

PRYOR CASHMAN LLP

New York/Los Angeles

ATTORNEYS AT LAW



Summary of Incentives Available for Producing in Australia and New Zealand

PRYOR CASHMAN LLP'S Summary of Australian and New Zealand Incentives

AUSTRALIA

NEW AUSTRALIAN SCREEN PRODUCTION INCENTIVE (DIVISION 376 OF THE INCOME TAX ASSESSMENT ACT, 1997)

- **Three Types of Refundable Film Tax Rebates**
 1. **Producer Tax Offset** (a new refundable film tax offset for producers of films with a significant Australian content or official co-productions)
 2. **Location Tax Offset** (enhancing the existing refundable film tax offset for higher budget films)
 3. **PDV Tax Offset** (a new refundable film tax offset for post, digital and visual effects (**PDV**) productions in Australia)
- Existing Tax Relief being phased out—Division 10BA and 10B and the Film Licensed Investment Company Scheme (FLICS)
- Only one of the three tax offsets can be claimed for any one eligible film

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1. Producer Tax Offset

- Provides an eligible film production company (**EPC**) with a tax offset of 40% of qualifying Australian production expenditure (QAPE) for eligible feature films, and a tax offset of 20% of QAPE for other eligible film formats (single episode programs, series, seasons of a series and short form animated drama). Films must have significant Australian content (**SAC**)
- Will be administered by Screen Australia, a new Australian Government funding agency to be established by 1 July 2008. Currently administered by the Film Finance Corporation Australia (**FFC**)
- Only available to an EPC, which for each of the 3 offsets is a company that is:
 - An Australian resident or
 - A foreign resident with a permanent establishment (being a place at or through which a person carries on any business) in Australia and an Australian Business Number (ABN)

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- Only available if the Film Authority has issued a certificate for the film to the EPC (a non-binding provisional certificate will be available and is required for co-investment by a Federal or State film body). The Film Authority must be satisfied that:
 - The film is an eligible format (note: reality programs are excluded for Producer Offset)
 - The EPC carried out, or arranged the carrying out of, the activities necessary to make the film
 - The film has significant Australian content (**SAC**) or has been made as an official co-production. The Film Authority must have regard to the following in determining whether a film has SAC:
 - The subject matter of the film
 - The place where the film was made
 - The nationalities and places of residence of the persons who took part in the making of the film
 - The details of Production Expenditure for the film
 - Any other matters the film authority considers to be relevant

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- These matters are similar to those matters required to be considered in the test for SAC under Division 10BA, except that, unlike Division 10BA, the film does not need to be wholly or substantially made in Australia and the following matters are no longer required to be automatically considered:
 - The sources of finance for the film
 - The nationalities and places of residence of the owners of copyright in the film
 - The nationalities and places of residence of the owners of shares in any company concerned in the making of the film
- Australia has official co-production arrangements with Canada, UK, Ireland, Germany, France, New Zealand, Italy, Israel (and is in negotiations with China, Singapore and South Africa).
- The film must be produced for exhibition or distribution in the required manner (evidence of proposed bona fide theatrical distribution in Australia is required for feature films)
- With respect to QAPE: the film must meet the minimum QAPE thresholds (A\$1 million of QAPE for feature films) and only available on QAPE incurred on or after 1 July 2007 (as determined by the Film Authority):

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- QAPE is generally speaking “Production Expenditure” reasonably attributable to:
 - Goods and services provided in Australia or
 - The use of land located in Australia or
 - The use of goods located in Australia at the time they are used in the making of the film

(Note: there are numerous specific inclusions and exclusions and if subject matter requires a location outside Australia expendable incurred outside Australia if the film nevertheless has SAC may be included in QAPE)
- A maximum of 20% of the total film expenditures can be claimed as QAPE for “above the line” expenditure
- EPC must complete the film in the income year for which the tax offset is claimed and must claim it in its tax return for such year:
 - EPC will receive refund from the Australian Taxation Office (**ATO**) where the total of tax offsets exceeds the amount of tax liabilities that the EPC would have had to pay if it had not received those tax offsets but must wait until the end of the financial year to receive refund
 - Any offset applied against tax liabilities or refunded will not be assessable income for income tax purposes for the EPC
 - An EPC may rely on third parties to cashflow the tax offset

