



## AUSTRALIAN SCREEN PRODUCTION INCENTIVES

### An overview by national Australian law firm, Holding Redlich

#### INTRODUCTION

In its 2007-2008 Budget presented on 8 May 2007, the Australian Government announced a package of measures, the Australian Screen Production Incentive (**ASPI**), to boost its support for the Australian film and television industry.

From the viewpoint of overseas producers, two of the most significant aspects of ASPI are the enhancement of the Refundable Tax Offset (which is now called the Location Offset) to increase the amount of the offset from 12.5% of qualifying Australian production expenditure to 15%, and the introduction of a new tax offset, also at the rate of 15%, for post production, digital and visual effects expenditure.

In addition, for film and television projects with significant Australian content, the existing investor tax incentives under Divisions 10B and 10BA of the *Income Tax Assessment Act 1936 (ITAA 1936)* were replaced by a new incentive for producers of film and television projects, the Producer Offset.

All of the new measures are contained in Division 376 of the *Income Tax Assessment Act 1997 (ITAA 1997)*. At the same time as announcing ASPI, the Australian Government announced the creation of a new "super" Australian film agency, Screen Australia, which will merge the Film Finance Corporation (**FFC**), Film Australia and the Australian Film Commission into one new authority with effect from 1 July 2008. **NB: All references to money in this information booklet are to Australian dollars.**

#### LOCATION OFFSET

The Location Offset replaces the incentive previously known as the Refundable Tax Offset. The Location Offset applies to eligible productions that spend at least \$15 million in qualifying Australian production expenditure (**QAPE**). The producer is able to access a 15% offset credited to the producer through its income tax return.

This is an increase from the 12.5% available under the Refundable Tax Offset since July 2002.

The general test for QAPE is to be calculated as set out below for the Producer Offset; however, a few specific rules also apply to the Location Offset.

#### Eligible applicants

The Location Offset is available to a company for projects commencing principal photography (or commencing visual image production for animation) on or after 8 May 2007, where the following conditions are met:

- the project is a feature film, telemovie, television series (unlike for the Producer Offset, referred to below, reality television is eligible) or television mini-series (the exclusions are the same as for the Producer Offset);
- the total QAPE is \$50 million, or, at least \$15 million (but less than \$50 million) where the QAPE is at least 70% of total production expenditure;
- if the project is a television series, it must also have a minimum average spend of \$1 million of QAPE per hour (other specific budget and production timeframe conditions apply for television series');
- a certificate has been issued by the Arts Minister of Australia;
- the offset is claimed in the production company's income tax return for the relevant income year; and
- the production company is either: (i) an Australian resident; or (ii) an Australian permanent establishment of a non-Australian resident company which has an Australian Business Number (ABN). A company need not be an eligible company at the time it applies for certification, but it is expected that it will meet this criterion at the time of application for the offset.

#### PDV OFFSET

A post production, digital and visual effects offset of 15% of related QAPE is available for activities on a project including 3D animation, digital compositing and music composition undertaken on or after 1 July 2007 (**PDV Offset**). The PDV Offset is available as an alternative to the Location Offset (it should be noted that a project cannot receive both) for projects spending at least \$5 million QAPE on post production, digital and visual effects. It is available even if the project itself is not shot in Australia.



### Eligible applicants

The PDV Offset is available to a company where the following conditions are met:

- the effects involve the creation of audio or visual elements (other than principal photography, pick ups, or the creation of physical elements such as set, props and costumes), the manipulation of audio or visual elements (other than pick ups, or the creation of physical elements) and activities necessarily related to these activities;
- a certificate has been issued by the Arts Minister of Australia;
- the offset is claimed in the year in which the post production, digital and visual effects ceased; and
- the company is either: (i) an Australian resident; or (ii) an Australian permanent establishment of a non-Australian resident company which has an ABN.

### PRODUCER OFFSET

The Producer Offset is a financial incentive offered to producers in the form of a refundable tax offset and is structured in a similar way to the existing Refundable Tax Offset (which, as set out above, is now enhanced and referred to as the Location Offset). A company which is an eligible applicant for an eligible project is entitled to receive a Refundable Tax Offset in relation to a percentage (a feature film receiving the highest percentage of 40%) of the QAPE incurred on the project (**Producer Offset**).

