

EXPLANATORY STATEMENT

Income Tax Assessment Act 1997

PDV Offset Rules 2018

Issued by the Authority of the Minister for the Arts

Authority

The Arts Minister has made the *PDV Offset Rules 2018* (**the new Rules**) under Subsections 376-260(2) and (3) of the *Income Tax Assessment Act 1997* (**the Act**).

Subsection 376-260(2) of the Act enables the Arts Minister to make rules by legislative instrument providing for the issue of provisional certificates in relation to the Post, Digital and Visual Effects (PDV) offset. Subsection 376-260(3) of the Act enables the Arts Minister to make rules by legislative instrument specifying how applications for certificates, including provisional certificates, in relation to the PDV offset are to be made.

Subsection 33(3) of the *Acts Interpretation Act 1901* relevantly provides that where an Act confers a power to make an instrument of a legislative character (including regulations), the power shall be construed as including a power exercisable in the like manner and subject to the like conditions to repeal, rescind, revoke, amend, or vary any such instrument. The new Rules repeal the *PDV Offset Rules 2008* (**the sunseting Rules**).

Purpose and operation

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

The PDV offset is an incentive to attract post production and visual effects work to Australia on productions, regardless of where they are shot. The Arts Minister is responsible for issuing certificates of eligibility for the PDV offset pursuant to section 376-45 of the Act.

A certificate for the PDV offset entitles the applicant company to a 30 per cent tax rebate on the company's qualifying Australian production expenditure to the extent that it relates to PDV, as determined by the Arts Minister. The key eligibility criterion is a minimum qualifying expenditure of \$500,000.

For the purposes of this explanatory statement, certificates issued by the Arts Minister are referred to as final certificates, to distinguish them from provisional certificates issued by the Film Certification Advisory Board (the Board).

The new Rules support Division 376 of the Act by providing the framework for companies to apply for a provisional or final certificate for the PDV offset. The Rules set out how applications are to be considered by the Board, and require sufficient information to be provided to the Arts Minister to enable him or her to undertake his or her statutory duty in issuing certificates for the PDV offset.

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

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

The new Rules substantially reflect the sunseting Rules. Minor amendments have been made in order to modernise the administration of the PDV offset. The amendments are unlikely to have any impact on applicants, the Board or the Arts Minister.

The new Rules streamline the audit requirements for applicants in order to provide greater flexibility, and ensure best practice.

The new Rules also establish timeframes for the provision of comments and additional information by applicants in order to ensure that applications can be processed in a timely manner.

The notes on the provisions of the new Rules are set out in [Attachment A](#).

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

Consultation

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

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

Regulatory Impact

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

Statement of Compatibility with Human Rights

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

Notes on the *PDV Offset Rules 2018*

Part 1 - Preliminary

Rule 1 Name

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

Rule 2 Commencement

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

Rule 3 Authority

Rule 3 provides that the source of authority for making of the Rules is subsections 376-260(2) and (3) of the *Income Tax Assessment Act 1997*.

Rule 4 Schedules

Rule 4 provides that each instrument that is specified in a Schedule to the instrument is amended or repealed as set out in the Schedule, and that any other item has effect according to its terms.

Rule 5 Objects of Rules

Rule 5 sets out the objects of the Rules, which are to:

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

Rule 6 Definitions

Rule 6 sets out relevant definitions for the instrument.

Subrule (1) provides that for the Rules:

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

The phrase *application for a certificate for the PDV offset* means an application made under subsection 376-230(2) of the Act.

The term *Board* is defined to mean the Film Certification Advisory Board that is established by rule 7 of the *Film Certification Advisory Board Rules 2018*.

The phrase *certificate for the PDV offset* means a certificate issued by the Arts Minister under section 376-45 of the Act.

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

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

- (a) has recent relevant experience in film production management; and

- (b) is independent of the company in relation to whom he or she is asked, under subrule 11(3) or 21(3), to provide a report.

The term *PDV offset* means the tax offset mentioned in subsection 376-35(1) of the Act.

The term *provisional certificate* means a certificate issued by the Board under rule 15.

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

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

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

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

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

Part 2 – Provisional certificates for PDV offset

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

Rule 7 Definition for Part 2

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

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

Rule 8 Application for provisional certificate

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

An applicant must also be in the process of carrying out, or making arrangements for the carrying out of, all the activities in Australia that are necessary for the post, digital and visual effects production for the film.

Rule 9 Form of application for provisional certificate

Rule 9 sets the broad requirements for applications for provisional certificates, including requiring applications to be in writing, signed, and addressed to the Board. Rule 9 also requires expenditure statements prepared in accordance with the requirements of rule 25, and other information listed in Schedule 1 to the Rules to be attached to the application.

