

Explanatory Statement

Issued by the Authority of the Arts Minister

Income Tax Assessment (Digital Games Tax Offset) Rules 2023

Authority

The *Income Tax Assessment (Digital Games Tax Offset) Rules 2023* (**the Rules**) is made under sections 378-100 and 378-105 of the *Income Tax Assessment Act 1997* (**the Act**).

Section 378-100 of the Act enables the Arts Minister to make rules by legislative instrument about the Digital Games Tax Offset (DGTO) on a range of matters, including specifying how applications for certificates are to be made, specifying the form and contents of certificate, how amendments to certificates are to be made and providing for provisional certificates in relation to the DGTO (including in relation to matters referred to in paragraph 378-100(1)(b), (b) or (c).

Section 378-105 of the Act enables the Arts Minister to make rules by legislative instrument establishing the Digital Games Tax Offset Advisory Board (the Board) to consider applications under the DGTO, advise the Arts Minister on whether to issue certificates under the DGTO, perform other functions in relation to the operation of Division 378 (including the operation of the rules made under section 378-100), specifying the membership and the terms and conditions of the appointment to the Board, and specifying procedures to be followed by the Board in performing its functions.

Sections 378-100 and 378-105 commence on the first 1 January, 1 April, 1 July or 1 October to occur after the day the *Treasury Laws Amendment (2022 Measures No. 4) Act 2023* (Amendment Act) receives the Royal Assent (being the ‘start time’). Subsection 4(2) of the *Acts Interpretation Act 1901* allows new powers to be exercised before the start time as if the relevant commencement had occurred.

Purpose

The purpose of the instrument is to set out the procedural rules for how companies apply for a Completion Certificate, Porting Certificate or Ongoing Development Certificate for the DGTO, or provisional forms of those certificates, and the rules for the processing and assessment of such applications (including seeking expert advice and additional information from applicants). The Rules also establish the Board, which will consist of three members.

The Rules provide for administrative processes related to the Board such as: resignation of appointed members; requests for a leave of absence; making acting appointments; and the termination of an appointment by the Arts Minister in certain circumstances. The Rules require Board members to disclose certain conflicts of interest, ensure that members are subject to a duty of confidentiality, and specify procedures to be followed by the Board in meetings and reaching decisions without meetings.

The Rules also provide for reports to be sought from independent experts and third parties in relation to applications for DGTO certificates, as a way of verifying information contained in applications. The Rules require sufficient information to be provided to the Arts Minister to enable the Minister to decide whether to issue a certificate under the DGTO.

The Rules also set out the procedures by which the Board will consider applications for provisional certificates for the DGTO. Provisional certificates are non-binding and provide guidance to applicants as to whether their game or games are likely to qualify for final DGTO certification.

Background

Division 378 of the Act establishes the DGTO, a refundable tax offset designed to support the growth of the digital games industry in Australia by providing concessional tax treatment for Australian expenditure. The DGTO is a new intervention and is a key policy commitment under the Government's National Cultural Policy, *Revive: a place for every story, a story for every place*.

The Arts Minister is responsible for issuing certificates of eligibility for the DGTO pursuant to 378-25 of the Act. A certificate for the DGTO entitles the applicant company to a 30 per cent tax rebate on the company's qualifying Australian development expenditure, as determined by the Arts Minister and not exceeding the \$20,000,000 per income year threshold established by section 378-15 of the Act. A key eligibility criterion is minimum qualifying Australian development expenditure of \$500,000, undertaken on development activity to complete a new game (Completion Certificate), development activity to port an existing game (Porting Certificate) or ongoing development activity on one or more games in a single income year (Ongoing Development Certificate). Together, these three 'streams' of certificate are known as 'certificates' for the purposes of the DGTO, and reflect the unique aspects of the games development industry business models.

The Arts Minister has the discretion to establish the Board, to provide advice as to whether they should issue certificates in relation to the DGTO and give advice regarding the estimated qualifying Australian development expenditure. The Rules implement the intention of Division 378 of the Act by establishing the Board. The Board will assist the Arts Minister to make determinations about whether to issue final certificates of eligibility for the DGTO, through the provision of the views of independent industry experts. The establishment of the Board ensures that people with appropriate experience can provide advice to the Arts Minister to assist with determining eligibility for the tax offset.

