



Producer Offset for Screen Production in Australia

GUIDELINES

AMENDED
May 2008

An Australian Government Initiative

CONTENTS

List of acronyms.....	3
SECTION I—INTRODUCTION.....	5
Overview of the Producer Offset	
SECTION II—OFFSET ELIGIBILITY.....	7
Significant Australian content (SAC).....	7
Eligible Film formats.....	8
Eligibility for Series and Seasons.....	10
QAPE thresholds and per hour minimums.....	12
Eligible applicants.....	13
Commencement and completion	14
Exclusion of access to other Commonwealth incentives.....	14
SECTION III—QUALIFYING AUSTRALIAN PRODUCTION EXPENDITURE.....	16
Production expenditure.....	16
Exclusions.....	17
What is Qualifying Australian Production Expenditure (QAPE)?.....	18
Above the Line costs as QAPE.....	24
Which costs are not QAPE?.....	24
SECTION IV—SPECIFIC EXPENDITURE ISSUES.....	25
Arm’s length expenditure.....	25
Accrual basis of expenditure.....	26
Currency exchange.....	26
Spend prior to 1 July 2007.....	27
Depreciating assets.....	27
Goods and Services Tax (GST).....	28
Transfer pricing.....	28
SECTION V—PROVISIONAL CERTIFICATION PROCESS.....	29
Eligible applicants.....	30
Projected provisional expenditure statements.....	30
Verification of distribution.....	30
SECTION VI—FINAL CERTIFICATION PROCESS.....	31
Consideration of the Application.....	31
Verification of SAC, distribution and QAPE.....	31
Film Authority’s assessment.....	32
Notification, statement of reasons and appeal of decision.....	33
Submission to the ATO.....	33
Revocation of a Certificate.....	33
Copy of the completed production.....	34
SECTION VII—YOUR APPLICATION.....	34
Timing of applications.....	34
Auditor’s statement.....	34
Attached documentation.....	35
Statutory declaration.....	35
Confidentiality.....	35
Further information from the applicant.....	36
Submitting your application.....	36
Further information.....	36

List of acronyms

ABN	Australian Business Number
ASPI	Australian Screen Production Incentive
ATO	Australian Taxation Office
AUD	Australian dollars
Classification Act	<i>Classification (Publications, Films and Computer Games) Act, 1995</i>
Distribution	Theatrical release for a feature Film, animated feature or theatrical documentary, transmission or broadcast for all other Film
FBT	Fringe Benefits Tax
FFC	Film Finance Corporation Australia Limited
Film Authority	Film Finance Corporation Australia Limited or such other Authority
Film	Feature Films, single episode drama, single episode documentary, series, season documentary series and season animation series
FLIC	Film Licensed Investments Company
GST Act	<i>A New Tax System (Goods and Services Tax) Act 1999</i>
GST	Goods and Services Tax
IFPC	Independent Film Production Consultant (defined in The Rules as “Independent Line Producer”)
ITAA36	<i>Income Tax Assessment Act 1936</i>
ITAA97	<i>Income Tax Assessment Act 1997</i>
Offset	Producer Offset
QAPE	Qualifying Australian Production Expenditure
Rules	Producer Offset Rules 2007
SAC	Significant Australian Content

Guidelines: The Australian Screen Production Incentive: Producer Offset

These guidelines have been prepared to assist in the completion of the Application Form for a certificate of eligibility for the Australian Screen Production Incentive: Producer Offset for screen production in Australia (the Producer Offset). The Australian Screen Production Incentive (ASPI) is the Australian Government's incentive for film, television and other screen production in Australia.

The ASPI is available in three streams:

- The Producer Offset, a 40 per cent offset on the qualifying Australian production expenditure on a feature film and a 20 per cent offset if the film is not a feature film
- The Location Offset (formerly the refundable film tax offset (RFTO)), a 15 per cent offset on Australian expenditure on the film
- The PDV Offset, a 15 per cent offset on the qualifying Australian production expenditure on the film that relates to post, digital and visual effects production for the film.

These guidelines refer to the Producer Offset. Please contact the Department of the Environment, Water, Heritage and the Arts in relation to the Location Offset and the PDV Offset at www.arts.gov.au/locationoffset

SECTION I—INTRODUCTION

The Australian Government introduced ASPI to provide an additional financial incentive for the production of films in Australia. Within this, the Producer Offset was introduced to encourage support for the Australian screen production industry.

The Producer Offset is a refundable tax offset for producers of Australian films for Australian expenditure incurred on or after 1 July 2007 in making Australian Films. The Producer Offset is:

- a 40 per cent offset of qualifying Australian production expenditure incurred on a feature film
- a 20 per cent offset of qualifying Australian production expenditure incurred on films that are not feature films.

The legislation which governs the Producer Offset is contained in Division 376 of the *Income Tax Assessment Act 1997* (ITAA97). These guidelines should be read in conjunction with the ITAA97 and the Producer Offset Rules 2007 (the Rules).

Applicants should seek independent professional advice from an accountant, lawyer and/or other adviser in relation to all tax and legal matters discussed in these guidelines. The guidelines are intended to be of general information only and do not constitute advice with respect to a particular applicant's circumstances.

Applicants should also contact the Film Finance Corporation Australia Limited (FFC) early (ideally before production commences) to discuss the proposed film or television project and to explore issues surrounding the Producer Offset.

Please contact:

Film Finance Corporation Australia
Tel: +61 2 9268 2555
Fax: +61 2 9264 8551
Email: ffc@ffc.gov.au
Web: www.ffc.gov.au/producer_offset

Overview of the Producer Offset

The Producer Offset is only available to companies. It is applied at a fixed percentage of Qualifying Australian Production Expenditure (QAPE) on an eligible film project. In order to access the Producer Offset, an applicant must first obtain a certificate of eligibility by submitting an application to the Film Authority. The Film Finance Corporation (FFC) is currently the Film Authority. Screen Australia will become the Film Authority from its establishment in mid 2008.

A company is not entitled to the Producer Offset if the company or someone else in relation to the film has already accessed other Australian Government film incentives – e.g. the Location Offset, the PDV Offset or the Refundable Film Tax Offset. A company is also not entitled to the Producer Offset if it has received investment from a FLIC, or received production funding from the FFC, the Australian Film Commission, Film Australia or the Australian Film Radio and Television School prior to 1 July 2007.

Applications are made to the Film Authority for a Provisional Certificate (which is optional) and/or a Final Certificate, which is the mechanism for the payment of the offset.

The certificate will be issued by the Film Authority where a production meets the relevant requirements set out in Division 376 of the ITAA97. That certificate must be submitted with the applicant company's tax return for the year in which the Film is completed.

The applicant company must be an Australian resident or have a permanent establishment in Australia and an Australian Business Number (ABN) when it lodges its income tax return and when the Producer Offset is due to be credited to the applicant company.

The certificate is the central requirement for entitlement to the Producer Offset. As part of the process of assessing an application of the certificate, the Film Authority will formally determine the production's QAPE. The Australian Taxation Office (ATO) will apply the offset based on the certificate issued by the Film Authority and the determined QAPE. The amount of the offset will first be applied against any existing tax liabilities owed by the applicant company.

The ATO will not review either the requirements for the issue of a certificate or the determined amount of QAPE. However, if the ATO, in the course of its assessment of an applicant's tax return, finds evidence of fraud or serious misrepresentation, the ATO will advise the Film Authority, which may then revoke the certificate.

Outline of the guidelines

These guidelines are not a legal document. This means that:

- you are encouraged to seek professional advice when preparing an application
- you should consult Division 376 of the ITAA97 and the Rules, which are available from www.comlaw.gov.au, and download these guidelines from www.ffc.gov.au/producer_offset
- if there is an inconsistency between the guidelines and the ITAA97 and the Rules, the provisions in the ITAA97 and the Rules prevail over that part of the guidelines.

