

EXPLANATORY STATEMENT

Income Tax Assessment Act 1997

Producer Offset Rules 2018

Issued by the Authority of Screen Australia

Authority

The film authority has made the *Producer Offset Rules 2018* (**the new Rules**) under subsections 376-265(1) and (2) of the *Income Tax Assessment Act 1997* (**the Act**).

Subsection 376-265(1) of the Act enables the film authority to make rules by legislative instrument providing for the issue of provisional certificates in relation to the producer offset. Subsection 376-265(2) of the Act enables the film authority to make rules by legislative instrument specifying how applications for certificates, including provisional certificates, in relation to the producer offset are to be made.

Subsection 33(3) of the *Acts Interpretation Act 1901* relevantly provides that where an Act confers a power to make an instrument of a legislative character (including regulations), the power shall be construed as including a power exercisable in the like manner and subject to the like conditions to repeal, rescind, revoke, amend, or vary any such instrument. The new Rules repeal the *Producer Offset Rules 2007* (**the sunsetting Rules**).

Purpose and operation

Division 376 of the Act establishes three refundable tax offsets, including the producer offset, in relation to Australian expenditure incurred in making films.

The producer offset is an incentive to encourage the production of Australian film and television. The film authority is responsible for issuing certificates of eligibility for the producer offset pursuant to section 376-65 of the Act.

A certificate for the producer offset entitles the applicant company to a 40% (for a feature film) or 20% (for other media) tax offset on the company's qualifying Australian production expenditure (QAPE), as determined by the film authority pursuant to section 376-75. The key eligibility criterion is the requirement that a film has significant Australian content.

The new Rules support Division 376 of the Act by providing the framework for companies to apply for a provisional or final certificate for the producer offset. The new Rules set out how applications are to be considered by the film authority, and require sufficient information to be provided to the film authority to enable it to undertake its statutory duty in issuing certificates for the producer offset.

The new Rules set out the procedures by which the film authority will consider applications for provisional certificates for the producer offset. The new Rules also specify how applications for provisional and final certificates are to be made to the film authority, including the form of applications, the information to be provided, how such information is to be verified and procedures for seeking further information.

The new Rules also provide for reports to be sought from independent line producers and auditors in relation to applications for certificates as a way of verifying information contained in the applications.

The new Rules substantially reflect the sunseting Rules. Minor amendments have been made in order to modernise the administration of the producer offset. The amendments are unlikely to have any impact on applicants or the film authority.

The new Rules streamline the audit requirements for applicants in order to provide greater flexibility, and ensure best practice. The new Rules also provide for the indexation of fees charged for provisional certificate applications.

The notes on the provisions of the new Rules are set out in Attachment A.

The new Rules are a legislative instrument for the purposes of section 8 of the *Legislation Act 2003*.

Consultation

In accordance with section 17 of the *Legislation Act 2003*, consultation has taken place with the Treasury and the Australian Taxation Office in drafting the new Rules.

The film authority engage in ongoing consultation with key stakeholders, including applicants to the producer offset (i.e. independent screen producers, film studios and television networks). Given the administrative nature of the new Rules and the ongoing consultative relationship between the film authority and key stakeholders, a specific consultation process was not necessary.

Regulatory Impact

The Office of Best Practice Regulation (OBPR) has advised that, as the new Rules make amendments with minimal impact, a Regulatory Impact Statement is not required. The OBPR reference number is 22538.

Statement of Compatibility with Human Rights

A statement of compatibility with human rights for the purposes of Part 3 of the *Human Rights (Parliamentary Scrutiny) Act 2011* is set out in Attachment B.

Notes on the *Producer Offset Rules 2018*

Part 1 — Preliminary

Rule 1 Name

Rule 1 provides that the name of the instrument is the *Producer Offset Rules 2018* (the Rules).

Rule 2 Commencement

Rule 2 provides that the instrument commences the day after the instrument is registered on the Federal Register of Legislation.

Rule 3 Authority

Rule 3 provides that the source of authority for making of the Rules is subsections 376-265(1) and (2) of the *Income Tax Assessment Act 1997*.

Rule 4 Purpose of this instrument

Rule 4 sets out the purposes of the Rules, which are to:

- provide for the issue of provisional certificates in relation to the producer offset; and
- specify how applications for certificates (including provisional certificates) in relation to the producer offset are to be made.