The Rules is a legislative instrument for the purposes of the *Legislation Act 2003* and is subject to the default sunseting requirements and disallowance. The Rules commence the earlier of:

- immediately after the commencement of Schedule 1 to the Amendment Act; and
- the day after the instrument is registered.

There are no statutory preconditions that must be satisfied for the instrument to be lawfully made.

Details of the instrument are set out in [Attachment A](#).

The DGTO is a 30 per cent refundable tax offset in relation to the development of digital games, applying retrospectively to 1 July 2022 for eligible businesses that spend a minimum of \$500,000 on qualifying Australian development expenditure. Eligible businesses must be an Australian resident company or foreign resident company with a permanent establishment

in Australia. Games development studios will be able to claim per-project for new eligible games, and annually for a slate of further work ('live ops') done on existing/released eligible games across the financial year. Games with gambling elements and games that would not be able to achieve classification will be ineligible for the DGTO.

The DGTO is established by Division 378 of the Act.

Consultation

Consultation has taken place with the Treasury and the Australian Taxation Office in drafting the Rules.

On behalf of the Arts Minister, the Department of Infrastructure, Transport, Regional Development, Communications and the Arts undertook extensive stakeholder consultation with the games development sector to inform policy design, including with game developers and studios across Australia, international game development firms, and other industry stakeholders such as financiers, educational facilities, accountants and lawyers, and peak industry organisation the Interactive Games and Entertainment Association. Additionally, formal public consultation on the exposure draft legislation was undertaken, providing industry with an opportunity to comment on the clarity and operation of the legislation, prior to its introduction to Parliament. Aspects of this consultation have informed the development of the Rules. Given the administrative nature of the Rules and the extensive consultation conducted with key stakeholders during policy and legislative development, a specific further consultation on the Rules was not considered necessary.

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 at [Attachment B](#).

Details of the *Income Tax Assessment (Digital Games Tax Offset) Rules 2023*

Part 1 – Preliminary

Rule 1 – Name

This section provides that the name of the instrument is the *Income Tax Assessment (Digital Games Tax Offset) Rules 2023* (the Rules).

Rule 2 – Commencement

This section provides for the instrument to commence: immediately after the commencement of Schedule 1 to the *Treasury Laws Amendment (2022 Measures No. 4) Act 2023* (the Amendment Act); and the day after this instrument is registered on the Federal Register of Legislation.

Rule 3 – Authority

This section provides that the instrument is made under sections 378-100 and 378-105 of the *Income Tax Assessment Act 1997* (the Act) and subsection 4(2) of the *Acts Interpretation Act 1901*.

The Amendment Act enacts the DGTO and inserts sections 378-100 and 378-105 into the Act, being the provisions which confer power on the Arts Minister to make the rules. Sections 378-100 and 378-105 (and all other provisions comprising Schedule 1 to the Amendment Act) commence the first 1 January, 1 April, 1 July or 1 October to occur after the day the Amendment Act receives the Royal Assent (being the start time): item 2 of the table accompanying subsection 2(1) of the Amendment Act. Subsection 4(2) of the *Acts Interpretation Act 1901* allows new powers to be exercised before the start time as if the relevant commencement had occurred.

Rule 4 – Definitions

This section sets out relevant definitions for the Instrument.

There is a note at the beginning of the Rule reminding readers that a number of the expressions used in the instrument are defined in the Act.

Subsection 4(1) provides that for the Rules:

- **Act** means the *Income Tax Assessment Act 1997*.
- **Arts Department** means the Department administered by the Arts Minister.
- **Board** means the Digital Games Tax Offset Advisory Board established under section 21 of the Instrument.
- **certificate** means a completion certificate, a porting certificate, or an ongoing development certificate, issued by the Arts Minister under section 378-25 of the Act.

- **independent expert** means a person who, in the Board’s opinion: has recent, relevant experience in development, business or financial management in the digital games sector; and is independent of the company or head company in relation to whom they are asked, under subsection 8(3) or 16(3), to provide a report.
- **provisional certificate** means a provisional certificate issued by the Board under section 16.

Subsection 4(2) clarifies that for the purposes of the Instrument, the company that takes over the making of a digital game from the outgoing company is deemed to have carried out any activities, or made arrangements, that were undertaken by the outgoing company prior to the incoming company taking over the development of the digital game.