The guidelines are designed to be read in conjunction with the relevant Application Form. Please ensure that you have the most up-to-date version of both by checking at www.ffc.gov.au/producer_offset

In these guidelines:

- Section I is the introduction
- Section II outlines the eligibility criteria for the Offset and, in particular, the requirements for Significant Australian Content (SAC)
- Section III outlines the key concepts related to calculating expenditure
- Section IV outlines some specific issues related to calculating expenditure
- Section V explains the optional provisional certification process
- Section VI explains the process for obtaining a final certificate
- Section VII deals with your Application Form.

As soon as you are aware that you are likely to be preparing an application, even before production commences, you are encouraged to contact the Film Authority to discuss issues related to the Producer Offset, particularly the tracking of expenditure. Contacting the Film Authority early will make the application process smoother and can clarify any issues that may arise.

SECTION II—OFFSET ELIGIBILITY

This section sets out the seven core conditions required for a Provisional and/or Final certificate for the Producer Offset as follows:

Significant Australian Content (SAC)

An application for the Producer Offset must show evidence that the Film has a sufficient level of Australian content in order to be eligible for the Offset. In determining whether a Film has significant Australian content, the Film Authority must have regard to the following:

- the subject matter of the film
- the place where the film was made
- the nationalities and places of residence of the persons who took part in the making of the film (including producers, directors, authors, scriptwriters, composers, actors, editors, directors of photography, production designers and other film technicians)
- the details of production expenditure incurred in respect of the film
- any other matters that the Film Authority considers to be relevant.

Alternatively, the Film Authority must be satisfied that the Film is an official co-production, that is, it has been made under an arrangement entered into between the Commonwealth or an authority of the Commonwealth and a foreign country or an authority of a foreign country. [Australia's Official Co-production Program is administered by the Australian Film Commission.

For further information go to http://afc.gov.au/filminginaustralia/copros/fiapage_2.aspx or talk to, Manager, Legal Affairs & Co-production, 02-9321 6442.]

SAC test

The test to determine whether a film has Significant Australian Content (SAC) is the same as the test previously applied to applicants for certification under Division 10BA of the ITAA 1936, with the exception that the film does not have to be wholly or substantially made in Australia and the following two matters are no longer specified as matters to which regard must automatically be had:

- the holder of copyright in the film
- the source of finance for the film.

Whilst these two matters are no longer matters which must be considered, they may nevertheless still be considered as other matters that the Film Authority considers to be relevant.

In determining whether a project has SAC, the Film Authority will consider each project on its merits, examining the level of Australian content in each of the relevant areas, then make a decision about the project in its totality.

Verification of distribution

In order to qualify for the Producer Offset, the Film must be produced for Australian public release in a commercial cinema (features) or distribution/broadcast (non-features) in some form. Although evidence of such distribution is not required for provisional certification, applicants are advised to read Section V (Verification of Distribution at Provisional Certification). Applicants should be aware that evidence of distribution – including theatrical distribution for feature films – is a requirement for final certification (see Section VI).

Eligible Film formats

The formats which are eligible for the Producer Offset are:

- feature films, including theatrical documentary features, animated features and IMAX (40 per cent of QAPE)

A feature film is intended to mean a Film of at least sixty minutes in length that is screened as the main attraction in commercial cinemas. For large-format projects such as IMAX it is intended that the Film be at least 45 minutes in length.

- single episode programme other than a documentary (20 per cent of QAPE)

This is a stand-alone programme of at least one commercial hour in length that is exhibited commercially in a medium other than cinema. This category includes telemovies or movies-of-the-week, films released direct to DVD or films released on the internet, video-on-demand or a mobile phone delivery platform. A single episode programme other than a documentary may be an animated film.

- single episode documentary (20 per cent of QAPE)

A single episode documentary must be at least one commercial half-hour in length. A documentary is defined as a programme that is a creative treatment of actuality other than a news, current affairs, sports coverage, magazine, infotainment or light entertainment programme.

- series or season (20 per cent of QAPE)

- A series or season of a series is a multiple-episode film that does not receive a cinema release but is exhibited commercially on another medium: e.g. straight to DVD or via the internet. A series or season of a series must be at least two episodes and no more than 65 episodes. Each episode must be at least one commercial half-hour in length, with the exception of animation programmes which must be at least one commercial quarter hour in length.
- The 65-episode limit is a cumulative cap on the support the Producer Offset will provide to a series. This 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 film agency support and effectively become self-sufficient.
- A series or season of a series may be an animated film and may be a documentary.

[Further information of the requirements of a series or season is set out on page 10-11]

- short form animation (20 per cent of QAPE)

A short-form animation is a programme of one episode or a collection of episodes, predominantly utilising cell, stop motion, digital or other animation of not less than one commercial quarter hour in total duration. This means, for example, that a collection of six five-minute animated episodes (one commercial half hour) would be regarded as a short-form animation, as the film would be exceed the required one commercial quarter hour.

The following formats are ineligible for the Offset:

- an advertising programme or commercial
- a discussion, quiz, panel or variety programme, or a programme of a like nature
- a film of a public event
- a training film
- a news or current affair programme
- a reality programme

- a computer game within the meaning of *Classification (Publications, Films and Computer Games) Act 1995* (Classification Act).

Section 5A of the Classification Act defines a computer game as:

- a computer programme and any associated data capable of generating a display on a computer monitor, television screen, liquid crystal display or similar medium that allows the playing of an interactive game
- a computer programme, data associated with a computer programme or a computer programme and any associated data that:
 - is capable of generating new elements or additional levels into a game (the original game) that is a computer game under subsection (1); and
 - is contained in a device separate from that containing the original game.

You must specify the format of your Film and provide a synopsis on your Application Form. Agreements relating to the distribution or broadcast or transmission will be required for all Films at final certification.

Eligibility for series and seasons

Series

A series means a narrative series such as a drama or comedy, or a documentary.

A series, for the purposes of the Producer Offset, is made up of two or more episodes that are at least one commercial half hour in duration, with the exception of animation programmes which can be at least one commercial quarter hour in length. The series must:

1. have a common theme or themes
2. contain dramatic elements that form a narrative structure
3. consist of episodes that are intended for exhibition together in a national market or markets
4. be made up of at least 2 episodes
5. contain episodes of at least one half of a commercial hour in duration, except where the film is predominately made using cell, stop motion, digital or other animation, in which case each episode is at least one quarter of a commercial hour in duration
6. have a new creative concept.

This is intended to include anthology series released under a single title, which are thematically linked but where plot, setting and characters differ.

The episodes of the series must be intended to be exhibited together in a national market or markets. This means that different series which were produced to be shown in different markets cannot be grouped together or 'bundled'. It is not intended that the term "exhibited together" unreasonably constrains broadcasting arrangements. However, you should be able to demonstrate that the series is part of a cohesive whole that is intended to be exhibited in a given market as a single title.

Seasons

A series may be comprised of individual 'seasons'. Each season of a series may apply separately for certification until the 65 episode limit has been reached. Each season of the series must separately meet the expenditure thresholds.

A single application could be made for a series (up to a 65-episode cap) and include a number of seasons of the series.

When the 65 episode limit is reached, only those episodes up to and including the 65th episode of the series will be eligible for QAPE.

New Creative Concept

Once the 65-episode limit has been reached, a series is no longer eligible for the Producer Offset. However, a new series may be eligible where it emerges as a 'spin-off' from an existing series or where it is a remake of a series produced a long time in the past provided the criteria in sections 376-65(s) and 376-70(2) of the ITAA97 are met.

Where there is doubt as to whether a new season or series is actually part of an existing series, the Film Authority will be expected to satisfy itself that it involves a new creative concept. In assessing whether there is a 'New Creative Concept', the Film Authority must have regard to the degree of difference in the following factors, in comparison to other series which have previously been produced:

- the title
- the principal characters
- the setting
- the production locations
- the persons involved in the making of the series
- any other matters that the Film Authority considers to be relevant.