Rule 5 Schedules

Rule 5 provides that each instrument that is specified in a Schedule to the instrument is amended or repealed as set out in the Schedule, and that any other item has effect according to its terms.

Rule 6 Definitions

Rule 6 sets out relevant definitions for the instrument.

Subrule (1) provides that for the Rules:

The term *Act* means the *Income Tax Assessment Act 1997*.

The phrase *application for a certificate for the producer offset* means an application made under subsection 376-230(3) of the Act.

The phrase *certificate for the producer offset* means a certificate issued by the film authority under section 376-65 of the Act.

The phrase *estimated qualifying Australian production expenditure* means an amount worked out having regard to the matters in Subdivision 376-C of the Act.

The phrase *independent line producer* means a person who, in the film authority's opinion:

- (a) has recent relevant experience in film production management; and
- (b) is independent of the company in relation to whom he or she is asked, under subrules 13(3) or 24(2) to provide a report.

The term *indexation factor*, for a financial year, has the meaning given by rule 12.

The term ***index number***, in relation to a quarter, means the All Groups Consumer Price Index number, being the weighted averaged of the 8 capital cities, published by the Australian Statistician in respect of that quarter.

The phrase ***official co-production*** means a film that has been, or will be, made under an arrangement entered into between the Commonwealth (or any authority of the Commonwealth) and a foreign country (or an authority of a foreign country).

The term ***producer offset*** means the tax offset mentioned in subsection 376-55(1) of the Act.

The term ***provisional certificate*** means a certificate issued by the film authority under rule 17.

The phrase ***registered company auditor*** has the meaning given by section 9 of the *Corporations Act 2001*.

The phrase ***related body corporate*** has the meaning given by section 9 of the *Corporations Act 2001*.

The term ***statutory declaration*** means a statutory declaration made under the *Statutory Declarations Act 1959*.

There is a note at the end of subrule (1) indicating that a number of expressions used in the instrument are defined in section 995-1 of the Act, it includes a list of terms that are defined in the Act.

Subrule (2) provides a descriptive definition for the terms ***incoming company*** and ***outgoing company***. An incoming company is the company that takes over the making of a film from the outgoing company. The definition deems the incoming company to have carried out particular activities, or have made particular arrangements, that were undertaken by the outgoing company prior to the incoming company taking over the making of the film.

Part 2 — Provisional certificates for the producer offset

Part 2 of the Rules provides for the manner in which applications for provisional certificates are made, assessed, considered by the film authority and certified. To the maximum extent possible, the procedures for assessing and issuing provisional certificates for films mirror the procedures for assessing and issuing final certificates for films which are set out in Part 3 of these Rules and in Division 376 of the Act.

Rule 7 Definition for Part 2

Rule 7 sets out an additional relevant definition for Part 2.

The term ***applicant*** means a company that has applied for a provisional certificate for the producer offset in accordance with Part 2 of the Rules.

Rule 8 Application for provisional certificate

Rule 8 sets out the criteria for a company to apply for a provisional certificate. To be eligible to apply for a provisional certificate for the producer offset, an applicant company must be an Australian resident or a foreign resident with a permanent establishment in Australia and an ABN.

An applicant must also be:

- carrying out, or making arrangements for the carrying out of, all the activities in Australia that are necessary for the making of the film; or
- developing the film prior to the establishment of a production company.

This rule ensures only companies with an appropriate Australian connection can apply for a provisional certificate.

Rule 9 Form of application for provisional certificate

Rule 9 sets the broad requirements for applications for provisional certificates, including requiring applications to be in writing, signed and addressed to the film authority. Rule 9 also requires expenditure statements to be prepared in accordance with the requirements of rule 27, and other information listed in Schedule 1 to the Rules to be attached to the application.

The film authority may opt to waive a requirement for an application specified by this rule. This provides the ability for the film authority, when it considers it appropriate to do so, to accept an application which would otherwise be ineligible for a provisional certificate. Without this provision, the film authority is unable to certify a film which does not comply with the requirements in the Rules.

It is intended that an application can be completed, signed and submitted electronically, and satisfy the above requirements.

Rule 10 Delivery of application for provisional certificate

Rule 10 requires that an application for a provisional certificate is to be sent to the film authority. An application can be sent electronically, for example, to an email address nominated by the film authority.

Rule 11 Fee for application for provisional certificate

Rule 11 imposes a fee to apply for a provisional certificate. The authority for the film authority's ability to charge fees for services it provides is subsection 6(4) of the *Screen Australia Act 2008*.