Part 2 – Certificates for digital games tax offset

Part 2 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 completion certificate, a porting certificate or an ongoing development certificate (a certificate) is to be provided to the Arts Minister.

Rule 5 – Definitions

This section sets out an additional definition specific to Part 2 of the instrument.

The term **applicant** means a company or a head company that is applying, or has applied, for a certificate for the DGTO to be issued under section 378-25.

Rule 6 – Form of application for certificate

This section requires the application to be made to the Arts Minister, by being submitted electronically in the form provided and authorised by the applicant, and must include certain information (as applicable) as set out in Schedule 1.

A note on this section explains that an application is taken to be submitted to the Arts Secretary when the applicant is notified of its receipt.

Rule 7 – Amendment or withdrawal of application for certificate

This section sets out that an applicant may make an amendment to their application for a certificate, or withdraw their application for a certificate, by notifying the Arts Minister in writing. However, an amendment to, or withdrawal of, an application must be done prior to the issuing of a certificate for the DGTO. If changes need to be made after a certificate has been issued, a request must be made in accordance with section 378-75 of the Act and the accompanying note indicates that Rule 11 deals with the process making amendments to a certificate that has already been issued by the Arts Minister.

Rule 8 – Board to consider application for certificate if requested

This section outlines the functions of the Board in respect of an application for a certificate. If the Arts Minister requests the Board's advice on an application, the Board must consider the application and advise the Minister. Generally, the Board will advise the Arts Minister about whether they should issue a certificate in relation to a game or slate of games, and give its opinion on the amount of qualifying Australian development expenditure for the digital game(s) and in formulating its advice, the Board must consider all the relevant information, including:

- the application and its accompanying information and documents;
- any written report requested by the Board, and any written submission made by the applicant in response to a report;
- any additional information provided by the applicant under Rule 9;
- any other information or advice obtained by the Board.

Rule 8 provides that, when considering a request from the Arts Minister, the Board may:

- seek information or advice from any person or source, including an independent expert; and
- use its own knowledge and experience.

Where the Board requests a report from an independent expert in relation to an application, the report may consider matters relevant to the conditions set out in sections 378-20 and subsection 378-25 of the Act, indicating whether a game is eligible and meets the definition of digital game. The report may also consider whether specific claimed items are reasonably attributable to qualifying Australian development expenditure, and whether the applicant is the appropriate entity to apply for the DGTO.

Rule 9 – Request for additional information

This section 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.

Where information is sought from a third party, including from an independent expert, 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. The Board is also required to give an opportunity to make written submissions to the Board in response to the independent expert report related to its application (and provide a copy of 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 in writing and within the initial 28-day period, the Board may extend that period under Rule 9. If the applicant does not provide a response within the 28 days, or the extended period, the Board may proceed to advise the Arts Minister in accordance with Rule 10. This ensures that the Board provides timely advice on applications for certificates, whilst providing a reasonable opportunity to be heard before advice/recommendation is put to the Arts Minister.

Each of the following kinds of decisions made by the Arts Minister are subject to review by the Administrative Appeals Tribunal (refer to section 378-90 of the Act):

- to refuse an application for a certificate;
- a determination made by the Arts Minister in respect of the total of a company's qualifying Australian development expenditure;
- a decision to revoke a certificate; and
- a decision to amend a certificate.

Rule 10 – Board to advise Arts Minister

This section requires the Board to advise the Arts Minister on whether it is satisfied that certain conditions set out in 378-25 of the Act are met in relation to an application as if it were acting under Division 378 of the Act and had determined the qualifying Australian development expenditure. Such advice must be in writing and must include reasons if the advice is not to issue a certificate for the Offset.

Rule 11 – Amendment of certificate

This section sets out the process for when an applicant may request that a certificate be amended.

The note accompanying this section explains that an applicant may request an amendment to the certificate within four years of the certificate being issued; or the Arts Minister may amend the certificate on their own initiative, such as in circumstances where it is identified that the certificate issued is inconsistent or incorrect. This note summarises the effect of section 378-70 and 378-75.

Under the section, an applicant may initiate a request for an amendment to a certificate by notifying the Arts Secretary in writing and detailing the aspects of the certificate to be amended. The request must be submitted electronically.

