

EXPLANATORY STATEMENT

Income Tax Assessment Act 1997

Film Certification Advisory Board Rules 2018

Issued by the Authority of the Minister for the Arts

Authority

The Minister for the Arts has made the *Film Certification Advisory Board Rules 2018* (**the new Rules**) under subsection 376-260(1) of the *Income Tax Assessment Act 1997* (**the Act**).

Subsection 376-260(1) of the Act enables the Arts Minister to make rules by legislative instrument establishing the Film Certification Advisory Board (the Board) to consider applications for certificates under the post, digital and visual effects (PDV) offset and the location offset, and to advise the Minister on whether to issue certificates under these offsets. Subsection 376-260(1) also enables the Minister to make rules by legislative instrument specifying the membership, terms and conditions of appointment and procedures of the Board.

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 *Film Certification Advisory Board Rules 2008* (**the sunseting Rules**).

Purpose and operation

Division 376 of the Act establishes three refundable tax offsets 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 Minister for the Arts is responsible for issuing certificates of eligibility for the PDV offset pursuant to section 376-45 of the Act.

The location offset is an incentive to attract large-budget film and television projects to film in Australia. The Minister for the Arts is responsible for issuing certificates of eligibility for the location offset pursuant to section 376-20 of the Act.

In respect of these two offsets the Board provides advice to the Minister as to whether the Minister should certify an applicant's production. The Board also advises the Minister regarding the estimated level of qualifying Australian production expenditure under the relevant offset.

In effect, the new Rules implement the intention of Division 376 of the Act by assisting the Minister to make determinations about whether to issue certificates of eligibility for the location and PDV offsets and about a certified production's level of qualifying Australian production expenditure, through the provision of the views of experienced film producers.

The new Rules establish the Board, specify the conditions of membership of the Board, including the number of members and process for appointments, and specify procedures to be followed by the Board in meetings and reaching decisions without meetings.

Under separate but complementary legislative instruments, the Board is empowered to issue provisional certificates for both the location and PDV offsets. Provisional certificates provide guidance to applicants as to whether their production is likely to qualify for either the location or PDV offset once it is completed.

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

The new Rules provide certainty regarding the Board's ongoing operations while a position is vacant or a Board member is absent.

The new Rules also provide additional clarity on the Board's procedures for out-of-session decision making.

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 and location offsets (i.e. independent screen producers, film studios and television networks) and members of the Board. Given the administrative nature of the new Rules and the ongoing 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 *Film Certification Advisory Board Rules 2018*

Part 1 - Preliminary

Rule 1 Name

Rule 1 provides that the name of the instrument is the *Film Certification Advisory Board 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 subsection 376-260(1) 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 items in a Schedule have effect according to its terms.

Rule 5 Objects of Rules

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

- establish the Film Certification Advisory Board (the Board);
- specify additional functions of the Board;
- specify membership of the Board;
- specify terms and conditions of appointments to the Board; and
- specify the procedures to be followed by the Board when performing its functions.

Rule 6 Definitions

Rule 6 sets out relevant definitions for the instrument.

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

The term *appointed member* is defined to mean a Board member appointed by the Arts Minister under rule 10.

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

The phrase *certificate for the location offset* means a certificate for a film in relation to the location offset issued by the Arts Minister under section 376-20 of the Act.

The phrase *certificate for the PDV offset* means a certificate for the post, digital and visual effects production for a film issued by the Arts Minister under section 376-45 of the Act.

The phrase **location offset** means the tax offset mentioned in section 376-10 of the Act, which entitles a company to a tax offset for a film where Australian production expenditure occurred and certain conditions are met.

The phrase **PDV offset** means the tax offset mentioned in section 376-35 of the Act, which entitles a company to a tax offset for a film where Australian production expenditure occurred in relation to post, digital and visual effects production and certain conditions are met.

The term **scheme** means the scheme established under Division 376 of the Act, which is the scheme to provide tax offsets for Australian production expenditure in relation to films. The Scheme establishes 3 types of refundable tax offsets designed to support and develop the Australian screen and media industry, those offsets are: the location offset; the PDV offset, and the producer offset.

The phrase **SES employee** is defined to have the same meaning as is in section 7 of the *Public Service Act 1999*.

There is a note at the end of the rule indicating that a number of expressions used in the instrument are defined in section 995-1 of the Act, including the terms: Arts Secretary; and film.