Rule 11 sets out how fees are to be calculated for films, based on the total film expenditure (TFE). There are defined brackets of TFE values at which a different application fee will apply. The application fees that are identified in the Rules are those applicable for the financial year commencing 1 July 2017. Each financial year, the application fees are indexed using the appropriate indexation factor (see rule 12).

The previous applicable application fee is multiplied by the appropriate indexation factor to calculate the appropriate application fee for any given year.

For the purposes of rule 11, the following additional definitions are provided:

The term *indexation factor* means the indexation factor for the financial year.

The phrase *previous applicable application fee* means the application fee payable for the previous financial year.

The film authority cannot consider an application unless the fee is paid. If an applicant withdraws their application prior to it being considered by the film authority, the film authority must refund the application fee to the applicant. If an applicant's application is unsuccessful, and the film authority refuses to issue a provisional certificate, the application fee is not refundable.

Rule 12 Indexation factor

Rule 12 sets out how the applicable indexation factor, for the purposes of calculating the application fee in rule 11, is determined each year. The applicable formula for calculating the indexation factor

(to 3 decimal places) is the index number for the reference March quarter, divided by the index number for the base March quarter.

For the purposes of rule 12, the following additional definitions are provided:

The phrase *base March quarter* means the last March quarter before the reference March quarter.

The phrase *reference March quarter* means the last March quarter before the financial year.

Subrule 12(2) provides that where the Australian Statistician has published or publishes an index number in substitution for an index number previously published, the later index number is disregarded for the purposes of this rule. This arrangement is subject to subrule 12(3).

Subrule 12(3) provides that where the Australian Statistician has changed or changes the reference base for the Consumer Price Index, then for the purpose of rule 12 after any change to the reference base took place or takes place, it is only necessary to consider the index numbers published in terms of the new reference base.

Rule 13 Film authority to consider application for provisional certificate

Rule 13 outlines the film authority's responsibilities and powers upon receipt of an application for a provisional certificate. The film authority must, upon receipt, consider the application and decide whether it will issue a provisional certificate.

In deciding whether to issue a provisional certificate, the film authority may use its own expertise, seek advice from independent line producers to consider whether the film meets the criteria for producer offset provisional certification, and seek information from a third party. An independent line producer's report may consider matters relevant to the conditions set out in subsections 376-65(2) to (6) of the Act, including whether individual charges are commercially reasonable, whether they are reasonably attributable to qualifying Australian production expenditure and whether entities that are related are dealing with each other at arm's length.

Where information is sought from a third party, including from an independent line producer, and the film authority intends to rely on the information to support a decision to refuse to issue a provisional certificate, the film authority is required to give applicants an opportunity to comment on the substances of the information. If the film authority requests an independent line producer to provide a written report, a copy of that report must be provided to the applicant who will be given a reasonable opportunity to make written submissions to the film authority in response to the report. These requirements ensure that procedural fairness is provided to the applicant.

Rule 14 Film authority may request additional information from applicant

Rule 14 empowers the film authority to seek, in writing, further information from the applicant. This includes seeking further documents. The film authority may place time limits on the provision of a response, applicants may request an extension of the period in which the additional information is required to be provided. The film authority may refuse to issue a certificate if time limits are not met by the applicant.

Rule 15 Refusal to issue provisional certificate

Rule 15 provides that where the film authority is not satisfied, on the basis of the information provided, that the film will or is likely to meet the statutory conditions for the producer offset, it may refuse to issue a provisional certificate.

There is a note to rule 15 providing that the film authority may refuse to issue a provisional certificate on other grounds, such as the applicant not providing additional information within the required timeframe.

Rule 16 Notice of refusal to issue provisional certificate

Rule 16 requires that written notice be provided to applicants within 28 days of the film authority refusing to issue a provisional certificate. Such notice must outline the specific statutory condition or conditions for the producer offset that the film authority was not satisfied that the application met.

Rule 17 Issue of provisional certificate

Rule 17 provides that where the film authority is satisfied that a film will or is likely to meet the statutory conditions it must issue a provisional certificate. The provisional certificate is issued subject to any condition specified by the film authority in the certificate.

Rule 18 Content of provisional certificate

Rule 18 outlines what a provisional certificate must state. This includes any conditions attached to the provisional certificate. All provisional certificates must also state that the certificate is issued based on the information provided, that it does not entitle the applicant to a tax offset, and that it does not bind the film authority in considering whether to issue a final certificate for the producer offset. This is because a provisional certificate is only a guide to future eligibility, and is not conclusive.