In considering a request for an amendment to an issued certificate, the Arts Minister must make a decision to amend or not amend the certificate. In coming to a decision, the Arts Minister may request further information from the applicant and may ask the Board to advise about whether or not the certificate should be amended. If asked, the Board must advise the Arts Minister in writing on the issue.

Part 3 – Provisional certificates for digital games tax offset

Part 3 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 games mirror the procedures for assessing and advising the Arts Minister in relation to issuing (final) certificates as set out in Part 2 of these Rules and any other legislative instrument under Division 378 of the Act. Provisional certificates do not consider financial information associated with a game, noting that projects may be in early development and sufficient detail will not be available for material assessment.

Provisional certificates are issued by the Board, are non-binding and have no legal effect. Further, a provisional certificate does not entitle an applicant to claim the DGTO under Division 378 of the Act; does not prevent a decision by the Arts Minister to refuse to grant a certificate under Division 378 of the Act; and does not a guarantee that the Arts Minister will issue a (final) certificate to the applicant in any event. The utility of provisional certificates is to provide an indication of whether the game is likely to be eligible for the Offset, based on the information provided at that stage, which may assist developers with planning a project, business model and financing.

Rule 12 – Definitions

This section sets out an additional definition specific to Part 3 of the instrument.

The term **applicant** under Part 3 means a company or a head company that is applying, or has applied, in accordance with this part, for a provisional certificate for the digital games tax offset to be issued under section 378-25 of the Act.

Rule 13 – Application for provisional certificate

This section sets out the who is eligible to apply for a provisional certificate. Applicants must be companies and be either:

- an Australian resident;
- a foreign resident that intends to establish a permanent establishment in Australia; or
- a foreign resident that has a permanent establishment in Australia and an ABN.

The applicant must also be the company that is primarily responsible for undertaking the activities necessary for the development of the digital game in Australia.

An applicant may apply for a provisional certificate before the digital game is completed. An applicant is still able to apply for a provisional certificate even if the Board has already issued, or refused to issue, a provisional certificate for the same game. This recognises that games develop and evolve during the production process, and key criteria assessed as part of a previous provisional application may have changed, and the developer may wish to have the current game concept assessed for likely eligibility.

Rule 14 – Form of application for provisional certificate

This section requires the application to be made to the Arts Minister in writing, by being submitted electronically in the form provided, authorised by the applicant and including certain information contained in Schedule 2.

A note on this section explains that an application is taken to be submitted to the Arts Secretary when the applicant is notified of its receipt.

Rule 15 – Amendment or withdrawal of application for provisional certificate

This section sets out that an application for a provisional certificate cannot be amended. An application may be withdrawn prior to the certificate being issued by the Board, and this must be done by notifying the Arts Secretary in writing, in the form notified on the Arts Department’s website.

Rule 16 – Board to consider application for provisional certificate

This section outlines the requirements of the Board in terms of processing and assessing an application for a provisional certificate. The Board must consider the application and decide whether it will issue or refuse to issue a provisional certificate.

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

- the application and its accompanying information and documents;
- any written report requested by the Board, and any written submission made by the applicant in response to a report;
- any additional information provided by the applicant under Rule 17;
- any other information or advice obtained by the Board.

In making its decision, the Board may use its own expertise, seek advice from independent experts or information from third parties to consider whether the digital game(s) would meet the criteria for a certificate if one was applied for.

The Board may request a report from an independent expert in relation to an application for a provisional certificate. The report is to consider relevant matters, including whether the applicant is the appropriate entity to apply for the DGTO in relation to a particular game etc.

Rule 17 – Board may request additional information

This section empowers the Board to seek, in writing, further information from the applicant and place time limits on the provision of the response. The Board may refuse to issue a certificate if time limits are not met by the applicant.

Where information is sought from a third party, including from an independent expert, and the Board intends to rely on the information to support a decision to refuse or 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 expert 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 are consistent with procedural fairness, notwithstanding that the actual provisional certificate has no legally binding effect and there is no adverse impact arising from a decision to refuse an application for a provisional certificate.

If the Board provides information or a report to an applicant for comment, the applicant has 28 days to provide a response and Board may extend that period. However, to ensure timely decision making, if the applicant does not provide a response within the 28 days, or extended period, the Board may proceed to issue or refuse to issue a provisional certificate to the applicant.

