



Administrative  
Appeals Tribunal

**DECISION AND  
REASONS FOR DECISION**

Division: TAXATION AND COMMERCIAL DIVISION

File Number(s): **2020/5228**

Re: **Fragmentary Pty Ltd**

APPLICANT

And **Screen Australia**

RESPONDENT

And **Head Gear Films FN LTD**

OTHER PARTY

**DECISION**

Tribunal: **Senior Member A Poljak**

Date: **18 September 2024**

Place: **Sydney**

The decision under review is affirmed.



[SGD]

Senior Member A Poljak

### **Catchwords**

*INCOME TAX ASSESSMENT — Tax Offset — Producer Tax Offset — Production Expenditure — Qualifying Australian Production Expenditure — Australian Feature Film — Whether the Applicant carried out, or made the arrangements for the carrying out of, all activities necessary for the making of the film — Decision affirmed.*

### **Legislation**

*Income Tax Assessment Act 1997*

### **Secondary Materials**

*Producer Offset Rules 2018*

## **REASONS FOR DECISION**

### **Senior Member A Poljak**

**18 September 2024**

1. Fragmentary Pty Ltd, the applicant, produced ‘Fragmentary’ (the **Film**), a horror/thriller feature film, which was theatrically released in Australia and is currently streaming on Amazon Prime.
2. On 21 November 2019, the applicant company applied to Screen Australia for a final certificate for the ‘producer offset’ for the Film pursuant to subsection 376-65 of the *Income Tax Assessment Act 1997* (Cth) (**ITAA1997**). The applicant’s application for the certificate for the producer offset states that the Film was completed on 30 September 2019. The application for a certificate for the producer offset records the applicant’s claim for qualifying Australian production expenditure (**QAPE**) of \$857,670 and a total film expenditure for the Film of \$900,166. The tax offset for a film that is a ‘feature film’ is 40% of QAPE (for the applicant’s claimed QAPE, \$343,068). For other eligible films, the tax offset is 20% of QAPE (for the applicant’s claimed QAPE, \$171,534).

3. On 4 August 2020, the respondent, as the 'Film Authority' (subsection 376-55(3)), declined to issue a certificate to the applicant under section 376-65 in relation to the producer offset with the consequence that the applicant is not entitled to the producer offset: see paragraph 376-55(1)(b). This is the decision under review in these proceedings.
4. The respondent submits that the conditions for the issuing of a certificate under subsection 376-65(1) have not been met because:
  - (a) The applicant did not carry out, or make arrangements for the carrying out of, all the activities that were necessary for the making of the film (paragraph 376-65(1)(a)).
  - (b) The total amount of QAPE incurred by the applicant on the Film is less than \$500,000 (subsection 376-65(6) (table, item 1). This issue raises four sub-issues:
    - I. whether amounts claimed were 'incurred' by the applicant;
    - II. whether amounts claimed, if 'incurred' by the applicant, meet the general test for production expenditure in subsection 376-125(1);
    - III. whether the amounts are not production expenditure, and not QAPE, by reason that they are deferrals or profit participation (or advances of that nature) for the purposes of section 376-135 (table, items 6, 7 and 9);
    - IV. whether the amount claimed as QAPE should be reduced to an arm's length amount under section 376-175.
5. Screen Australia does not press a previously raised issues with subsection 376-65(2)(b) of the ITAA 1997, being whether the Film is a 'feature film' that was produced for exhibition to the public in cinemas or distribution to the public as a video recording.

### **RELEVANT LEGISLATIVE PROVISIONS**

6. Division 376 of the ITAA1997 regulates the entitlement of entities to three types of refundable tax offsets in relation to Australian expenditure incurred in making films, which are intended to support and develop the Australian screen media industry: section 376-1.
7. Subsection 376-55(1) provides that:

**376-55 Film production company entitled to refundable tax offset for Australian expenditure in making an Australian film (producer offset)**

(1) A company is entitled to a \*tax offset under this section (the **producer offset**) for an income year in respect of a \*film if:

(a) the film was \*completed in the income year; and

(b) the \*film authority has issued a certificate to the company under section 376-65 (certificate for the producer offset) for the film; and

(c) the company claims the offset in its \*income tax return for the income year; and

(d) the company:

(i) is an Australian resident; or

(ii) is a foreign resident but does have a \*permanent establishment in Australia and does have an \*ABN;

when the company lodges the income tax return and when the tax offset is due to be credited to the company.