It is intended that the Film Authority consider the creative concept of the applicant series compared only to other series, not, for example, to feature films, books or plays with a similar creative concept.

To remove doubt, a spin-off may be 'new', but a minor change in title merely to re-qualify a series that has exceeded 65 episodes will not be 'new'. A series that is 're-imagined' or re-made after a long hiatus may also be new.

Details of the series format are required in the Application Form, including a synopsis of the series broken down by episode.

QAPE thresholds and per hour minimums

Eligibility for the Producer Offset is principally governed by a requirement to meet SAC and a minimum level of QAPE on the production of the Film as follows:

- Feature Films: the QAPE threshold is \$1,000,000
- Single episode programme other than a documentary: the QAPE threshold is \$1,000,000 and the QAPE per hour must be at least \$800,000
- Single episode programme, documentary: the QAPE per hour must be at least \$250,000
- Series (or season), other than documentary: the QAPE threshold is \$1,000,000, and the QAPE per hour must be at least \$500,000
- Series (or season), documentary: the QAPE per hour must be at least \$250,000
- Short form animation: the QAPE threshold is \$250,000 and the QAPE per hour must be at least \$1,000,000.

For official co-productions undertaken under a treaty or Memorandum of Understanding between the Australian Government and the Government of another country, eligible expenditure made in that other country, which would not normally be QAPE, will count towards meeting the minimum QAPE thresholds. This expenditure will NOT be counted for the purposes of quantifying the value of the Producer Offset.

Please note that the Producer Offset is based on expenditure incurred by the eligible company, not by any other party (but see ‘Expenditure by prior companies’ at page 13).

QAPE per hour

The QAPE per hour is calculated by dividing the total QAPE by the duration of the series measured in hours. You must provide the calculation in your application.

$$\frac{\text{Total QAPE}}{\text{Duration of film in hours}} = \text{Average per hour QAPE}$$

The following example shows the calculation for a 26 episode series, with each episode 22 minutes in duration (which may be a commercial half hour):

$$\frac{\$5,000,000}{9.53 \text{ hours (572 minutes)}} = \$524,658 \text{ per hour QAPE}$$

Thus the series in the example above meets the QAPE threshold of \$1 million as well as the QAPE per hour minimum of \$500,000.

Eligible applicants

To be eligible for the Producer Offset, a company must be an Australian resident company or a foreign resident company with an ABN that is operating through a permanent establishment in Australia – both when it lodges the income tax return and when the Offset is due to be credited. Certificates are non-transferable, therefore an applicant must meet this criterion at application, in addition to when the tax return is submitted and the offset paid.

A company is defined as being resident in Australia if:

- the company is incorporated in Australia
- although not incorporated in Australia, it carries on business in Australia and has either its central management and control in Australia, or its voting power is controlled by shareholders who are residents of Australia.

The term ‘permanent establishment’ is defined in subsection 6(1) of the *Income Tax Assessment Act 1936* (ITAA36) and refers to ‘a place at or through which [a] person carries on any business’ and includes examples of a permanent establishment. Taxation Ruling TR 2002/5 provides the ATO’s interpretation of the meaning of the phrase ‘a place at or through which [a] person carries on any business’ in the definition of ‘permanent establishment’. The Ruling provides guidance to a non-resident who carries on business in Australia as to whether they have a place for the purposes of the definition of ‘permanent establishment’. If you have any doubt, you should contact the ATO or your own adviser to seek advice.

Where several production companies are involved in making a Film, the company that is eligible to claim the Producer Offset is the one that either carried out, or made the arrangements for the carrying out of, all the activities that were necessary for the making of the Film. Although there may be a number of entities who make arrangements for, or carry out activities necessary for, making a Film, only one company can be eligible for the Producer Offset, that is, the company that is responsible for all of those activities. The only exception is where an official Co-Production agreement would be considered to fulfil the requirement for carrying out all the activities for the making of the Film in relation to a co-production partner’s activities.

Details of the registered name of the production company, ABN, registered address, date of incorporation, and names and addresses of the company directors are to be provided in the Application Form. A statutory declaration verifying this information and confirming the legal status of the company as well as the company’s responsibility for the production of the project must be submitted with the Application Form. Please refer to the checklist ‘Before submitting your application’ attached to these guidelines.

For information about taxation and other obligations of companies commencing business in Australia, registering for an ABN and filing business activity statements and annual income tax returns, please consult the ATO website at www.ato.gov.au

Expenditure by prior companies

Eligibility for the Producer Offset extends to the production company that completes an eligible Film after having taken over the making of it from another company or companies. In this case, the new production company is taken to have incurred the production expenditure of the previous company or companies for the purposes of the Producer Offset.

Any costs incurred by the production company in the takeover of the project are excluded from its QAPE.

In some cases, one company may initiate the development of a project and a second production company may be incorporated to actually make and complete the Film. In this situation the first company's expenditure in developing the Film becomes part of the production expenditure of the second. However, any fee paid by the second company to take-over the production would not be considered QAPE.

Where the applicant company has taken over the making of a production from another company or companies, the applicant is required to identify the costs that relate to expenditure of the previous company or companies. These companies are to be identified in the Application Form with the relevant legal agreements attached to the Application for final certificate for verification purposes.

Commencement and completion

The Producer Offset has a commencement date of 1 July 2007. This means QAPE can only include expenditure incurred on or after 1 July 2007.

In respect of productions which were underway on 1 July 2007, it is intended that expenditure incurred will apply to services provided, or goods acquired, on or after 1 July 2007. This is regardless of when the contractual obligation to provide the services was undertaken. This means that in the case of any film in production on 1 July 2007, where contracts have been entered into prior to that date, applicants may make a reasonable apportionment of expenses for goods and services provided or used on or after 1 July 2007.

A film must be completed prior to applying for final certification. However there is no time limit on the submission of such application. In a case where a film is completed in one year of income, and the application is submitted in a later income year, any certificate will still have to be provided with the earlier year's tax return (i.e. applicants will have to delay the submission of the tax return).

Exclusion of access to other Commonwealth incentives

The Producer Offset, the Location Offset and the PDV Offset are mutually exclusive. Therefore, a production company is not eligible to claim the Offset if:

- It has received a final certificate for the Location Offset
- It has received a final certificate for the PDV Offset
- It has received a final certificate for the Refundable Film Tax Offset (RFTO)
- The applicant, or anyone else has claimed a deduction for the project under Division 10B of the ITAA36
- It has been granted a final certificate at any time under Division 10BA of the ITAA36

- It has been granted concessional capital investment support under the Film Licensed Investment Company scheme
- It has received production funding from the FFC, Australian Film Commission (AFC) Film Australia Limited (FAL), or the Australian Film, Television & Radio School (AFTRS) prior to 1 July 2007.

On your Application Form you will have to confirm that none of the above apply to your production. You should be aware that the Film Authority will confirm that this is the case by cross-referencing with The Department of the Environment, Water, Heritage and the Arts regarding any certification for Division 10B or 10BA, or for the Location Offset, the PDV Offset or the RFTO. The Film Authority may also cross-reference with the ATO, FAL, AFC or AFTRS.

A provisional certificate issued under Division 10BA is not a bar to eligibility for the Producer Offset. However you must disclose any provisional 10BA certificate on your Application Form.

If you have raised any finance with a provisional 10BA certificate and the production is also certified for the Producer Offset, investors will be unable to claim a deduction under Division 10B

Access to other incentives

Various Australian states and territories provide incentives in the forms of tax offsets and direct financial support to encourage productions to locate to those jurisdictions. However this has no bearing on a production's ability to access the Producer Offset. A production that accesses any state and territory incentives may also apply for the Producer Offset.