Rule 19 Effect of provisional certificate

Rule 19 makes it clear that a provisional certificate does not entitle the applicant to a tax offset, and that it does not bind the film authority in considering whether to issue a final certificate for the producer offset. This is because a provisional certificate is only a guide to future eligibility, and is not conclusive.

Part 3 — Certificates for the producer offset

Part 3 of the Rules specifies the manner in which applications for final certificates are made, assessed, and considered by the film authority, and also about the manner in which final certificates are issued by the film authority under section 376-20 of the Act.

Rule 20 Definition for Part 3

Rule 20 sets out an additional relevant definition for Part 3.

The term *applicant* means a company that has applied for a certificate for the producer offset in accordance with Part 3 of the Rules.

Rule 21 Form of application for certificate for the producer offset

Rule 21 requires the application to be made to the film authority, be signed by the applicant, and include certain information listed in Schedule 2 to the Rules. Rule 21 also requires the applicant to attach specified documentation that will be used to establish whether the company qualifies for a certificate.

Rule 21 also requires an expenditure statement to be attached to an application. An expenditure statement is the key part of an application for assessing whether a film meets the qualifying Australian production expenditure threshold in subsection 376-20(5) of the Act and for determining the amount of the producer offset. Expenditure statements (outlined in rule 28) must be independently and

properly audited. The expenditure statement will be relied upon by the film authority in determining the qualifying Australian production expenditure of the film under section 376-30 of the Act. Applicants must ensure that all audits are conducted in accordance with all applicable standards (rule 30).

Rule 21 also requires a foreign exchange statement to be attached to an application, where expenditure has been made in a foreign currency and converted to Australian dollars. Foreign exchange statements are described in rule 29.

Rule 21 also sets out a number of specific requirements for attached information where certain kinds of qualifying Australian production expenditure are being claimed, including where qualifying Australian production expenditure is being claimed in relation to acquiring copyright in a pre-existing work under item 2 in the table in subsection 376-150(1) of the Act, an application must also include evidence that the copyright is, or was immediately before the acquisition, held by an Australian resident and agreements verifying the acquisition of copyright ownership or a licence.

The film authority may opt to waive a requirement specified by this rule. This provides the ability for the film authority, when it considers it appropriate to do so, to accept an application which would otherwise be considered incomplete.

Rule 22 Delivery of application for certificate for the producer offset

Rule 22 requires an application to be sent to the film authority. An application can be sent electronically, for example, to an address nominated by the film authority.

Rule 23 Adjustment of fee for application for provisional certificate

Rule 23 applies to a situation where a fee for a provisional certificate was paid based on a particular budget range, but the final budget of the film, as notified to the film authority with an application for a final certificate, would have meant that the fee for the provisional certificate should have been a higher amount. In such a case, the applicant must pay the additional amount. This is an anti-avoidance mechanism.

The film authority may notify the applicant in writing that an additional fee is payable for the service. The additional fee that may be payable is the difference between the application fee that was paid in relation to the provisional certificate and the application fee that would have been payable in relation to the provisional certificate if the final total had been used to calculate the application fee.

Subsection 6(4) of the *Screen Australia Act 2008* allows Screen Australia, as the film authority, to charge fees for services it provides.

Rule 24 Consideration of application for certificate for the producer offset and other information

Rule 24 outlines the functions of the film authority in respect of an application. When considering an application, the film authority must consider all relevant information, including:

- the application, and any attachments;
- any written report requested by the film authority, and any written submissions made by the applicant in response to a report;
- any additional information provided by the applicant under rule 25;
- any other information or advice obtained by the film authority.

Rule 24 further provides that, when considering an application, the film authority may:

- use its own expertise;
- seek advice from independent line producers; or
- seek information from any third party;

to determine whether the film meets the criteria for producer offset certification.

Where the film authority requests a report from an independent line producer in relation to the application, the report may consider matters relevant to the conditions set out in subsections 376-65(2) to (6) of the Act, including whether individual charges are commercially reasonable, whether items claimed are reasonably attributable to qualifying Australian production expenditure, and whether costs that are charged for items indicate parties are dealing with each other at arm's length. These reports allow the film authority to ensure that charges are not being inflated to increase a film's qualifying Australian production expenditure.