Part 2 – Film Certification Advisory Board

Rule 7 Establishment of the Board

Rule 7 establishes the Board, the role of which is to:

- consider applications for provisional certificates for the location offset or the PDV offset;
- consider applications for a certificate for the location offset or the PDV offset; and
- advise the Minister on whether to issue certificates for the location offset or the PDV offset.

Rule 8 Additional functions of the Board

Rule 8 sets out the additional functions of the Board, which are to:

- Advise the Minister on matters of policy relevant to the scheme to the extent it relates to the location and PDV offsets. This includes matters in relation to the administration of the offsets.
- Consider applications for provisional certificates for the offsets, and issue provisional certificates; which are certificates issued by the Board and are indicative, although not determinative, of whether the company may be eligible for a final certificate issued by the Minister.
- Provide the Minister with advice, on request, on the total of a company's qualifying Australian production expenditure to the extent that it relates to a location or a PDV offset, to assist the Minister to determine whether a final certificate should be issued.

There is a note at the end of the rule indicating the functions of the Board expressly conferred on the Board, which are not considered additional functions.

Rule 9 Powers of the Board

Rule 9 provides for the powers of the Board.

Subrule 9(1) provides that the Board has the power to do everything that is necessary or convenient to be done for the purpose of carrying out its functions, which includes both core functions and additional functions.

Subrule 9(2) makes it clear that the Board can exercise all of its powers, and carry out all of its functions if an appointed member position is vacant, or an appointed member is absent from performing the duties of the office. This means that the Board can continue to function and exercise all of its powers where there is only a Chair and one appointed member. This could arise, for example, when the second appointed member is on a leave of absence, or the second appointed member position is vacant.

Rule 10 Constitution of, and appointment to, the Board

Rule 10 provides for the membership of the Board, and how members are appointed.

The Board is to consist of a Chair, and two other appointed members.

The Chair is the person who, from time to time, performs the duties of the Band 1 SES employee in the Department who is responsible for administering the location offset and the PDV offset.

However, if the Secretary of the Department makes a nomination, the Chair will be the person who, from time to time, performs the duties of an SES employee in the Department which are specified in the nomination. Under either option, a person who is acting in the position of the relevant SES employee will be the Chair for the period they are acting.

The rule also makes it clear that the Secretary can nominate duties instead of a person for paragraph 10(2)(b) or paragraph 17(2)(b), and that the person who performs those duties will be the Chair for the period they perform those duties and while the nomination is in effect.

The rule provides for the Minister to appoint a person as an appointed member for a period of up to three years on a part-time basis, and establishes the processes for appointment, and qualifications and experience required of an appointed member.

Rule 11 Acting appointments

Rule 11 provides for the Minister to appoint a person to act as an appointed member in certain circumstances.

This rule allows the Minister to appoint persons as members on an acting basis when a member is absent or unable to perform his or her duties, or during any vacancy in the office of a member, and confirms that actions taken by persons purporting to be acting members are not made invalid by any irregularity in their appointment or the timing of their appointment.

Rule 12 Appointed members may be given leave of absence

Rule 12 provides for the Minister to grant an appointed member a leave of absence from performing duties of the office or attending meetings of the Board, or both. The Minister may determine terms and conditions on which the appointed member is granted leave to be absent from performing those duties or performing those functions.

A leave of absence could be granted, for example, if an appointed member is ill and is unable to perform duties or attend meetings for an indeterminate period of time. In this example, the Minister could impose a term or a condition that the appointed member is to provide the Minister with 2 weeks advanced notice of when they will likely be available to return to duties.

Rule 13 Resignation of appointed member

Rule 13 allows for an appointed member to resign their appointment. For the resignation to be effective, it must be given to the Minister by written notice.

Rule 14 Termination of appointment of appointed members

Rule 14 provides for circumstances when the Minister may or must terminate the appointment of an appointed member.

The Minister may terminate the appointment of an appointed member for misbehaviour or physical or mental incapacity. The Minister may also terminate the appointment of an appointed member if the member has failed to comply, without a reasonable excuse, with the duty of confidence or the duty to disclose a conflict of interest.