Please note however that QAPE must only include expenditure that has been 'incurred', so if a state government incentive means that you incur less production expenditure, it will effectively reduce your QAPE. For example, a production company's estimated payroll budget is AUD\$10 million but this is reduced by a state payroll tax exemption to AUD\$9 million and the production company only pays AUD\$9 million in payroll. QAPE is only claimable on the AUD\$9 million that the production company actually expended.

This is to be distinguished from a situation where, even though the state incentive is a payroll tax rebate, the state incentive is provided for after the payroll tax liability is incurred. In such a case, the expenditure incurred is the amount of the payroll tax originally paid. For example, a production company pays AUD\$10 million in payroll, including a payroll tax of AUD\$1 million. However the state government provides the production company with AUD\$1 million in financial assistance as an incentive to offset the payroll tax. In this case, the AUD\$10 million in payroll expended by the production company is claimable as QAPE.

You must indicate on your Application Form whether your production has been provided with any other Australian Federal Government or State Government support and provide contact details for the provider of any State Government support.

SECTION III—QUALIFYING AUSTRALIAN PRODUCTION EXPENDITURE

The value of the Producer Offset is calculated on the basis of eligible qualifying Australian production expenditure.

There are two general expenditure concepts relevant to the Producer Offset. They are:

- ‘production expenditure’, which is the expenditure incurred in the making of the film
- ‘qualifying Australian production expenditure’ (QAPE) which is the total 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
 - The use of goods that are located in Australia at the time they are used in the making of the film
 - Other specified expenditure.

Production expenditure

A project’s ‘production expenditure’ is defined in s.376-125 of the ITAA97 as the expenditure incurred in, or that is reasonably attributable to, the making of the production.

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

This includes pre-production activities, post production activities and any other activities undertaken inside and outside Australia that are necessary to bring a production up to the state that it is ready to be distributed, broadcast or exhibited to the general public.

The making of the production does not include any aspect of financing the Film, developing the proposal for the Film (e.g. pitching), distribution, marketing or promotion of the Film. QAPE is a subset of production expenditure. The exclusions set out below will assist applicants to identify expenditure which is ineligible for production expenditure and QAPE. In deducting the exclusions from production expenditure, applicants will be able to identify more clearly their QAPE.

An applicant company may incur production expenditure and QAPE in the income year for which the Producer Offset is sought or in earlier income years, but not expenditure prior to 1 July 2007.

Exclusions

The following types of expenditure are specifically excluded from production expenditure and QAPE:

1. Financing expenditure (including forms of insurance which constitute financing)

As financing of a production is not considered to be the making of the production by the ITAA97 [see subs.376-125 (4)], expenditure on financing is to be excluded from production expenditure and QAPE. Financing expenditure specifically includes returns payable on amounts invested, and expenditure connected with raising and servicing finance, such as interest payments.

Further, certain kinds of insurance are considered forms of financing. Accordingly, expenditure on them should be excluded from production expenditure and QAPE. Examples of these types of insurance policies include extra expense insurance, negative film risk insurance, completion guarantees and bonds, weather insurance and film producer's indemnity insurance. The Commissioner of Taxation issued Tax Determination is TD2006/2 on this issue and while it was made in relation to the Refundable Tax Offset, the Film Authority considers it a correct interpretation for the Producer Offset. For further details please see TD2006/02 at www.ato.gov.au.

2. Foreign development expenditure

Expenditure on development work undertaken outside of Australia cannot be counted as part of production expenditure and QAPE for the purposes of the Producer Offset. Examples of development expenditure are detailed on page 19/1.

3. Foreign-held copyright acquisition

Expenditure acquiring copyright from a non-Australian resident is not production expenditure or QAPE. This applies to the purchase and licensing in pre-existing works.

4. Publicity and promotion expenditure

Publicity and promotion expenditure – including press expenses, still photography, video tapes, public relations and other similar expenses – in relation to the production is to be excluded from production expenditure and QAPE where:

- expenditure creates copyright that is held by a non-Australian resident.
- expenditure was incurred after the project was completed.

5. Deferrals and profit participation

Production expenditure and QAPE is limited to expenditure that is independent of a production's commercial performance and its earnings. Therefore, payments which are deferred until the production provides financial returns through box office receipts, earnings or profits are excluded from production expenditure and QAPE.

6. *Residuals*

Unless paid out by the applicant company before production is completed, production expenditure and QAPE also excludes amounts payable in relation to the residual rights of cast members concerning the commercial exploitation of the Film through future exhibition and distribution.

A separate schedule detailing the fees and residuals paid out to each individual cast member before completion of the Film (where the cast member's remuneration qualifies as QAPE) must be attached to the Application Form for final certification.

7. *Advances*

All payments made by way of an advance on a payment in respect of deferments, profit participation or residuals (as described in paragraphs 5 & 6 above) are excluded from production expenditure and QAPE unless the advances are non-recoverable from the payee.

If the payment is non-recoverable the advance can be included as QAPE because it is not related to the Film's commercial performance or earnings.

Where such advances are included as QAPE, a separate schedule detailing their payment to individual cast members must be included as an attachment to the Application Form for final certification.

8. *Acquisition of depreciating asset*

Other than expenditure incurred to acquire copyright (outlined on page 20/2) costs incurred in the acquisition of a depreciating asset, and any capital costs invested in that asset, are not regarded as QAPE. See page 21/7 for further information on depreciation as QAPE.

9. *Distribution and promotion of the film*

The distribution of the film and its promotion and marketing are not part of actually making the film for the purposes of the Producer Offset, except for certain costs which may be incurred during production of the film (see QAPE below).

What is Qualifying Australian Production Expenditure (QAPE)?

QAPE is defined by s.376-145 of the ITAA97 as the company's expenditure on the Film that is incurred for, or is reasonably attributable to:

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

In certain circumstances, the use of goods and services provided by Australian residents in foreign countries during principal photography may be counted as QAPE (see point 12 below).

QAPE has a dual role for the purposes of the Producer Offset:

- it is the basis for determining whether the minimum expenditure thresholds have been met. [As stated earlier, for official co-productions, eligible expenditure made in the co-production country, which would not normally be QAPE, will count towards meeting the minimum QAPE expenditure thresholds]
- it provides the basis of the Producer Offset itself, as the amount of the refund is a fixed percentage of QAPE on a eligible Film.

QAPE may be incurred in any year prior to and including the year for which the Producer Offset is sought, having regard to the exclusion of expenditure incurred prior to 1 July 2007.

All costs claimed as QAPE must be presented with the Application Form (budget spreadsheet for Provisional, audited expenditure statement for Final) as detailed in Section V.

The following expenditures are QAPE and should be included in the applicant company's audited expenditure statement:

1. Australian development expenditure
2. Australian copyright acquisition
3. Insurance (other than forms of insurance which constitute financing)
4. Australian business overheads
5. Publicity and promotion expenditure
6. Residuals
7. Depreciating assets
8. Additional audio-visual material
9. Legal expenses
10. Travel to Australia
11. Freightin an item
12. Expenditure incurred in other countries
13. Fringe Benefits Tax (FBT) and State payroll tax
14. Remuneration other than by salary.

Please see items 1-14, below, for further explanation of these expenditures.

1. Australian development expenditure

Development expenditure on the film can be counted as QAPE to the extent to which it is incurred for, or is reasonably attributable to:

- (a) goods and services provided in Australia
- (b) the use of land located in Australia
- (c) the use of goods that are located in Australia at the time they are used in the making of the film.

Examples of development expenditure include:

- location surveys and other activities undertaken to identify and assess locations for possible use
- storyboarding and script writing
- research for the film
- casting actors
- developing a budget
- developing a shooting schedule for the film.

Please note that legal costs which form part of Australian development expenditure that relate to writers' contracts or to copyright issues only, including chain of title, will qualify as QAPE. Please also note that other legal costs associated with the making of the film may also be QAPE.