Where information is sought from a third party, including from an independent line producer, and the film authority intends to rely on the information to support a decision to refuse to issue a certificate, the film authority is required to give applicants a reasonable opportunity to comment on the substance of the information. If the film authority requests an independent line producer to provide a written report, a copy of that report must be provided to the applicant who will be given a reasonable opportunity to make written submissions to the film authority in response to the report. These requirements ensure that procedural fairness is provided to the applicant.

Rule 25 Film authority may request additional information from applicant

Rule 25 provides that the film authority may also seek further information from an applicant, and place time limits on the provision of the response. The film authority may refuse to issue a certificate if time limits are not met by the applicant.

Part 4 — Expenditure statements and foreign currency statements

Part 4 sets out the requirements for expenditure statements and foreign currency statements, in relation to applications for both provisional and final certificates for the producer offset. These requirements effectively allow the film authority to decide whether each proposed item of expenditure is or is likely to be qualifying Australian production expenditure and decide whether the qualifying Australian production expenditure of the film is likely to meet the minimum expenditure requirements in subsection 376-65(6) of the Act.

Rule 26 Definition for Part 4

Rule 26 sets out an additional relevant definition for Part 4.

The term *applicant* means a company that has applied, or that intends to apply, for a certificate for a provisional certificate or a certificate for the producer offset.

Rule 27 Expenditure statements for provisional certificates

Rule 27 outlines the expenditure statement requirements in relation to an application for a provisional certificate. Such a statement must:

- distinguish expenditure that has been or is likely to be incurred outside Australia;
- specify any estimated qualifying Australian production expenditure claimed for expenditure incurred on international travel, by virtue of item 2 of the table in subsection 376-170(2) of the Act;

- specify expenditure incurred by an outgoing company, from whom the applicant has taken over production, that is intended to be claimed as qualifying Australian production expenditure;
- give a breakdown and details of projected expenditure against each budget item; and
- describe the location in, and period over which each good or service was or will be provided, and the location of any land used in production.

Amounts in expenditure statements must be expressed in Australian dollars. An amount in a foreign currency that is relevant for a purpose mentioned in column 2 of item 9 of the table in subsection 960-50(6) of the Act must be converted into Australian dollars using the special translation rule in the same item. Amounts are to be treated as if a reference in that item to qualifying Australian production expenditure were a reference to estimated qualifying Australian production expenditure.

Further, where principal photography (or production of the animated image, if applicable) has not commenced at the time of preparing the expenditure statement, a reference to the exchange rate applicable when principal photography (or production of the animated image) commences, is read as a reference to an exchange rate estimated by the applicant.

If an expenditure statement includes an amount that has been translated, from a foreign currency into Australian currency, using the special translation rule, the expenditure statement is also required to include the exchange rate, or estimated exchange rate, used to translate the amount.

Rule 28 Expenditure statements for certificates for the producer offset

Rule 28 outlines the expenditure statement requirements in relation to an application for a final certificate. Such a statement must:

- distinguish expenditure incurred outside Australia;
- specify expenditure incurred by an outgoing company, from whom the applicant has taken over production, that is intended to be claimed as qualifying Australian production expenditure;
- give a breakdown and details of actual expenditure against each budget item; and
- describe the location in, and the period over which each good or service has been provided, and the location of any land used in production (specifically, whether the land was in Australia).

If a film is an official co-production, the expenditure statement is also required to specify any estimated qualifying Australian production expenditure claimed for expenditure incurred in a foreign country.

If any of the expenditure on the film was paid for with development assistance received from one of the following bodies (listed in paragraph 376-170(4)(a) of the Act):

- Film Australia Limited;
- the Australian Film Commission;
- the Australian Film, Television and Radio School; or
- Screen Australia;

the expenditure statement must include details of the expenditure that was paid for with the development assistance, and whether the amount or value of the development assistance has been repaid.

Expenditure in expenditure statements must be expressed in Australian dollars and any expenditure in a foreign currency must be converted into Australian dollars using items 9 or 9B, as applicable, of the table in subsection 960-50(6) of the Act.

Rule 29 Foreign currency statement for certificates for the producer offset

Rule 29 sets out the requirements for a foreign currency statement that is required by subrule 21(5) where an expenditure statement contains an amount of estimated Australian production expenditure that has been incurred in a foreign currency.