The circumstances where the Minister must terminate the appointment of an appointed member are where the member:

- becomes bankrupt or applies to take the benefit of any law for the relief of bankrupt or insolvent debtors;
- compounds with his or her creditors;
- makes an assignment of his or her remuneration for the benefit of his or her creditors; or
- is absent, without a leave of absence granted by the Minister, from three consecutive Board meetings or from performing the duties of the office for a period of three months or longer.

These circumstances are sufficiently serious, as they generally affect the trust that applicants have in the Board along with the effective functioning of the Board, and as such warrant mandatory termination.

The rule provides that the termination takes effect when the member is given written notice of the termination.

Rule 15 Board members' duty of confidentiality

Rule 15 places members, both the Chair and appointed members, under a duty of confidentiality in respect of information they learn through their positions on the Board, notably the expenditure statements of applicant films. This rule is important as it fosters trust in the operation of the Board by applicants, ensuring that they feel confident in providing all the requisite information in order for the Board to assess applications and provide advice to the Minister.

This rule makes it clear that there is an ongoing duty of confidence that continues even after the person ceases to be a member of the Board.

Rule 16 Disclosure of certain interest of Board members

Rule 16 requires members, both the Chair and appointed members, to disclose any direct or indirect pecuniary interest in a matter that is being considered, or is about to be considered, by the Board. The disclosure must be made as soon as possible to the Minister, in writing, and detail the nature of the interest.

The Minister can consent in writing for the member to consider, or continue to consider, the relevant matter and this is to be recorded in the minutes of the relevant meeting. However, if the Minister does not consent, the member must not be present for any deliberations on the matter, and must not vote on the matter or otherwise contribute to the decision by the Board.

This provision promotes confidence in the Board and ensures transparency. Applicants will have trust that the Board will make impartial decisions and recommendations which are not tainted by conflicting pecuniary interests of members.

Rule 17 Board meetings

Rule 17 provides that the Chair may convene a meeting of the Board at any time. The meeting must be presided over by the Chair or, if the Chair is not present, the person who, from time to time, performs the duties of an SES employee in the Department who is nominated by the Secretary for the purposes of paragraph 17(2)(b).

Rule 18 Quorum

Rule 18 sets out that there must be two Board members present at a meeting of the Board to constitute a quorum. The rule makes it clear that where an appointed member position is vacant (i.e. the only Board members are the Chair and one appointed member) a quorum still requires at least two Board members.

However, if two members of the Board are unable to participate in a Board meeting in relation to a particular matter due to disclosure of pecuniary interests under rule 16, the quorum necessary for a meeting of the Board in relation to that matter is one (i.e. the Chair only). There is a note under subrule 18(3) that makes it clear that in these circumstances, only one member will be entitled to vote in respect of the relevant matter.

Rule 19 Conduct of meetings

Rule 19 sets out how Board meetings are to be conducted.

A question arising at a meeting of the Board will be determined by a majority of members present and entitled to vote on that question. For example, if the Chair and two appointed members are present and are all entitled to vote on the particular matter being considered, a question will be determined by two out of the three members voting to resolve the question in a particular way.

This rule makes it clear that the person presiding over the meeting will have a deliberative vote and, if necessary, a casting vote. For example, if one appointed member votes to resolve the issue in a particular way, and the other appointed member to resolve the same issue in another way, the Chair presiding at the meeting will have the determinative and casting vote.

When conducting meetings, this rule provides that the Board can regulate those meetings as it considers appropriate, consistent with these rules. For example, the Board could decide to hold a meeting via a videoconference, so all members do not need to be present in person to participate in the meeting. This provides the Board with the flexibility to conduct meetings in a way that is efficient and practical for the Board and members.

There is a note to subrule 19(3) referring to section 33B of the *Acts Interpretation Act 1901* which provides that a body such as the Board may permit members to participate in a meeting by telephone, closed-circuit television, or any other means of communication the member is permitted to utilise and the member will be taken to be present at the meeting.

This rule permits the Board to invite a person to attend a meeting to provide advice or information to assist the Board determine a matter. For example, the Board could invite an expert from the industry to provide advice or information to assist the Board make a recommendation to the Minister in relation to a certificate for a PDV or location offset.

If a person is invited to assist the Board, that person must not share any information they obtained as a result of the invitation, nor use that information to gain an advantage for themselves or another

person. This ensures that information provided by applicants to the Board is appropriately protected, and not exploited by a person invited to assist the Board.

For any Board meeting held, the Board must keep minutes of that meeting.

