effects production in Australia that commences on or after 1 July 2011. ***[Schedule 9, subitem 31(2)]***

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