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2. The Location Offset

- The Location Offset provides a 15% refund on a production's QAPE for large budget productions. It replaces the Refundable Film Tax Offset (**RFTO**) (which had a benefit worth 12.5 per cent of a film's QAPE) for films commencing on or after 8 May 2007. Does not require a film to have SAC
- The key criterion to access the Location Offset (or the RFTO) is a minimum level of A\$15 million in QAPE on the production. Once this is satisfied, there are two further categories of expenditure to qualify for the Location Offset for a film:
 - Where the film's QAPE is at least A\$15 million and less than A\$50 million, the production company must spend at least 70% of the film's total production expenditure on QAPE or
 - Where a company has spent A\$50 million or more on QAPE, it will qualify regardless of the total amount of production expenditure involved
- For an eligible television series: must spend an average of A\$1 million of QAPE per hour of series (can include reality programs for Location Offset)

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- Only an EPC may apply:
 - For a project with QAPE of at least A\$15 million and less than A\$50 million, EPC must be the company responsible for all the activities undertaken to make the film worldwide
 - For a project with QAPE of at least A\$50 million, EPC must be the company that is responsible for all the activities involved in making the film in Australia
- Will be administered (along with the PDV Offset) by Film Incentives and International Section, Department of Environment, Water, Heritage and the Arts which will issue a certificate of eligibility (non-binding provisional certificate will be available):
 - Once a final certificate is issued in respect of a particular production, the applicant company can claim the offset in its income tax return for the relevant income year
 - The ATO will provide a refund of a tax offset where the amount exceeds any existing tax liabilities owed by the applicant company

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3. The PDV Offset

- Even if a film is not eligible for the Location Offset, the PDV Offset offers an alternative 15% refund on all QAPE incurred on post, digital and visual effects regardless of where the film or television program is shot. A minimum threshold of A\$5 million of QAPE on PDV for a feature film applies
- QAPE on PDV includes but is not limited to visual effects, audio and visual editing and mixing, orchestration, green-screen photography, etc. It can also include salaries, per diems and travel for PDV staff and crew and hire of relevant facilities and equipment
- Only an EPC may apply, EPC must be responsible for all the activities that were necessary for PDV production in Australia

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Other Investments/Grants

- **FFC** (soon to be merged into Screen Australia)
 - Australian producer can apply for films with SAC (and provisional certification currently under Division 10BA) or official co-productions
 - Must meet criteria in FFC's Investment Guidelines for relevant type of production (two "doors of entry" for features– market attachment (minimum 25%) and evaluation)
 - Generally no more than A\$5 million or 45% of budget
 - Can co-invest with productions using the Producer Tax Offset. Maximum combined investments for projects using both will be 75% of production budget. From December 2007, the FFC will invest its usual percentage amount minus the dollar value of the tax offset (which the EPC must arrange to cashflow)
 - Co-productions have specific criteria, FFC will fund only cost of Australian elements and that the Australian spend not less than 1.5 times its investment
- **AFC** (soon to be merged into Screen Australia)
 - Provides development funds and marketing funds, currently available for Australia producers for films with SAC (and certification)
 - Must meet certain criteria

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- **Other State and Territory Screen Agencies**
 - Grants, incentives, payroll tax rebates, etc. for different types for film activity are available in particular states/territories, relevant bodies include:
 - New South Wales Film and Television Office
 - The Pacific Film & Television Commission (for Queensland)
 - South Australian Film Corporation
 - Film Victoria
 - NT Film Office
 - Screen Tasmania
 - Screen West (for Western Australia)
 - Generally these appear to be available in addition to Producer or Location or PDV Offset to extent doesn't reduce QAPE (e.g. a waiver of State payroll tax)

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- **HELPFUL LINKS AND CONTACTS**

- **AUSTRALIA**

- Gateway to information on filming in Australia, the AUSFILM site - <http://www.ausfilm.com.au>
- A FFC link, mainly dealing with the new Producer Offset (Dec 2007) but also linking to other sources http://www.ffc.gov.au/producer_offset/
- Location and PDV Offsets – http://www.arts.gov.au/arts_culture/film/location-offset
- A FFC document setting out guidelines for obtaining an investment from the FFC (for financial year 2007-8) - http://www.ffc.gov.au/investment/0708_investment_guidelines.doc
- Ausfilm- Los Angeles Office
2029 Century Park East, Suite 3150
Los Angeles, CA 90067, USA
(310) 229-2362 tel
(310) 201-8410 fax
info@ausfilm.com.au