Rule 20 Powers, functions and decisions without meetings

Rule 20 provides that the Board is able to exercise all of its powers, and carry out all of its functions without a Board meeting. This recognises that the majority of the work undertaken by the Board will be conducted without a Board meeting. In practice, Board members will consider matters independently and then liaise with other members in relation to those matters via email or telephone, for example. This rule allows the Board to function and make decisions without having to hold a formal Board meeting.

In order to exercise a power or carry out a function without a Board meeting, a majority of the members are required to agree to the exercise of the power or the performance of the function. This could be achieved by members agreeing to a particular course of action via email, for example.

If exercising a power or performing a function outside of a Board meeting, records of the agreement of the majority of members to that course of action must be kept. This is similar to the requirement to keep minutes of the meeting, and will ensure that appropriate records of decisions to exercise a power or perform a function are kept.

This rule also makes it clear that the Board can pass a resolution without a Board meeting if a majority of the members entitled to vote on the resolution provide a statement in writing that they are in favour of the resolution. This allows the Board to conduct business that would usually be undertaken at a Board meeting out of session.

An out of session resolution is taken to have passed when a majority of members entitled to vote on the resolution have each provided a statement in writing that they are in favour of the resolution. Similar to the example above, this could be achieved by a member emailing the Chair and other member setting out their vote in relation to the resolution. Records of resolutions that are resolved in this manner are to be kept.

Part 3 – Transitional provisions

Rule 21 Definitions

Rule 21 sets out a definition of the term **2008 rules** for the purposes of Part 3 of the Rules. That term is defined to mean the *Film Certification Advisory Board Rules 2008* that were in force immediately before the commencement of the instrument.

Rule 22 Establishment of the Board

Rule 22 makes it clear that the Board established under the 2008 rules, continues to be established under this new instrument. This rule makes it clear that on commencement of these rules, the Board is taken to have been established under rule 7, notwithstanding that it was established under rule 5 of the 2008 rules.

Rule 23 Appointments

Rule 23 is required because various appointments made under the 2008 rules are required to continue in force under this instrument. Any appointment as an appointed member made under subrule 8(4) of

the 2008 rules that was in force immediately before commencement of these rules, is taken to have been made under subrule 10(4) of this instrument.

This ensures that appointments that were in force immediately before the commencement of this instrument, continue in force without the need to make new appointments.

Schedule 1 Repeals

The Schedule repeals the *Film Certification Advisory Board 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

Film Certification Advisory Board 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 Film Certification Advisory Board Rules 2018

The *Film Certification Advisory Board 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 incentivise the production and post production of projects in Australia, creating opportunities for Australians to work on these films and television series.

Under the scheme, production companies may apply to the Minister for the Arts (the Minister) for a certificate of eligibility for the location offset, or the post, digital and visual effects production (PDV) offset. The location offset is a 16.5 per cent tax rebate on Australian spend of large budget productions filmed in Australia. The PDV offset is a 30 per cent tax rebate on qualifying PDV expenditure of productions regardless of where they are filmed.

The Rules establish the Film Certification Advisory Board (the Board), which is responsible for considering applications for, and providing advice to, the Minister regarding whether to issue a certificate for a location offset or a PDV offset. The Board also provides advice to the Minister regarding the estimated level of qualifying Australian production expenditure in relation to the location offset or the PDV offset. The establishment of the Board ensures that people with appropriate experience can provide advice to the Minister to assist with determining eligibility for one of these tax offsets.

The Board consists of three members: a Chair, who is a senior Departmental employee responsible for administering the location offset and PDV offset; and two members appointed by the Minister for up to three years, who are, or have been, involved in the film production industry, and have expertise in film production budgets.

The Rules provide for administrative processes such as: resignation of appointed members; requests for a leave of absence; making acting appointments; and the termination of an appointment by the Minister in certain circumstances. The Rules also require Board members to disclose certain pecuniary interests, and ensure that members are subject to a duty of confidentiality. The Rules specify how Board meetings are to be conducted, including the number of members required for a quorum. However, the Rules make it clear that the Board may exercise its powers and carry out its functions without meetings where a majority of its members agree to the exercise of the power or the performance of the function.

Human rights implications

The Rules do not engage any of the applicable rights or freedoms.

Conclusion

The Rules are compatible with human rights as they do not raise any human rights issues.