Rule 9 also requires, where applicants claim expenditure on publicity and promotional expenditure as qualifying Australian production expenditure under item 3 in the table in subsection 376-150(1) of the Act, additional documentation. These applicants must provide evidence that the copyright is held by an Australian resident with their application. If this evidence is unavailable at the time of application, the applicant may provide a statement of assurance that the copyright in the material will be held by an Australian resident.

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

Rule 10 Delivery of application for provisional certificate

Rule 10 requires that an application for a provisional certificate is to be sent to the Arts Department, which is the Department for which the Arts Minister at any point in time is responsible for. An application can be sent electronically, for example to an email address specified by the Department.

Rule 11 Board to consider application for provisional certificate

Rule 11 outlines the Board's responsibilities and powers upon receipt of an application for a provisional certificate. The Board must, upon receipt, consider the application and decide whether it will issue a provisional certificate.

In deciding whether to issue a provisional certificate, the Board may use its own expertise, seek advice from independent line producers to consider whether the film meets the criteria for PDV offset provisional certification, and seek information from a third party. An independent line producer's report may consider matters relevant to the conditions set out in subsections 376-45(2), (3) or (5) of the Act, including whether individual charges are commercially reasonable, whether they are reasonably attributable to qualifying Australian production expenditure and whether entities that are related are dealing with each other at arm's length.

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

If the Board provides information or a report to an applicant for comment, the applicant has 28 days to provide a response. However, if requested, the Board may extend that period. If the applicant does not provide a response within the 28 days, or extended period, the Board may refuse to issue a provisional certificate to the applicant. This ensures that the applicant cannot frustrate the Board's decision making processes through delay in providing a response, ensuring that the Board can make timely decisions on applications for provisional certificates.

Rule 12 Board may request additional information from applicant

Rule 12 empowers the Board to seek, in writing, further information from the applicant. This includes seeking further documents. The Board may place time limits on the provision of a response and applicants may request an extension of the period in which the additional information is required to be provided. The Board may refuse to issue a certificate if time limits are not met by the applicant.

Rule 13 Refusal to issue provisional certificate

Rule 13 provides that where the Board is not satisfied, on the basis of the information provided, that the film will or is likely to meet the statutory conditions for the PDV offset, it may refuse to issue a provisional certificate.

There is a note to rule 13 providing that the Board may refuse to issue a provisional certificate on other grounds, such as the applicant not providing additional information within the required timeframe.

Rule 14 Notice of refusal to issue provisional certificate

Rule 14 requires that written notice be provided to the applicant within 28 days of the Board refusing to issue a provisional certificate. Such a notice must outline the specific statutory condition or conditions for the PDV offset that the Board was not satisfied that the applicant met.

Rule 15 Issue of provisional certificate

Rule 15 provides that where the Board is satisfied that a film will or is likely to meet the statutory conditions for the PDV offset it must issue a provisional certificate. The Board can issue a provisional certificate subject to conditions, such as eligible public exhibition and broadcasting arrangements being satisfied.

Rule 16 Content of provisional certificate

Rule 16 outlines what a provisional certificate must state. This includes any conditions attached to the provisional certificate. All provisional certificates must also state that the certificate is issued based on the information provided, that it does not entitle the applicant to a tax offset, and that it does not bind the Arts Minister in considering whether to issue a final certificate for the PDV offset. This is because a provisional certificate is only a guide to future eligibility, and is not conclusive.

Rule 17 Effect of provisional certificate

Rule 17 makes it clear that a provisional certificate has no effect on the eligibility of an applicant for a final certificate or for a tax offset. This is because a provisional certificate is only a guide for future eligibility, and is not conclusive.

Part 3 — Certificates for PDV offset

Part 3 of the Rules specifies the manner in which applications for final certificates are made, assessed, and considered by the Board, and also about the manner in which advice in relation to issuing a final certificate is to be provided to the Arts Minister.

Rule 18 Definition for Part 3

Rule 18 sets out an additional relevant definition for Part 3.

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

Rule 19 Form of application for certificate for the PDV offset

Rule 19 requires the application to be made to the Arts Minister, be signed by the applicant, and include certain information listed in Schedule 2 to the Rules. Rule 19 also requires the applicant to attach specified documentation that will be used to establish whether the company qualifies for a certificate. These requirements are similar to those for provisional certificates noted above.