A foreign currency statement must include:

- each amount of estimated qualifying Australian production expenditure that has been expended in a foreign currency, expressed in the relevant foreign currency.
- for a foreign expenditure amount that is to be translated into Australian currency, the amount expressed in Australian currency and the sum of all foreign expenditure amounts translated into Australian currency in accordance with each of item 9 and item 9B of the table in subsection 960-50(6) of the Act.

Part 5 — Audit requirements

Rule 30 Conduct of audit

Rule 30 requires an applicant company to ensure that an audit is conducted in accordance with all applicable accounting standards, including standards relating to the independence of auditors.

Part 6 — Transitional provisions

Part 6 sets out provisions that ensure continuity in the operation and administration of the producer offset in the context of the replacement of the sunseting *Producer Offset Rules 2007* with the *Producer Offset Rules 2018*.

Rule 31 Definition for Part 6

Rule 31 sets out an additional relevant definition for Part 6.

The term **2007 rules** means the *Producer Offset Rules 2007*, as in force immediately before the commencement of this instrument.

Rule 32 Application of the 2007 rules

Rule 32 sets out the situations in which the 2007 rules continue to apply notwithstanding the repeal of those rules generally.

For the purposes of continuity, the 2007 rules will continue to apply in relation to:

- an application for a provisional certificate for the producer offset made under rule 6 of the 2007 rules;
- a provisional certificate for the producer offset issued under rule 13 of the 2007 rules; and
- an application for a certificate for the producer offset made under rule 17 of the 2007 rules;

before the commencement of this instrument.

It is intended that this transitional provision will prevent undue burden being placed on applicants who have already applied for a provisional or final certificate. These applicants will not be required to

submit a further application but can instead rely on the application that they have already prepared and submitted, which will be assessed against the 2007 rules.

Likewise, for applicants that have been issued with a provisional certificate under the 2007 rules, the effect of the provisional certificate will remain the same, as set out under rule 15 of those rules.

Schedule 1 Information and documents for an application for a provisional certificate

Schedule 1 to the Rules outlines the information that must be included in and attached to an application for a provisional certificate.

Part A of Schedule 1 to the Rules outlines what information about the applicant company and film should be provided in an application for a provisional certificate. The specific information requirements are as follows:

- Items 1.1 to 2.5 require the applicant to provide general information about the applicant and the film to enable an assessment.
- Items 2.6 to 2.18 require the applicant to provide information about the subject matter of the film, the place the film was made and the details of persons involved in making the film to assist the film authority to determine if the film has significant Australian content within the meaning of section 376-70 of the Act.
- Items 2.19 to 2.28 require the applicant to disclose existing assistance provided by certain Australian Government agencies, including tax incentives, which in particular cases act as bars to certification for the producer offset. These provisions also seek information on assistance received from State or Territory government agencies to allow tracking of total government support for the film.
- Items 2.29 and 2.30 require the applicant to provide information about whether a film will incur expenditure as a foreign resident.
- Items 2.31 to 2.33 require the applicant to provide additional information where the film is a series that will enable assessments to be made about particular criteria for a series. The information sought relates to the cap on producer offset support to a maximum of 65 commercial hours of a series and the need for a series to have a new creative concept different from that of any existing series.
- Items 3.1 and 3.3 require the applicant to provide additional information that will be relevant for tracking a film if it changes production companies during its making. This is required so that any expenditure claimed as qualifying Australian production expenditure pursuant to paragraph 27(2)(c) can be attributed to the outgoing company.
- Item 3.2 allows the film authority to check that services provided by related entities are charged at arm's length.

Part B of Schedule 1 to the Rules requires certain documents to be attached to the application to certify the veracity of information provided, including a statutory declaration that the application is true and correct, and evidence that the applicant is an eligible company.

Schedule 2 Information and documents for an application for a certificate for the producer offset

Schedule 2 to the Rules outlines information that must be included in and attached to an application for a final certificate.