2. Australian Copyright acquisition

The acquisition of copyright or licensing of copyright in a pre-existing work for use in the production may be claimed as QAPE if the copyright is held by an Australian resident.

Where the purchase or licensing of copyright is being claimed as QAPE, the relevant legal agreement verifying the transfer of copyright ownership must be attached to the Application Form for final certification.

3. Insurance (other than forms of insurance which constitute financing)

Expenditure on insurance policies that are unrelated to financing and are reasonably required for the making of the project may be claimed as QAPE where the service is provided in Australia. Examples of forms of insurance that are claimable as QAPE include insurance for props, sets, wardrobes and miscellaneous equipment and public liability insurance.

Some of your production's insurance expense may be QAPE and you should obtain a breakdown of your insurance policy from your insurer to identify those that are eligible and those that are not eligible.

If your insurer is unable to provide a breakdown of the policy, applicants may make a fair and reasonable apportionment, with reference to TD2006/02. You should consult with the ATO prior to making this apportionment

4. Australian business overheads

Section 376-170 (2), Item 1 and 376-170 (3) of the ITAA97 provides that an allowance representing a proportion of general business overheads that are indirectly attributable to the production, can be claimed as QAPE.

An appropriate share of the expenditure on these overheads may be claimed as QAPE to the extent that the overheads do not exceed whichever of the following is the lesser amount:

- Five (5) per cent of the total of the company's total film expenditure on the Film
- AUD \$500,000.

The amount claimed as QAPE for general business overheads must be separately identified on your Application Form.

5. Publicity and promotion expenditure

Publicity and promotion expenditure may be counted as QAPE where it is incurred by the applicant company before completing the production, and copyright in the publicity material is held by an Australian resident.

Documents verifying the transfer of ownership of copyright, or establishing that the copyrighted promotional material is held by an Australian resident, must be attached to your Application Form for final certification.

6. Residuals

Residuals can only be claimed as QAPE if they are paid out to cast members by the applicant company before production is completed and where the payment relates to production activities undertaken in Australia or, in the case of Australian residents, in a foreign country during principal photography..

Payment of residuals to non-cast members may be QAPE (a) if payment is made before the production is completed and (b) the payment relates to production activities undertaken in Australia and the individual to whom payment is made works on the film for 2 or more consecutive calendar weeks. It is assumed such expenditures will be included in appropriate line items of the production's audited financial statements (eg: non-cast salary/remuneration).

A separate schedule detailing the fees and residuals paid out to each individual cast member before completion of the production (where the cast member's remuneration qualifies as QAPE) must be attached to your Application Form.

7. Depreciating assets

The depreciation of a depreciating asset, to the extent that it is the result of the making of the project, is claimable as QAPE. See page 27 for further information.

Please note that the cost of a depreciating asset is reduced by the amount of any GST input tax credit to which the company is entitled

8. Additional audiovisual content

Usually, QAPE can only be incurred in relation to producing the first copy of the project (i.e. for a feature film, producing the theatrical release). However, expenditure incurred in Australia on producing audiovisual content for a subsequent release of the production to the extent that it is incurred prior to completion may also be QAPE.

This means, for example, that where additional footage is shot for DVD special features, expenditure on that footage is QAPE to the extent that such expenditure is incurred in Australia.

This provision also acts as an exception to the general exclusion on publicity and promotion expenditure from QAPE (see page 17/4). For example, if a trailer to promote the film is manufactured during production is shot in Australia and is intended to be released with the film in some form, expenditure on producing the trailer may be considered QAPE.

You must separately identify any expenditure on producing additional content, or estimate the amount of that expenditure if expenditure is not easily attributed, on your applicable.

9. Legal expenses

Legal expenses incurred in respect of services performed by a law firm in Australia during the making of the production may be claimed as QAPE.

Such services would need to be integral to production activity (e.g. contracting cast and crew, music clearances, insurance and lease agreements).

Applicants should ensure that legal expenses that relate directly to Australian production activity are identified and invoiced separately. This will assist in the preparation of expenditure statements which claim QAPE for the Producer Offset.

Legal expenses that are incurred during development are only QAPE to the extent that they relate to writers' contracts or copyright issues, including chain of title.

10. Travel to Australia

Travel costs that relate to production activity undertaken in Australia will be considered as QAPE where that travel relates to incoming journeys for non-Australian personnel:

- whose remuneration qualifies as QAPE
- whose stay in Australia is necessary to undertake activities in relation to the making of the Film.

Where airfares are purchased as a return airfare, the cost of an incoming journey is equivalent to 50 per cent of that return fare. The applicant company will need to maintain detailed records of this expenditure and it must be available for examination upon request as part of the application assessment process.

In those circumstances where the production schedule requires personnel to travel into and out of Australia more than once during the making of the production, then each of those incoming journeys may be claimed as QAPE, so long as the trip meets the criteria above.

Please note that claiming of incoming travel for non-cast members is subject to the two-week rule outlined at page 25. All incoming travel costs for cast members are QAPE where their remuneration is QAPE regardless of their length of stay.

11. Freighting an item

Expenditure incurred in freighting goods within and between countries, to the extent that the goods will be used in the making of the film, is QAPE. This means that sending goods out of Australia will not be QAPE, unless the goods will be used in the making of the film at its destination.

12. Expenditure incurred in other countries

Despite the general rule that expenditure must be made in Australia for it to count as QAPE, some expenditure incurred outside of Australia may be claimed as QAPE as set out in s.376-170 (2) Item 4. In such cases, the following criteria must be met:

- the expenditure must be incurred during principal photography
- the location being used for principal photography must be reasonably required by the subject matter of the film (such as where a certain landscape or place is needed for a story)
- the expenditure must be for the remuneration of an Australian resident, or the purchase of goods or services from companies or permanent establishments in Australia that have an ABN
- goods and services provided by non-Australian residents outside Australia, or goods and services provided outside Australia during pre- or post-production, are not able to be claimed as QAPE. An exception to this is where the expenditure meets another special rule for the Producer Offset, such as freight or travel expenditure
- where the remuneration of the person travelling for the film is QAPE under this rule, that person's travel costs are also QAPE.

NB: Expenditure incurred outside the principal photography period (e.g. during the post production and editing period) does not qualify for QAPE.

13. Fringe Benefits Tax (FBT) and State payroll tax

Fringe Benefits Tax (FBT) and State payroll tax may be claimed as QAPE where they relate to qualifying goods and services used in making the production in Australia. For instance, the payroll tax attributable to an Australian cast member who works on the production in Australia would qualify as QAPE, while that for a non-cast member who visits Australia for less than two weeks would not. In both cases the tax paid would also be counted towards QAPE.

14. Remuneration other than by salary

If personnel are remunerated other than by a salary, the value of the remuneration is QAPE only if the remuneration is contractually required and is apportioned for the time the person in question provides services in Australia. Where such personnel are Australian residents and are required to travel to another country during principal photography, QAPE is applicable (as per item 13 above).

If any personnel are remunerated other than by salary, you must provide copies of the contract in question with your Application Form. You should also be aware of any Fringe Benefits Tax (FBT) obligation that may be incurred in these circumstances and you should discuss these obligations with the ATO prior to making your application.

Above the Line costs as QAPE

A maximum of 20 per cent of the total film expenditure's 'Above the Line' expenditure can be claimed as QAPE. The definition of 'Above the Line' is intended to equate to the concept as understood in the Australian film industry as follows:

- development (including script and story)
- remuneration for the principal director
- remuneration for the producers and the producers' unit
- remuneration for principal cast.

The Above the Line expenditure in excess of 20 per cent is not excluded from total film expenditure, nor does it preclude the Film's eligibility for the Producer Offset.

Which costs are not QAPE?