Rule 19 also requires an expenditure statement to be attached to an application. An expenditure statement is the key part of an application for assessing whether a film meets the qualifying Australian production expenditure threshold in subsection 376-45(5) of the Act and for determining the amount of the PDV offset. Expenditure statements (outlined in rule 26) must be independently and properly audited. The expenditure statement will be relied upon by the Arts Minister in determining the qualifying Australian production expenditure of the film under section 376-50 of the Act. Applicants must ensure that all audits are conducted in accordance with all applicable standards (rule 28).

Rule 19 also requires a foreign exchange statement to be attached to an application, where expenditure has been made in a foreign currency and converted to Australian dollars. Foreign exchange statements are described in rule 27.

Rule 19 also sets out a number of specific requirements for attached information where certain kinds of qualifying Australian production expenditure are being claimed:

- where qualifying Australian production expenditure is being claimed in relation to acquiring copyright in a pre-existing work under item 2 in the table in subsection 376-150(1) of the Act, an application must also include evidence that the copyright is, or was immediately before the acquisition, held by an Australian resident and agreements verifying the acquisition of copyright ownership or a licence;
- evidence of expenditure and of Australian ownership of the relevant copyright must be attached where qualifying Australian production expenditure is claimed for producing copyrighted promotional material under item 3 of the same table; and
- where expenditure on additional audio or visual content produced otherwise than for use in the first copy of the film is claimed as qualifying Australian production expenditure under item 4 of the same table, evidence that the content was produced for the film but not for use in the first copy of the film must also be attached along with evidence that the expenditure was incurred in Australia prior to the completion of the film.

Rule 20 Delivery of application for certificate for the PDV offset

Rule 20 requires an application to be sent to the Arts Department, which is the Department for which the Arts Minister at any point in time is responsible for. An application can be sent electronically, for example to an email address nominated by the Department.

Rule 21 Board to consider application for certificate for the PDV offset

Rule 21 outlines the functions of the Board in respect of an application. If the Arts Minister requests the Board's advice on an application, the Board must consider the application and advise the Minister as requested. Generally, the Board will advise the Arts Minister about whether the Minister should issue a certificate in relation to a film and its opinion on the amount of qualifying Australian production expenditure for the film.

When considering an application, the Board must consider all relevant information, including:

- the application, and any attachments;
- any written report requested by the Board, and any written submissions made by the applicant in response to a report;
- any additional information provided by the applicant under rule 22;
- any other information or advice obtained by the Board.

Rule 21 further provides that, when considering a request from the Arts Minister, the Board may:

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

to consider whether the film meets the criteria for PDV offset certification, and to assess claimed qualifying Australian production expenditure.

Where the Board requests a report from an independent line producer in relation to the application, the report may consider matters relevant to the conditions set out in subsections 376-45(2), (3) or (5) of the Act, including whether individual charges are commercially reasonable, whether items claimed are reasonably attributable to qualifying Australian production expenditure, and whether costs that are charged for items indicate that parties are dealing with each other at arm's length. These reports allow the Board to ensure that charges are not being inflated to increase a film's qualifying Australian production expenditure.

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

If the Board provides information or a report to an applicant for comment, the applicant has 28 days to provide a response. However, if requested, the Board may extend that period. If the applicant does not provide a response within the 28 days, or extended period, the Board may proceed to advise the Arts Minister in accordance with rule 23. This ensures that the applicant cannot frustrate the Board's processes for providing advice to the Arts Minister through delay in providing a response to the Board, ensuring that the Board can provide timely advice on applications for certificates.

Rule 22 Board may request additional information from applicant

Rule 22 provides that the Board may also seek further information from an applicant, and place time limits on the provision of the response. The Board may advise the Arts Minister not to issue a certificate if time limits are not met by the applicant.

Rule 23 Board to advise Arts Minister

Rule 23 requires the Board to advise the Arts Minister on whether it is satisfied that certain conditions set out in the Act are met by an application as if it were acting under Division 376 of the Act and had determined the qualifying Australian production expenditure on the film. Such advice must be in writing and must include reasons if the advice is not to issue a certificate for the PDV offset.

Part 4 — Expenditure statements and foreign currency statements

Part 4 sets out the requirements for expenditure statements and foreign currency statements, in relation to applications for both provisional and final certificates for the PDV offset. These requirements effectively allow the Board and the Arts Minister to decide whether each proposed item of expenditure is, or is likely to be, qualifying Australian production expenditure and decide whether the qualifying Australian production expenditure of the film is likely to meet the minimum expenditure requirements in subsection 376-45(5) of the Act.

Rule 24 Definition for Part 4

Rule 24 sets out an additional relevant definition for Part 4.