Part A of Schedule 2 to the Rules outlines what information about the applicant company and film should be provided in an application for a final certificate for the producer offset. Specific information requirements are as follows:

- Items 1.1 to 2.5 require the applicant to provide general information about the applicant and the film to enable assessment of an application.
- Items 2.6 to 2.18 require the applicant to provide information about the subject matter of the film, the place the film was made and the details of persons involved in making the film to assist the film authority to determine whether the film has significant Australian content within the meaning of section 376-70 of the Act.
- Item 2.19 requires the applicant to provide the dates for the commencement and completion of qualifying Australian production expenditure. This provision allows the film authority to check the average exchange rate for qualifying Australian production expenditure incurred in a foreign currency.
- Item 2.20 requires the applicant, for a film other than a feature film, to provide the value that results from dividing the estimated qualifying Australian production expenditure on the film (in Australian dollars) divided by the running time of the film (in hours). This allows the film authority to determine whether the film satisfies the expenditure thresholds in subsection 376-65(6) of the Act.
- Items 2.21 to 2.30 require the applicant to disclose existing assistance from certain Australian government agencies, including tax incentives and direct investment, which in particular cases act as bars to certification for the producer offset. The provision also seeks information on assistance received from State or Territory government agencies to allow tracking of total government support for the film.
- Items 2.31 and 2.32 require the applicant to provide information about expenditure incurred on the film as a foreign resident.
- Items 2.33 to 2.35 require particular information where the film is a series or a season of a series relating to the overall cap on producer offset support to a maximum of 65 commercial hours of a series, and the need for a series to have a new creative concept different from that of any existing series.
- Items 3.1 and 3.3 require additional information that will be relevant for tracking a film if it changes production companies during production. This enables the film authority to track the production of a film from provisional to final certification.
- Item 3.2 allows the film authority to check that services provided by related entities are charged at arm's length.

Part B of Schedule 2 to the Rules requires certain documents to be attached to the application to certify the veracity of information provided.

- Item 1.1 requires a statutory declaration to be made certifying the application.
- Item 1.2 requires the applicant to provide evidence in relation to expenditure which would not normally be qualifying Australian production expenditure but may be in some circumstances.
- Item 1.3 requires the applicant to provide evidence that the company meets the statutory requirement of residency.
- Item 1.4 requires the applicant to provide any agreements relevant to the establishment of the company, the transfer of any film production responsibility from another company and the distribution of exhibition of the completed film. This evidence will establish whether the company has the requisite level of responsibility for the film (as per paragraph 376-20(5)(c) of the Act).

- Item 1.5 requires, where the film is an official co-production, the applicant to provide a copy of the agreement between the co-producers, and evidence from the Commonwealth and the relevant foreign country that the film is an official co-production.

Schedule 3 Repeals

Schedule 3 to the Rules repeals the entirety of the *Producer Offset Rules 2007*.

Statement of Compatibility with Human Rights

Prepared in accordance with Part 3 of the Human Rights (Parliamentary Scrutiny) Act 2011

Producer Offset Rules 2018

These Rules are compatible with the human rights and freedoms recognised or declared in the international instruments listed in section 3 of the *Human Rights (Parliamentary Scrutiny) Act 2011*.

Overview of the Producer Offset Rules 2018

The *Producer Offset Rules 2018* (the Rules) are made under the *Income Tax Assessment Act 1997* (the Act). The Act establishes a scheme of tax offsets for film and television productions that incentivises the production of films in Australia, thereby creating opportunities for Australians in the industry to work on these projects. The purpose of the Rules is to provide the framework for production companies to apply for provisional, or final, certificates for the producer offset. The Rules also set out how applications are to be considered by Screen Australia, as the film authority.

The producer offset is a 40 per cent (for a feature film) or 20 per cent (for other formats) tax rebate designed to encourage the production of Australian films. It creates opportunities for Australian cast, crew and other screen production service providers to participate in productions that feature significant Australian content, disseminating Australian stories locally and overseas. The rebate is applied to the company's qualifying Australian production expenditure (QAPE), which is expenditure that is incurred for, or is reasonably attributable to: goods and services provided in Australia; the use of land in Australia; and the use of goods that are located in Australia at the time they are use in the making of the project.

Provisional certificates

The Rules permit an application for a provisional certificate, where an applicant has not commenced production or is in the midst of production. Provisional certificates give an indication of eligibility and the extent to which projected expenditure might be considered QAPE. Applications for a provisional certificate must include the information and documents listed in the Rules; the film authority will consider the information and documents provided by an applicant, together with any independent reports or additional information received by the film authority, from a third party, that it intends to rely on.

The film authority determines whether to issue a provisional certificate based on whether it is satisfied that the statutory criteria in the Act for the producer offset will be met, or are likely to be met, if the film is completed in accordance with the information supplied in the application. the film authority may also refuse to issue a provisional certificate where an applicant fails to provide additional information, requested by the film authority, within the specified period.