The following expenditures are specifically excluded from QAPE:

1. Expenditure while applicant company is a foreign resident

If expenditure has been incurred when a company is neither an Australian resident nor has both a permanent establishment in Australia and an ABN, that expenditure is not eligible as qualifying Australian production expenditure. Therefore, if the company starts a production as a non-resident without a permanent establishment in Australia this will reduce both its QAPE and the share of production expenditure that it represents.

2. Costs of services embodied in goods

If services are embodied in the cost of goods that are delivered to the applicant company, and those services were predominantly performed outside Australia, those services are not deemed to be provided in Australia for the purposes of determining QAPE.

For example, the cost of animation or special effects work undertaken outside of Australia is not QAPE. If a company contracts the delivery of animation or visual effects work undertaken outside Australia as stock or computer media in Australia, the cost of that contract would not qualify as QAPE (although the cost of delivering the stock to Australia would). The animation or effects work would have to be carried out in Australia for the work to be considered QAPE.

Please note that the costs of services embodied in goods that are carried out in Australia as part of making the production will qualify as QAPE. Only those services that are not performed in Australia are excluded.

3. Gratuities and entertainment expenses

Gratuities and entertainment expenses are not able to be claimed as QAPE.

4. Expenditure incurred in other countries

Goods and services provided in countries other than Australia, where the goods and services are not supplied by Australian residents or Australian resident companies during principal photography, are not considered QAPE (except where they are considered QAPE for Australian residents).

All goods and services in other countries provided by Australian residents, Australian resident companies and non-resident Australians outside the principal photography period are not considered QAPE.

5. The 'two-week' rule for non-cast members

In order for costs associated with non-cast to be considered QAPE, the non-cast member must enter Australia to work on the film for at least two consecutive calendar weeks. If the non-cast member enters Australia to work on the film for less than two calendar weeks, that person's remuneration, travel expenses and per diems are not considered QAPE.

This restriction is aimed at maximising the impact of the Producer Offset on the Australian film industry, by encouraging producers either to employ Australian residents to work on the production, or to increase the amount of time non-residents working on the project spend in Australia.

Where non-cast visit Australia more than once during production, each visit must be for at least two consecutive calendar weeks in order for the costs associated for that visit to be considered QAPE. If a non-cast-member's stay is for less than two weeks, the incoming airfare for that stay is not QAPE.

No minimum stay in Australia applies to cast members.

SECTION IV—SPECIFIC EXPENDITURE ISSUES

This Section outlines particular requirements of the ITAA97 that you must follow in preparing your application. It also explains the treatment of certain items of expenditure, based on rulings or determinations issued by the ATO.

Arm's length expenditure

The basis of the arm's length principle is to ensure that amounts charged between the applicant company and any related companies (including parent and subsidiary companies) for the provision of goods and services are commercially reasonable. Where the company incurs expenditure under a non-arm's length arrangement which inflates the cost of particular goods or services in relation to the project, only the commercial rate for those goods or services will be counted towards QAPE for the purpose of the Producer Offset.

The expenditure will be taken to be the amount that would have been incurred if the parties were dealing at arm's length with each other, charging what they would ordinarily charge an unrelated party.

This principle applies not only to the actual arrangement under which the company incurs expenditure, but also to any act or transaction directly or indirectly connected with the expenditure the company incurs. For example, even if the applicant company itself was dealing at arm's length to obtain the goods and services, the principle still applies if a non-arm's length deal between others could otherwise inflate the cost.

The applicant company will be required to provide details of all providers of goods or services that are used in making the production where the providers are associated with the applicant or any of its associate companies. This will assist in the process of assessing the extent to which costs charged between related goods and services providers are at the appropriate commercial level.

Accrual basis of expenditure

For the purposes of the Producer Offset, expenditure will count as QAPE as long as it has been incurred by the applicant company. The company does not have to actually discharge its liability to pay, thereby allowing expenditure to count on an accrual basis as is consistent with normal commercial practice in the film industry.

For example, a company may be making a Film on a cost-plus basis and hold significant expenditures unpaid until funds are available via payments made from a commissioning entity. Some of these expenditures, and some part of the payments by the commissioning entity, could be unpaid at the time of completion of the Film and at the time the Producer Offset is claimed.

Note however that despite the above, most deferrals and residuals are explicitly excluded from QAPE, unless paid out by the applicant company before production is completed.

Currency exchange

All production expenditure and QAPE incurred in foreign currencies must be converted into Australian dollars. For the purposes of applying for the Producer Offset, this is done in two ways:

- For the purposes of meeting the QAPE expenditure thresholds, expenditure must be converted using the foreign exchange rate for the day on which principal photography commenced. For a predominantly animated production, the relevant date is the day on which creation of the visual image commenced. This is to provide certainty to applicants in being eligible for the Producer Offset.
- For the purposes of calculating the final QAPE figure upon which the Producer Offset is based, the exchange rate used for expenditure on foreign currency will be averaged across the period in which QAPE was incurred.

Official published exchange rates are available from the Reserve Bank of Australia (RBA) at www.rba.gov.au

Spend prior to 1 July 2007

In respect of productions which were underway on 1 July 2007, it is intended that expenditure incurred will apply to services provided, or goods acquired, on or after 1 July 2007. This is regardless of when the contractual obligation to provide the services was undertaken. This means that in the case of any film in production on 1 July 2007, where contracts have been entered into prior to that date, applicants may make a reasonable apportionment of expenses for goods and services provided or used on or after 1 July 2007.

Details of the average currency exchange rate, the source from which the rate was derived, and the dates of commencement of principal photography (or for an animation, the commencement of production of the animated image) and completion of the production must be included in the Application Form.

Depreciating assets

Where a production company holds a depreciating asset and uses it for the purposes of making a production, the production expenditure includes as much of the decline in value (depreciation) of the depreciating asset that is reasonably attributable to the asset's use in the production. In order to qualify as production expenditure, a deduction in relation to the asset must also be available under Division 40 of the ITAA97.

The only exception to this general rule relates to copyright, explained at page 20/2 (Section III).

It is only the decline in value of the asset that is included in QAPE. The expenditure incurred in acquiring or improving a depreciating asset is not directly included in QAPE and neither is the difference between the purchase and sale price of the asset (but note that a balancing adjustment may be made in certain circumstances). The decline in value of a depreciating asset is worked out using either the prime cost or diminishing value method and is based upon the cost and effective life of the asset.

Deductions for depreciating assets are based on an asset's effective life as determined by the Commissioner of Taxation. The Commissioner's determinations regarding the effective life of depreciating assets used in Film production can be found on the ATO Legal Database law.ato.gov.au/atolaw/index.htm (TR 2007/3). You may use these determined values in calculating your QAPE.

Alternatively, taxpayers also have the option of self-assessing the effective life of a depreciating asset based on their particular circumstances. Effective life is worked out by estimating the period (in years) that the asset can be used by any entity to produce income, having regard to the wear and tear expected from the circumstances of use and assuming that the asset will be maintained in reasonably good order and condition. If, in working out that period, it is concluded that the asset is likely to be scrapped, sold for no more than scrap value, or abandoned before the end of that period, its effective life ends at the time it is either scrapped, sold or destroyed.

Expenditure relating to depreciating assets is included in QAPE to the extent that the expenditure is reasonably attributable to depreciating assets provided in Australia or the use of depreciating assets located in Australia at the time that they are used in the making of the production. Note that the applicant will need to take account of depreciation of assets that are owned by Australian residents and are used overseas during principal photography and are necessary for the making of the film.

Division 40 of the ITAA97 also reconciles an assumed loss of value to the actual change in value worked out when a 'balancing adjustment event' occurs. A balancing adjustment event occurs for the asset before the film is completed if:

- the asset's termination value is more than its adjustable value just before the event occurred – the production expenditure of the company on the film is reduced by the film proportion of the difference
- the asset's termination value is less than its adjustable value just before the event occurred – the production expenditure of the company on the film includes the film proportion of the difference.