Rule 18 – Refusal to issue provisional certificate

This section provides that where the Board is not satisfied, on the basis of the information provided, that the game will or is likely to meet the statutory conditions for the DGTO, it must refuse to issue a provisional certificate.

There is a note to Rule 18 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 19 – Notice of refusal to issue provisional certificate

This section 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 DGTO that the Board was not satisfied that the applicant met, as well as any other grounds on which the Board made the decision.

Rule 20 – Content of provisional certificate

This section 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 supplied, 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 DGTO. This is because a provisional certificate is only a guide to future eligibility, is not conclusive and has no legal effect.

Part 4 – Digital Games Tax Offset Advisory Board

Part 4 establishes the Digital Games Tax Offset Advisory Board and provides for the operation of the Board and other related matters.

Rule 21 – Establishment of the Board

This section establishes the Board.

Rule 22 – Functions of the Board

This section provides that the Board is to perform the functions specified in paragraph 378-105(a) of the Act and other administrative functions (which are consistent with the Act) provided for in the instrument.

The accompanying note reminds readers that the legislated role of the Board is to:

- consider applications for a certificate for the DGTO;
- advise the Arts Minister on whether to issue certificates for the DGTO; and

- perform other functions in relation to the operation of Division 378 of the Act and the Rules, including considering applications for provisional certificates for the DGTO.

Rule 23 – Membership of the Board

This section provides for the membership of the Board and how members are appointed.

The Board consists of three members: a Chair, who is a senior executive officer of the department responsible for the Arts; and two members appointed by the Arts Minister for up to three years at a time, who are, or have been, involved in the digital games industry and have experience or expertise in digital game development activities, pipeline or budgets.

Board positions are part time.

The Arts Minister may appoint a person as a Board 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.

This section sets out that a qualified candidate must be someone who, in the opinion the Arts Minister, is an individual who is, or has been, involved in the digital game development industry and has experience or expertise in digital game development activities, pipeline or budgets. There is no limit on the number of terms, either consecutive or non-consecutive, that an appointed member may serve.

Rule 24 – Leave of absence

This section provides for the Arts 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 Arts 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. For example, the Arts Minister could impose a condition of appointment that the appointed member is to provide the Minister with two weeks advanced notice of any proposed leave.

Rule 25 – Acting Appointment

This section provides that the Arts Minister may appoint a person to act as a member of the Board in certain circumstances (e.g. a vacancy in the office of the member; and when a member is absent from Australia or unable to perform the duties of the office).

Rule 26 – Resignation of members

This section 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 27 – Termination of members

This section provides for circumstances when the Arts Minister may terminate the appointment of an appointed member and provides that termination takes effect when the termination notice is given to the member.

The Arts Minister may terminate the appointment of an appointed member for any of the following reasons:

- misbehaviour or physical or mental incapacity;
- 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;
- if a member becomes bankrupt or applies to take the benefit of any law for the relief of bankrupt or insolvent debtors;
- compounds with their creditors;
- makes an assignment of their remuneration for the benefit of their creditors; or
- is absent, without a leave of absence granted by the Arts Minister, from performing the duties of the office for a period of three months or longer.

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

Rule 28 – Duty of confidentiality

This section places the Chair and appointed members under a duty of confidentiality in respect of information they become aware of or receive through their positions on the Board, notably the expenditure statements of applicant game/s. This section 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 Arts Minister. This section imposes an ongoing duty of confidence that continues even after the person ceases to be a member of the Board.

Rule 29 – Disclosure of interests

This section requires the Chair and appointed members to disclose any potential or perceived conflict of interest in relation to a matter that is to be considered by the Board:

- For an appointed member, the disclosure must be made as soon as possible to the Chair, in writing, and detail the nature of the interest.
- For the Chair, the disclosure must be made to the Arts Secretary.

Unless the Chair or Arts Secretary (as applicable) consents in writing, the member must not participate in deliberations on the matter, nor vote or partake in decision-making. This provision promotes confidence in the Board and ensures transparency. Applicants for the DGTO will have trust that the Board will make impartial decisions and recommendations which are not tainted by conflicting pecuniary or personal interests of members.