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NEW ZEALAND

FOUR TYPES OF FINANACING ASSISTANCE IN NEW ZEALAND

1. **Large Budget Screen Production Grant** (recently increased from 12.5% to 15%)
 2. **Post, Digital and Visual Effects Grant** (new!)
 3. **New Zealand Film Commission** funding
 4. **New Zealand Film Fund** funding
- Plus: a number of smaller funds for development and post production offered by the New Zealand Film Commission;
 - NZ taxpaying investors may also obtain tax writedowns on 100% of investments in “New Zealand films” certified by NZFC.

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1. Large Budget Screen Production Grant

- *What's available?* 15% of qualifying expenditure, being a film's expenditure on goods, services and land in New Zealand in the making of the film.
- Includes the costs of all cast and crew while in New Zealand.
- *What films qualify?* Qualifying expenditure must be over NZ\$15 million (US\$12 million). Alternatively producers can bundle productions to reach a NZ\$30 million threshold under certain conditions.
- Applicants must be New Zealand resident companies or a foreign company operating with a fixed establishment in New Zealand for the purposes of lodging an income tax return (both when it lodges the application and when the grant is paid).
- *What are the steps to obtaining it?* Submit an application including audited information to the NZFC no later than 90 days from film completion but not (subject to exceptions) before the expenditure is incurred.
- *What conditions trigger release of funds?* The NZ Inland Revenue audits the information and assuming a clean bill of health, the grant is paid within 3 months.

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2. Post, Digital and Visual Effects Grant

- *What's available?* 15% of qualifying expenditure, being a film's expenditure on a defined list of post, digital and visual effects activities either during or post principle photography.
- * *What films qualify?* Qualifying expenditure must be NZ\$3 million - NZ\$15 million (US\$2.4-12 million). Again, producers can bundle productions under certain conditions.
- * *What are the steps to obtaining it?* See above.
- * *What conditions trigger release of funds?* See above.

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3. New Zealand Film Commission (NZFC) Investment Funding

- *What's available?* Production investment financing, recouped pro rata pari passu with all equity investors. NZFC invests around US\$6.5 million annually, spread among five or less films.
- *What films qualify?* The film's budget must be under US\$4 million and be certified by the NZFC as a New Zealand film.
- *What are the steps to obtaining it?* Complete the applications for funding and for certification found on the NZFC website.
- *What conditions trigger release of funds?* Typically, once an investment is approved the NZFC advances money on the satisfaction of conditions similar to those required by its counterparts in the UK and Australia including insurances, standard security, completion bond and satisfactory recoupment position.
- It *may* seek to be the sales agent for the film.

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4. New Zealand Film Fund (“NZFF”) Funding

- * *What's available?* Recoupable production investment finance, up to US\$2 million. The fund also has the discretion to provide funds by other means including loan or contracted payment.
- The fund invests around 50% of a film's budget, in around 2 or 3 films per year.
- * *What films qualify?* Films with budgets over US\$3.5 million, having a New Zealand director and (a separate) New Zealand producer who have previously made at least one feature film, and that are certified by the NZFC as a New Zealand film.
- Its highly desirable for a film to have at least 40% of its budget from offshore sources as well as a reputable sales agent commitment. Two positive independent script assessments and reasonable evidence of market potential in the main markets (including a New Zealand distribution agreement) are also desirable.
- * *How is it obtained?* Complete the application for funding found on the NZFF website and for certification found on the NZFC website.
- * *What conditions trigger release of funds?* Typically, similar to those that trigger NZFC funding.

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A Final Note On Certification As A New Zealand Film

- The certification of a New Zealand film is made when the New Zealand Film Commission is satisfied that the film has “significant New Zealand content”. The test is not points based but is broadly worded - the NZFC looks at subject matter, location, sources of finance, nationalities and so on.
- A film is automatically a New Zealand Film where the NZFC awards it co-production status under any of eight treaties - with Australia, Canada, France, United Kingdom, Italy, Singapore, Germany and Ireland.