Please note that expenditure incurred in acquiring or improving assets such as buildings and structures are unlikely to be production expenditure. In general, such buildings and structures are not held by production companies and, where needed, are leased for the period required for the Film project (lease costs are included in production expenditure and may be QAPE when they meet the definition in Section IV).

Further information about the availability of deductions and the treatment of depreciating assets under the uniform capital allowance rules (set out in Division 40 of the ITAA97) may be downloaded from the ATO website at www.ato.gov.au. It is recommended that you seek advice from the ATO about depreciation of assets used in Filmmaking.

Goods and Services Tax (GST)

Where applicable, all fees and expenditure referred to should include GST as set out in *A New Tax System (Goods and Services Tax) Act 1999* (GST Act). An entity, which includes a person, is able to claim input tax credits for the GST included in its expenditure provided that:

- the acquisition is for a creditable purpose under Division 11 of the GST Act
- the entity is registered, or required to be registered for GST
- the entity holds a tax invoice.

Transfer pricing

Australia's transfer pricing rules are set out in a number of related Taxation Rulings. In particular, Taxation Ruling TR97/20 explains the principles of transfer pricing methodologies, while TR 98/11 discusses how these principles can be applied. Furthermore, the 'permanent establishment' attribution rules as they relate to international transfer pricing are contained in TR2001/11.

The ATO's view on how the Producer Offset might be reflected in the method of charging for services supplied to a foreign associate are set out in Taxation Determination TD2002/20. The above rulings, determinations and other ATO publications on international transfer pricing issues can be accessed on the *ATO-assist* website at www.ato.gov.au

SECTION V—PROVISIONAL CERTIFICATION PROCESS

A Provisional Certificate is a requirement for co-investment by Federal and State film bodies. Provisional certification is not a pre-requisite for a Final Certificate.

In circumstances where an applicant has not commenced production, or at any time during production, there is an option to apply for a Provisional Certificate. A Provisional Certificate does not provide a guarantee of receiving a Final Certificate. It will however provide an indication of eligibility and the extent to which:

1. the production qualifies under the Significant Australian Content (SAC) test
2. the production is likely to meet the minimum QAPE expenditure thresholds for eligibility (this is an optional part of the application).

Where the application for a provisional certificate is for an official treaty co-production, the applicant must provide a copy of the agreement between the co-producers of the film and evidence from the Commonwealth and from the relevant foreign country that the film is an official co-production.

To apply for provisional certification for SAC only, or for both SAC and QAPE, you must fill in the Provisional Application Form and provide it, along with all attachments, to the Film Authority. The Film Authority will assess your application and will issue you, or decline to issue you, with provisional certification. If your application is for both SAC and QAPE the Provisional Application Form must include your best estimates as to the likely budget and expenditure. The Provisional Application Form is found at www.fgc.gov.au/producer_offset

A Provisional Certificate will state that, based on the information and projected budget expenditure presented in the application, the proposed project would meet the eligibility requirements for the Producer Offset.

A project that holds a Provisional Certificate is not guaranteed of qualifying for the Producer Offset and **must apply for final certification once the Film is completed** in order to claim the Producer Offset benefit. Conversely, a decision not to issue a Provisional Certificate for a project does not prevent a production company applying for a Final Certificate in relation to that production.

Where a film holds a Provisional Certificate, but material elements of the production change (e.g. changes to key creative personnel including director, principal cast, filming locations) the applicant should contact the Film Authority to see if these changes may affect the eligibility of the film for the Provisional Certificate or if a new provisional application should be made. This is of particular importance for changes to SAC.

Eligible applicants

Companies are eligible to apply for provisional certification where they are either:

- the production company responsible for the making of the production
- the company responsible for developing a project prior to the establishment of a production company.

Prospective applicants have the option of applying for a Provisional Certificate at any stage in development and production of a project up to its completion. Details of the registered name of the applicant company, ABN, registered address, and names and addresses of the company directors are to be provided in the Provisional Application Form. A statutory declaration verifying this information must be submitted with the Provisional Application Form. If the applicant company is not the production company, the same details must be provided for the production company. If the production company has taken over responsibility for the production from a previous company this must also be noted.

If the production company is yet to be established, you must indicate the level of responsibility that the production company will have for the making of the Film, and whether the production company will be an Australian company or a foreign company with a permanent establishment in Australia and an ABN.

Applicants should refer to Section IV regarding arm's length expenditure requirements. To the extent that they have been finalised, applicants for provisional certification must note all providers of goods and services that are associated with the Film production company or any of its associated companies.

Projected provisional expenditure statements

Applicants seeking provisional certification in regard to QAPE must fill in each item for the projected expenditure in the budget spreadsheet attached to the Provisional Application Form. Please refer to Section III above for explanations as to the meaning of production expenditure and QAPE. Also, ensure you attach a copy of the Film's budget.

Verification of Distribution at Provisional Certification

In order to qualify for the Producer Offset, the Film must be 'produced for exhibition to the public in cinemas or by way of television broadcasting...or distribution to the public as a video recording': section 376-65(2)(b) of the ITAA97.

Providing evidence of distribution at provisional certification stage is optional, but assists in the final certification process. The Film Authority considers that the question of production for exhibition, broadcast or distribution is a matter of intent.

In the case of provisional certification of feature films, the relevant intent to produce the Film for public exhibition must be shown to exist before and at the commencement of principal photography of the Film.

The evidence may take the form of a bona fide, legally binding deal memo or distribution agreement, as for the final certification process (*see Section VI-Final Certification Process*). Non-binding deal memos or letters of interest are not sufficient. If the intent to produce a feature film for public exhibition can be shown to exist before and at the commencement of principal photography of the Film, the Film Authority considers that the relevant intent continues to exist for the purpose of final certification of the Film, unless there is evidence of a change of intent by the Producer.

SECTION VI—FINAL CERTIFICATION PROCESS

Consideration of the Application

The first step in obtaining a Final Certificate for the Producer Offset is to provide an Application Form, along with all attachments, to the Film Authority. The Application Form is available at www.ffc.gov.au/producer_offset

The application may be submitted at any time after the film has been completed and after QAPE expenditure has ceased, and will be assessed by the Film Authority.

As outlined previously, the issuing of a Final (as opposed to a Provisional) Certificate for the Producer Offset is the central requirement for payment of the offset.

The certification of a production is the responsibility of the Film Authority. In the course of considering an application, the Film Authority will determine:

- whether a film meets SAC requirements
- evidence of distribution
- levels of QAPE.

Where a Film has provisional certification for SAC, this must be revisited at final certification to determine whether any elements of Australian content have changed.

The determination of QAPE forms the basis of an assessment of the production's eligibility against the relevant expenditure threshold and the final offset amount.

Where the application for a certificate is for an official treaty co-production, the applicant must provide a copy of the agreement between the co-producers of the film and evidence from the Commonwealth and from the relevant foreign country that the film is an official co-production.

Verification of Significant Australian Content

The FFC will assess whether the Film has Significant Australian Content as outlined on page 7.

Verification of distribution

In order to qualify for the Producer Offset, the film must be produced for public release or distribution in some form. Applicants must provide evidence of such distribution for final certification.

- A feature film is the only format which receives a 40 per cent offset. The term feature film is intended to mean a film of at least 60 minutes (45 minutes for large format, such as IMAX) that is screened as the main attraction in commercial cinemas.
- In order to receive the Producer Offset the film needs to show evidence of its intent for a cinema release in Australia. The Film Authority will require evidence of a commercial agreement for distribution via exhibition in commercial cinemas in Australia, where an admission fee is charged. This should be a bona fide release (e.g. six screens in aggregate in three capital cities), not a contrived arrangement for release on one or a very small number of screens. It excludes test screenings, free or charitable screenings, and film festival screenings (as such terms are commonly understood in the Australian film and television industry).
- Evidence of distribution on a commercial basis must also be provided for formats other than feature film. Such distribution may include Australian television broadcast or commercial delivery of a production via a new media platform (such as online or mobile content), where access to the content is available to Australians. This may be through bona fide self-distribution or arm's length distribution.