A refund will occur where the offset exceeds the amount of income tax and other tax liabilities. Any amount of offset applied against tax liabilities or refunded to a company is not assessable income for income tax purposes. However, if the offset is distributed to shareholders, those distributions will be unfranked dividends under Australian tax law.

The Producer Offset is not available in a limited set of circumstances including: where a claim has been made under Division 10B; where a final certificate has been issued under Division 10BA; or where a certificate has been issued for the Location Offset.

In October 2008, the Arts Minister of Australia is required to review the legislation implementing the Producer Offset to consider its effect on the levels of production within the independent production sector as compared to that by television broadcasters (which are also entitled to access the offset for eligible in-house production).

### Eligible applicants

The Producer Offset is available to a company for the

making of an Australian project where the following conditions are met:

- the project was completed (i.e. in a state ready to be distributed, broadcast or exhibited to the general public) in the income year that the offset is claimed;
- a certificate (see below) has been issued for the project by the film authority (being the FFC until 1 July 2008 and then Screen Australia);
- the offset is claimed in the company's income tax return for the relevant income year; and
- the company is either: (i) an Australian resident; or (ii) an Australian permanent establishment of a non-Australian resident company which has an ABN both at the time when the company lodges its tax return claiming the offset and the time when the tax offset is due to be credited.

### Eligible projects

For the Producer Offset, a feature film is a film (which may be an animated film or a documentary) of at least one hour in length that is screened as the main attraction in commercial cinemas, or 45 minutes in length where the film is designed for release in a large format cinema such as IMAX.

While a feature film is the only format which is eligible to receive an offset of 40% of QAPE, the following are other eligible projects which receive an offset of 20% of QAPE:

- a single episode program (e.g. telemovies and direct to DVD, Internet or mobile films);
- a series;
- a season of a series; or
- a short-form animation.

Eligible projects are those that meet the definitions of an eligible project, the minimum duration, and the minimum QAPE thresholds (including minimum QAPE per hour) which is different for each genre of eligible television program.

Certain projects are not eligible for the Producer Offset including: reality, discussion, quiz, panel, variety, and news and current affairs programs.

### Production expenditure and QAPE

Production expenditure is the expenditure incurred or reasonably attributable to actually making the project up to completion (i.e. in a state ready to be distributed, broadcast or exhibited to the general public), and may be revenue or capital in nature (and so may give rise to an income tax deduction). It does not include the "making of" a project, developing a proposal, arranging or obtaining finance for the project, or the distribution of the project and its promotion.



For the purposes of the Producer Offset QAPE is the production expenditure for a project to the extent that it is incurred on or after 1 July 2007 for, or 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 project; and
- other specified expenditure.

There are specific exclusions (e.g. expenditure incurred on a member of the cast who enters Australia to work on the project for less than 2 consecutive weeks) and specific inclusions (for example, legal expenses relating to writers' contracts and chain of title, and certain development costs).

There is a cap of 20% of a project's production budget for 'above the line' costs (development, remuneration for the principal director, the producers and producers' unit and principal cast) that can be claimed as QAPE for the purposes of the Producer Offset.

Total QAPE of a project is determined by the film authority, and a company may seek the film authority's advice on QAPE and a provisional certificate in respect of the elements of the budget eligible as QAPE. It should be noted that a provisional certificate does not guarantee that a project will receive final certification, however it will provide an indication of eligibility in regards to either or both of the QAPE and significant Australian content (see below).

### **Certification**

To receive the Producer Offset a project must have a final certificate of eligibility from the film authority. The film authority is the FFC until 30 June 2007 and then the new authority Screen Australia. Final certification requires that the film authority is satisfied that:

- the project is an eligible project;
- the project has been completed;
- there is evidence of Australian distribution;
- the applicant company carried out, or made the arrangements for, all the activities necessary for the making of the project and is the only company that did so; and
- the project has 'significant Australian content' (or is an official co-production made under an arrangement entered into between Australian and a foreign country).