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

Rule 25 Expenditure statements for provisional certificates

Rule 25 outlines the expenditure statement requirements in relation to an application for a provisional certificate. Such a statement must:

- specify an estimated qualifying Australian production expenditure on the film, to the extent that it relates to post, digital and visual effects production for the film;
- specify expenditure incurred by an outgoing company, from whom the applicant has taken over production, that is intended to be claimed as qualifying Australian production expenditure;
- give a breakdown and details of projected expenditure against each budget item; and
- describe the location in which, and the period over which, each good or service has been or will be provided, including the location of any land used in production (specifically, whether the location was in Australia).

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

Further, where post, digital and visual effects production has not commenced at the time of preparing the expenditure statement, a reference to the exchange rate applicable when post, digital and visual effects production commences, is read as a reference to an exchange rate estimated by the applicant.

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

Rule 26 Expenditure statements for certificates for the PDV offset

Rule 26 outlines the expenditure statement requirements in relation to an application for a final certificate. Such a statement must:

- specify qualifying Australian production expenditure incurred by the film, to the extent that it relates to post, digital and visual effects production for the film;

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

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

Rule 27 Foreign currency statement for certificates for the PDV offset

Rule 27 sets out the requirements for a foreign currency statement that is required by paragraph 19(2)(d) because an expenditure statement contains an amount of estimated Australian production expenditure that has been translated into Australian currency.

A foreign currency statement must include:

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

Part 5 — Audit requirements

Rule 28 Conduct of audit

Rule 28 requires an applicant company to ensure that an audit is conducted in accordance with all applicable accounting standards, including standards relating to the independence of auditors.

Part 6 — Transitional provisions

Part 6 sets out provisions that ensure continuity in the operation and administration of the PDV offset scheme in the context of the replacement of the sunseting *PDV Offset Rules 2008* with the *PDV Offset Rules 2018*.

Rule 29 Definition for Part 6

Rule 29 sets out an additional relevant definition for Part 6.

The term *2008 rules* means the *PDV Offset Rules 2008*, as in force immediately before the commencement of this instrument.

Rule 30 Application of the 2008 rules

Rule 30 sets out the situations in which the 2008 rules continue to apply notwithstanding the repeal of those rules generally.

For the purposes of continuity, the 2008 rules will continue to apply in relation to:

- an application for a provisional certificate for the PDV offset made under rule 6 of the 2008 rules;
- a provisional certificate for the PDV offset issued under rule 13 of the 2008 rules;
- an application for a certificate for the PDV offset made under rule 17 of the 2008 rules;

before the commencement of this instrument.

It is intended that this transitional provision will prevent undue burden being placed on applicants who have already applied for a provisional or final certificate. These applicants will not be required to submit a further application but can instead rely on the application that they have already prepared and submitted, which will be assessed against the 2008 rules.

Likewise, for applicants that have been issued with a provisional certificate under the 2008 rules, the effect of the provisional certificate will remain the same, as set out under rule 15 of those rules.

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

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

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

- Items 1.1 to 2.7 require the applicant to provide general information about the applicant and the film to enable an assessment.
- Items 2.8 to 2.11 require the applicant to disclose any film tax incentives provided by certain Australian Government agencies that in particular cases act as bars to certification for the PDV offset.
- Items 2.12 and 2.13 require the applicant to provide information about whether a film will incur expenditure while it is a foreign resident. Such expenditure would not be qualifying Australian production expenditure.
- Items 3.1 and 3.3 require the applicant to provide additional information that will be relevant for tracking a film if it changes production companies during its making. This is required so that any expenditure claimed as qualifying Australian production expenditure pursuant to paragraph 26(2)(b) can be attributed to the outgoing company.
- Item 3.2 allows the Board to check that services provided by related entities are charged at arm's length.

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

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

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

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

- Items 1.1 to 2.7 require the applicant to provide general information about the applicant and the film to enable assessment of an application.
- Item 2.8 requires the applicant to provide dates for the commencement and completion of qualifying Australian production expenditure.
- Items 2.9 to 2.12 require the applicant to disclose any film tax incentives administered by certain Australian Government agencies that in particular cases act as bars to certification for the PDV offset.
- Items 2.13 and 2.14 require the applicant to provide information about whether expenditure was incurred for post, digital and visual effects production for the film while the applicant was a foreign resident, and particular details in relation to that expenditure. Such expenditure is not qualifying Australian production expenditure.
- Item 3.1 allows the Board to check that services provided by related entities are at market rates and at arm's length.
- Item 3.2 requires information on any company from which the applicant company took over production.