Verification of QAPE

The Film Authority may seek the advice of an Independent Film Production Consultant (IFPC – see definition in acronyms at page 3) to:

- provide an independent assessment of whether specific items claimed in expenditure statements are 'reasonably attributable' to QAPE
- assess whether costs charged for specific items are made on an 'arm's length' basis
- provide advice on the extent to which costs between subsidiary companies and parent/associate companies are commercially reasonable.

The assessment will be undertaken on a strictly commercial-in-confidence basis, and the IFPC will be subject to a contractual duty of confidentiality.

Further information may be required, to assist the IFPC's assessment. When this information relates to arm's length issues, the IFPC may seek information on the process and methodologies adopted to show that the amounts charged accord with the arm's length principle. The IFPC may contact you directly for this or for other reasons and, if so, you should co-operate with the consultant's requests.

The consultant's report will be provided to you by the Film Authority. You may provide written submissions to the Film Authority in response to the report.

Film Authority's assessment

The Film Authority will assess whether the application satisfies the requirements for the issue of a certificate under the ITAA97.

The Film Authority has the capacity to request further information from an applicant if such information is required to assist its assessment of the application.

Notification, statement of reasons and appeal of decision

When the Film Authority certifies a Film for the Producer Offset, the applicant company will be notified in writing of this decision.

Where the Film Authority refuses to issue a certificate, the applicant company will be notified in writing of this decision (including reasons for the decision).

In the course of considering an application, the Film Authority will formally determine the amount of QAPE of your Film. Once you receive your certificate you may therefore be certain of the amount of the offset you will receive.

An applicant can request a statement of reasons for the decision by the Film Authority under section 28 of the *Administrative Appeals Tribunal Act 1975*, and may also seek review of the decision by the Administrative Appeals Tribunal. A statement of reasons or review of a decision may be sought in relation to:

- a decision not to issue a certificate (i.e. declining to certify a Film)
- a determination of the amount of QAPE
- a decision to revoke a certificate (see below).

Submission to the ATO

The Final Certificate issued by the Film Authority must be submitted as part of the applicant company's tax return for the given income year in which the film was completed.

The ATO will not reconsider the determination of QAPE or SAC and it will merely pay the applicant the offset percentage according to formula (i.e. either 20 per cent or 40 percent). The final offset will be paid against the company's Australian tax liabilities for the income year in which the production was completed, with the remainder refunded to the applicant company.

Revocation of a Certificate

The Film Authority may revoke a Final Certificate where it was obtained by fraud or serious misrepresentation, and will notify the applicant company in writing of this decision (including reasons for the decision to revoke the certificate).

The information provided to the Film Authority (in an application and such other additional information requested by the Film Authority or IFPC) may be used for the purposes of the consideration of the revocation of a certificate.

As noted above, a statement of reasons may be sought in relation to a decision to revoke a certificate. An applicant may also seek Review of the decision by the Administrative Appeals Tribunal.

Copy of the completed production

The applicant must submit a copy of the completed Film (by which is meant when it is first in a state to be viewed by the general public) with their final Application Form. The copy should be provided on DVD, unrestricted territories.

The copy of the Film is required to verify that the Film is ready for distribution or exhibition to the general public and to confirm other details of the production. A certificate will not be issued if a copy of the completed film is not provided.

SECTION VII—YOUR APPLICATION

There are a number of considerations to take into account when completing your application for the Producer Offset.

Timing of applications

There is no specific closing date for applications. However, you should bear in mind the following:

- an application for final certification can only be made when arrangements are in place for Australian distribution, transmission or broadcast, and accompanying documents are available to accompany the Application
- an application for final certification can only be made when the Film is completed (as defined in Section VI)
- an application for final certification can only be made when QAPE has ceased being incurred
- the process of assessing the application by the Film Authority may take up to eight weeks, if all relevant documents are in order, after which the Film Authority will consider whether to issue a Certificate
- once you have received your Certificate, it must be must provided along with the your tax return for the income year in which the film is completed (which is outlined above) to the ATO.

Auditor's statement

You will need to include, with your Application Form, an independent auditor's statement verifying the particulars of the production expenditure detailed in your application. The auditor's statement must be provided on the pro forma attached to the Application Form.

The audit must be prepared by a person who is:

- a registered auditor under the *Corporations Act 2001*

- not an officer, partner or employee of the applicant company or a related body corporate of the applicant company (but may be contracted by them from time to time on a non-permanent basis). A related body corporate of an applicant company would be a subsidiary of an applicant company, the holding company of an applicant company or a subsidiary of the holding company of the applicant company.

The auditor's statement is provided at the applicant's expense, with the name of the auditor and auditor's company or firm, qualifications and contact details provided in the relevant section of the Application Form.

Attached documentation

You will be required to attach a range of documentation to support your application, including copies of legal documents relating to, for example, the establishment of the applicant company, legal agreements to verify the fact of Australian copyright ownership, and confirmation of distribution and exhibition arrangements. A checklist of these documents is included in the page entitled 'Before submitting your application', attached to these guidelines at page 36.

Statutory declaration

The information provided in your application must be certified as true and correct in a Statutory Declaration by an authorised person from the applicant company - normally this would be the Producer or CEO.

Confidentiality

Please note that all information provided by the applicant will be held by the Film Authority on a strictly commercial-in-confidence basis. The information will only be provided to the ATO and an IFPC in certain circumstances, to allow administration of the three offsets available under the Australian Screen Production Incentive. Some information may be exchanged between The Department of the Environment, Water, Heritage and the Arts and the Film Authority as well as the AFC, FAL and/or AFTRS.

All bodies that are privy to confidential information will be bound by Commonwealth Government confidentiality provisions to treat all such information as commercial-in-confidence and, where appropriate, will be subject to contractual duties of confidentiality.

Section 16 of the ITAA36 and Section 3C of the *Taxation Administration Act 1953* impose secrecy obligations and restrictions on any ATO officer who, in the course of his/her duties, may acquire information about the tax affairs of any person. There are some exemptions to these provisions.

The Film Authority may be legally required to release information provided by applicants in certain circumstances, for example, under the *Freedom of Information Act 1982*. However, in processing a request under that Act, the Film Authority would consult the relevant applicant prior to a decision on release of documents containing commercial information being made.

Further information from the applicant

The Film Authority reserves the right to require any additional information it deems necessary in order to issue a certificate. For instance, where an application is incomplete, the Film Authority may require the applicant, at the applicant's expense, to provide further information.

Submitting your application

You can submit an application in hard copy on the Application Form provided. You can download the Application Form and these guidelines from the Producer Offset page at www.ffc.gov.au/producer_offset. Should you have trouble downloading the form or these guidelines, please contact the Producer Offset team at the Film Authority and we will mail or fax you the forms in hard copy.

tel: +61 2 9268 2555
fax: +61 2 9264 8551
email:ffc@ffc.gov.au

Send the original application, including all attachments, to:

Film Finance Corporation Australia
Level 12
130 Elizabeth Street
SYDNEY NSW 2000

Further information

For information about taxation and other obligations of companies commencing business in Australia, registering for an ABN, filing business activity statements and annual income tax returns you can consult the ATO website at www.ato.gov.au.

Alternatively, you can contact the ATO contact officer in the National Client Group Segment of Large Business & International on tel: +61 2 9374 1555, fax: +61 2 9374 1223 or write to:

ATO contact officer – Film Tax Offset
National Client Group
Large Business & International
Australian Taxation Office
PO Box 1216
HURSTVILLE NSW 2220
Australia