As the film authority must be satisfied of all of these matters, the claim for the Producer Offset in a company's income tax return is based only on the existence of the certificate and on the level of QAPE set out in the certificate.

Decisions not to issue or to revoke a certificate, and determinations of QAPE, are reviewable on application.

The FFC has recently released guidelines and an application form for the Producer Offset which are available on its website: [www.ffc.gov.au](http://www.ffc.gov.au).

### **How to determine if a film has sufficient SAC**

The test for determining whether a project has 'significant Australian content' (**SAC**) is the same test previously applied to applicants for certification under Division 10BA of the ITAA 1936, except it is no longer necessary that a project is wholly or substantially made in Australia and, in addition, sources of finance and ownership of copyright are no longer specified as factors automatically requiring consideration. These factors may, however, still be considered as particular factors in the certification test, especially where consideration of other matters does not result in strong grounds for or against certification.

The film authority is expected to look particularly closely at the position of the Australian producer in respect of copyright ownership and financial participation.

The matters detailed in the test are intended to be interpreted in the same way as the Division 10BA test. Accordingly, the following comments on Division 10BA taken from the Ministerial guidelines for Division 10BA issued on 23 January 1983 remain relevant.

### **The subject matter of the project**

Documentary programs dealing with non-Australian subjects and to be filmed overseas should demonstrate that an Australian perspective will be evident in the project and could be expected to be based on Australian scripts. Australianised versions of foreign scripts would not normally be acceptable. A drama work could be expected to be based on an Australian source. Any non-Australian services should be identified and the impact of those services should be assessed. Where the source is non-Australian the scriptwriters would be expected to be Australian and the subject matter be demonstrated to be in accordance with the above criteria.

### **The place where the project was made**

Where overseas location shooting is required by the script, other production elements should be carried out in Australia.

### **The nationalities and places of residence of the persons who took part in the making of the project**

The key roles in the development of a script and the production of a project should normally be undertaken by Australians. In particular, the producer and director would normally be expected to be Australian. The writer and principal actors also would be expected to be Australian,

unless special circumstances warrant otherwise. The role of non-Australians must be closely identified and explained in terms of their impact on the Australian content of the project.

#### **The details of the production expenditure incurred in respect of the project**

Production and post production would normally be expected to be undertaken in Australia.

#### **Any other matters that the film authority considers to be relevant**

This will largely depend on whether there are any areas requiring further investigation. The determination will be a matter of judgement based on consideration of all the elements of a particular project. Where there are non-Australian elements in a particular section, the applicant should provide justification for these elements and it is expected that there would be reliance on strong Australian elements in other sections.

#### **FURTHER INFORMATION**

Further information about the **Location Offset** and the **PDV Offset** is available from:

Ausfilm

Tel: (310) 229 2362 – Los Angeles

+61 2 9383 4192 – Sydney

Email: [info@ausfilm.com.au](mailto:info@ausfilm.com.au)

Internet: [www.ausfilm.com](http://www.ausfilm.com)

Department of Environment, Water, Heritage and the Arts –  
[www.arts.gov.au](http://www.arts.gov.au)

Further information about the **Producer Offset** is available from:

Film Finance Corporation Australia

Tel: +61 2 9268 2555

Email: [ffc@ffc.gov.au](mailto:ffc@ffc.gov.au)

Internet: [www.ffc.gov.au/producer\\_offset](http://www.ffc.gov.au/producer_offset)

#### **ABOUT HOLDING REDLICH**

Holding Redlich is a leading national Australian law firm and has been at the forefront of the Australian media and entertainment industries for more than 25 years.

We provide legal advice to media and entertainment clients on a broad range of topics including all aspects of production, distribution and finance, for producers, broadcasters, distributors, talent, investors and other financiers.

In representing the most important players, we:

- offer extensive experience of every possible type of transaction and dispute;
- hold a position of recognised leadership in the industries we serve;
- are continually asked to comment on the most recent developments; and
- contribute to Australian government policy and regulatory development.

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Every effort has been made to ensure that this document is accurate. However, it is not intended to be, and is not, a substitute for obtaining competent legal advice.

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