Final certificates

Applications for a final certificate for the producer offset are also made to the film authority. The film authority considers applications to determine a film's suitability for the producer offset against the statutory criteria in the Act. If the film is assessed as suitable, the film authority can issue a final certificate for the producer offset.

The film authority will determine whether to issue a final certificate based on whether it is satisfied that the statutory criteria in the Act for the producer offset have been met. An applicant that has been issued with a certificate for the producer offset can claim a tax rebate for QAPE incurred by the production.

Human rights implications

The Rules engage the following rights:

- To take part in cultural life, Article 15, *International Covenant on Economic, Social and Cultural Rights* (ICESCR).
- To freedom of expression, Article 19, *International Covenant on Civil and Political Rights* (ICCPR).
- The prohibition on interference with privacy and attacks on reputation, Article 17, ICCPR.

The right to take part in cultural life

Article 15 of the ICESCR protects the rights of citizens to take part in cultural life. The Rules facilitate the framework for providing an incentive for undertaking the production of film and television projects that feature significant Australian content, engaging the right to take part in cultural life.

Parties to the ICESCR undertake to: take steps to achieve the full realisation of this right, including those necessary for the conservation, development and diffusion of culture; respect the freedom indispensable for creative activity; and recognise the benefits to be derived from the encouragement and development of international contacts and cooperation in cultural fields.

The producer offset creates increased opportunities for Australian cast, crew and other screen production service providers to participate in major film and television productions. The producer offset supports the production of films and series that are developed by Australians, and tell Australian stories.

Increased film and television production in Australia develops the capability of Australians to participate in, and contribute to, a stronger local film and television industry, benefiting all Australians. Additionally, the producer offset increases the exposure of Australians generally to Australian stories.

If a project is assessed to be ineligible for the producer offset, this does not prevent a company from proceeding with the project, or from participating in cultural life generally. Additionally, it will not prevent the intended audience from participating in cultural life through the enjoyment of film and other projects.

Overall, the Rules promote the right to take part in cultural life by establishing a framework for the facilitation of the producer offset, which creates opportunities for Australians to

develop skills, participate in, and enjoy culture, and encourages the production of Australian content.

The right to freedom of expression

Article 19 of the ICCPR protects the right of citizens to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art or through any other media of his or her choice. The Rules relate to an incentive for the production of Australian films and television series, engaging the right to freedom of expression.

The Rules do not place any restrictions on the right to freedom of expression.

The Rules facilitate the producer offset tax incentive which promotes production of Australian screen projects that communicate ideas and stories, primarily Australian stories, in the medium of film. This tax incentive encourages the free communication of ideas and information through film. The producer offset encourages Australian companies and individuals to participate in the free expression of ideas through this medium.

Overall, the Rules promote the right to freedom of expression by creating opportunities for Australians to be involved in the production of films, allowing them to contribute to the free communication of ideas and information through film.

The prohibition on interference with privacy and attacks on reputation

Article 17 of the ICCPR prohibits unlawful or arbitrary interferences with a person's privacy, family, home and correspondence. It also prohibits unlawful attacks on a person's reputation. It provides that persons have the right to the protection of the law against such interference or attacks. Article 17 does not set out the reasons for which the guarantees in it may be limited, however, limitations contained in other articles, for example, those which are necessary in a democratic society in the interests of national security, public order, the protection of the rights or freedoms of others, might be legitimate objectives in appropriate circumstances. In any event, limitations on privacy must be authorised by law and must not be arbitrary.

Under the Rules, the contact person for the application is required to provide personal information, such as their name and email address to the film authority for the purposes of assessing eligibility for a provisional or final certificate for the producer offset. The information collected is to enable the film authority to communicate with the contact person while processing the application, and to notify them of the outcome. The collection of this information serves a legitimate objective, is reasonable, necessary and proportionate.

In addition, personal information that the film authority collects in relation to applications for the producer offset will be subject to the protections in the *Privacy Act 1988* and protections under the tax-specific provisions contained in Division 355 of Schedule 1 of the *Taxation Administration Act 1953*.

Overall, to the extent the Rules engage the right to privacy, the collection of personal information serves a legitimate objective, is reasonable, necessary and proportionate, and there are appropriate safeguards in place in the existing legislative framework that prevent the misuse of applicants' personal information.

Conclusion

To the extent the Rules engage the above listed human rights, the Rules are compatible with those rights because they promote the rights of Australians to freedom of expression, and to take part in cultural life.