Rule 30 – Meetings of the Board

This section provides that the Chair may convene a meeting of the Board at any time. The meeting must be presided over by the Chair.

Rule 31 – Quorum

This section sets out that there must be two Board members present at a meeting of the Board to constitute a quorum. If two members of the Board are unable to participate in a Board meeting in relation to a particular matter due to disclosure of an interest under Rule 29, 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 to make clear that, in these circumstances, only one member will be entitled to vote in respect of the relevant matter.

Rule 32 – Conduct of meetings

This section 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 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.

The Rule makes clear that the Chair has 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 section 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.

The section 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 digital games industry to provide advice or information to assist the Board make a recommendation to the Arts Minister in relation to a certificate for the DGTO. 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.

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

Rule 33 – Powers, functions and decisions without meetings

This section provides that the Board is able to exercise all of its powers, and carry out all of its functions without a 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. For example, this could be achieved by members agreeing to a particular course of action via email.

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 section also makes 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.

Schedule 1 – Information and documents required for an application for certificate

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

Part A of Schedule 1 to the Rules outlines what information about the applicant company and game/s should be provided in an application for certification.

Part B of Schedule 1 to the Rules requires certain documents to be attached to the application to certify the veracity of the information.

Schedule 2 – Information and documents required for an application for provisional certificate

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

Part A of Schedule 2 to the Rules outlines what information about the applicant company and game/s should be provided in an application for provisional certification.

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

Statement of Compatibility with Human Rights

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

Income Tax Assessment (Digital Games Tax Offset) Rules 2023

Overview

The *Income Tax Assessment (Digital Games Tax Offset) Rules 2023* (the Rules) are made under Division 378 of the *Income Tax Assessment Act 1997* (the Act).

Division 378 establishes the Digital Games Tax Offset (DGTO), a refundable tax offset designed to support the growth of the digital games industry in Australia by providing concessional tax treatment for Australian expenditure. The DGTO will promote employment and career paths for Australia's creative and digital talent, building transferable capabilities that can benefit a range of other sectors.

The DGTO is designed to strengthen the Australian digital games industry, expand employment opportunities for digital and creative talent, enhance the industry's international competitiveness and make Australia a more attractive destination for foreign investment. It creates opportunities for game developers to undertake work in Australia and the rebate is focussed on supporting critical technical, creative and project management roles, promoting employment and building transferable capabilities that can benefit a range of sectors.

Applying retrospectively from 1 July 2022, the DGTO provides a 30 per cent refundable tax offset for eligible businesses that spend a minimum of \$500,000 on qualifying Australian development expenditure. Eligible businesses must be an Australian resident company or foreign resident company with a permanent establishment in Australia.

The purpose of the instrument is to set out the procedural rules for how companies apply for a completion certificate, a porting certificate or an ongoing development certificate for the DGTO, or provisional forms of those certificates, and the rules for the processing and assessment of such applications. The Rules also establish the Digital Games Tax Offset Advisory Board (the Board) and provide for operational aspects of the Board and related matters.

The Board

The Rules establish the Board, which is responsible for considering applications for, and providing advice to, the Arts Minister regarding whether to issue a certificate for the DGTO. The Board also provides advice to the Arts Minister regarding the estimated level of qualifying Australian development expenditure in relation to the DGTO. The establishment of the Board ensures that people with appropriate experience can provide advice to the Arts Minister to assist with determining eligibility the tax offset.

The Board consists of three members: a Chair, who is a senior Departmental employee responsible for the Arts; and two members appointed by the Arts Minister for up to three years at a time, who are, or have been, involved in the digital games industry and have experience or expertise in digital game development activities, pipeline or 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 Arts Minister in certain circumstances. The Rules also require Board members to disclose certain conflicts of interest, 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.

Certification

Under the DGTO, the Arts Minister is responsible for issuing certificates of eligibility. A certificate for the DGTO entitles the applicant company to a 30 per cent tax offset on the company's qualifying Australian development expenditure, undertaken on development activity to complete a new game (Completion Certificate), port an existing game (Porting Certificate) or ongoing development activity on one or more games in a single income year (Ongoing Development Certificate). Together, these three 'streams' of certificate are known as final certificates for the purposes of the DGTO.

Human rights implications

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

Conclusion

The instrument is compatible with human rights as it does not raise any human rights issues.