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

- Item 1.1 requires a statutory declaration to be made certifying the application.
- Item 1.2 requires the applicant to provide evidence that the company is an Australian resident, or has a permanent establishment in Australia and an ABN.
- Item 1.3 requires copies of any agreements relevant to the establishment of the company, certain responsibilities for post, digital and visual effects production for the film, and distribution or exhibition of the completed film.
- Item 1.4 requires written confirmation from the production company for the film, or from the person who commissioned the applicant's services, that the company did carry out, or made arrangements for carrying out, the activities in Australia that were necessary for the post, digital and visual effects production for the film.

Schedule 3 Repeals

Schedule 3 to the Rules repeals the entirety of the *PDV Offset Rules 2008*, which are due to sunset on 1 April 2018.

Statement of Compatibility with Human Rights

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

PDV Offset Rules 2018

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

Overview of the PDV Offset Rules 2018

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

The PDV offset is a 30 per cent tax rebate for work done on post, digital and visual effects production in Australia, regardless of where a project is shot. It creates opportunities for PDV producers and professionals to undertake PDV activities in Australia. The rebate is applied to qualifying PDV expenditure, such as expenditure incurred on: 2D and 3D animation; animatronics; computer generated imagery (CGI); editing; motion capture; soundtrack; or titles and credits.

Provisional certificates

The Rules permit an application for a provisional certificate, where an applicant has not commenced, or is in the midst of, work on the PDV activities. Provisional certificates give an indication of eligibility, and the extent to which projected expenditure would be considered qualifying PDV expenditure. Applications for a provisional certificate must include the information and documents listed in the Rules; the Board will consider the information and documents provided by an applicant, together with any independent reports or additional information requested. Applicants are required to be given an opportunity to respond to any additional information received by the Board, from a third party, that it intends to rely on.

The Board determines whether to issue a provisional certificate based on whether it is satisfied that the statutory criteria in the Act for the PDV offset will be met, or are likely to be met, if the film is completed in accordance with the information supplied in the application. The Board may refuse to issue a provisional certificate where it is not satisfied the criteria will be met, or are likely to be met. The Board may also refuse to issue a provisional certificate where an applicant fails to provide additional information, requested by the Board, within the specified period.

Final certificates

Applications for a final certificate for the PDV offset are made to the Minister for the Arts (the Minister). The Minister may request the Board consider the application and provide advice regarding the applicant's suitability for the PDV offset against the statutory criteria in the Act. If a film is assessed as suitable, the Board can make a recommendation to the Minister that he or she should issue a final certificate for the PDV offset. An applicant that has been issued with a certificate for the PDV offset can claim a tax rebate for qualifying PDV expenditure incurred by the production.

The Board may also advise the Minister that it is not satisfied that the criteria for the PDV offset is met in relation to an application, or that a certificate should not be issued. The Board must provide reasoning for its advice to the Minister.

Human rights implications

The Rules engage the following rights:

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

The right to take part in cultural life

Article 15 of the ICESCR protects the rights of citizens to take part in cultural life. The Rules facilitate the framework for providing an incentive for undertaking the production and post production of screen productions in Australia, engaging the right to take part in cultural life.

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

The PDV offset creates increased opportunities for PDV professionals based in Australia to participate in major film and television productions. The PDV offset is primarily pitched at attracting PDV work to Australia on productions which shoot offshore, however a project that shoots in Australia may still qualify for the PDV offset. The PDV offset is only available on qualifying PDV expenditure, not on expenditure incurred on principal photography or other tasks.

Increased production and post-production opportunities in Australia on major film and television projects develop the capability of Australian PDV professionals to participate in, and contribute to, a stronger local film and television industry, benefiting all Australians. Additionally, the PDV offset encourages international cooperation on large-scale cultural projects by incentivising foreign productions undertaking PDV work in Australia.

If a project is assessed to be ineligible for the PDV offset, this does not prevent a company from proceeding with the project, applying for the PDV offset again in the future for other productions, or from participating in cultural life generally. Additionally, it will not prevent

the intended audience from participating in cultural life through the enjoyment of film, television series or other productions.

Overall, the Rules promote the right to take part in cultural life by establishing a framework for the facilitation of the PDV offset, which creates opportunities for Australians to develop skills, participate in, and enjoy culture.

The right to freedom of expression

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

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

The Rules facilitate the PDV offset tax incentive which promotes the production and post-production of major film and television projects in Australia by local and international companies. This tax incentive encourages the free communication of ideas and information through film. The PDV offset sets out to reduce financial barriers to filming in Australia, contributing to a stronger film and television industry that can compete internationally. This means that Australians in the film industry have increased opportunities to become involved in productions, and can participate in the free expression of ideas through this medium.

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

The prohibition on interference with privacy and attacks on reputation

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

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

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

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

Conclusion

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