*The claim referred to in paragraph (c) is irrevocable.*

8. As to subsection (1)(a), for a film that is not a series or a season of a series other than a drama series, a 'film is completed ... when it is first in a state where it could reasonably be regarded as ready to be distributed, broadcast or exhibited to the general public': subsection 376-55(2)(a).
9. As to subsection (1)(b), subsection 376-65(1) relevantly provides that:

**376-65 Film authority must issue certificate for an Australian film for the producer offset**

(1) The \*film authority must issue a certificate to a company for a \*film in relation to the producer offset if the film authority is satisfied that:

(a) the company either carried out, or made the arrangements for the carrying out of, all the activities that were necessary for the \*making of the film; and

*(b) the conditions in subsections (2) to (6) are met. Screen Australia's Submissions (24 June 2024)*

*Note: The operation of paragraph (a) is affected by paragraph 376-180(1)(d) (which deals with the situation where one company takes over the making of a film from another company).*

*Type of film*

*(2) The conditions in this subsection are that:*

*(a) the \*film:*

*(i) has a significant Australian content (see section 376-70); or*

*(ii) has been made under an \*arrangement entered into between the Commonwealth or an authority of the Commonwealth and a foreign country or an authority of the foreign country; and*

*(b) the film was produced for:*

*(i) exhibition to the public in cinemas or ...*

*(c) the film is:*

*(i) a \*feature film; or*

*...*

*Expenditure thresholds*

*(6) The conditions in this subsection are as set out in the table.*

10. Subdivision 376-C comprises sections 376-125 to 376-185. As to QAPE, section 376-145 provides:

***Qualifying Australian production expenditure—common rules***  
***376 145 Qualifying Australian production expenditure—general test***

*A company's qualifying Australian production expenditure on a \*film is the company's \*production expenditure on the film to the extent to which it is incurred for, or is reasonably attributable to:*

*(a) goods and services provided in Australia; or*

*(b) the use of land located in Australia; or*

*(c) the use of goods that are located in Australia at the time they are used in the \*making of the film.*

11. Subdivision 376-C goes on to provide for specific inclusions and exclusions from the definition of QAPE (sections 376-150, 376-155, 376-160 and 376-170).
12. The general test for 'production expenditure' is set out in section 376-125, which relevantly provides:

*(1) A company's production expenditure on a \*film is expenditure that the company incurs to the extent to which it:*

*(a) is incurred in, or in relation to, the \*making of the film; or*

*(b) is reasonably attributable to:*

*(i) the use of equipment or other facilities for; or*

*(ii) activities undertaken in;*

*the making of the film.*

*(2) The making of a \*film means the doing of the things necessary for the production of the first copy of the film.*

*(3) The making of a \*film includes:*

*(a) pre-production activities in relation to the film; and*

*(b) post-production activities in relation to the film; and*

*(c) any other activities undertaken to bring the film up to the state where it could reasonably be regarded as ready to be distributed, broadcast or exhibited to the general public.*

*(4) The making of a \*film does not include:*

*(a) developing the proposal for the \*making of the film; or*

*(b) arranging or obtaining finance for the film; or*

*(c) distributing the film (other than the activities listed in paragraphs (a) to (e) of item 7 of the table in subsection 376-170(2)); or*

*(d) promoting the film.*

13. Production expenditure also includes expenditure that is QAPE under sections 376-150 and 376-165: section 376-130.

14. Relevantly, section 376-135 provides that:

*Despite sections 376-125 and 376-130, the following expenditure of a company is not production expenditure of the company on a \*film, except to the extent, if any, as mentioned in column 3 of the table:...*

15. Item 2 of the table refers to the phrase 'development expenditure', which is defined in section 995-1 to mean expenditure to the extent it is incurred in meeting the development costs for the film and includes expenditure on *inter alia* activities to assess locations, storyboarding, scriptwriting, casting actors, and developing a shooting schedule.

16. When read together, it is apparent from these provisions that the *making of a film* commences with pre-production development activities such as storyboarding, scriptwriting and casting actors, encompasses the shooting or production of the film, and extends to post-production activities such as editing the film (but does not include the anterior step of developing the proposal for undertaking those activities): paragraph 376-125(4)(a)).

## **BACKGROUND CHRONOLOGY OF EVENTS**

17. In 2016, Mr Jace Pickard prepared a script for the Film. In the same year he also commenced discussions with cast and crew for the Film and principal photography commenced on or about 8 April 2017. There is no evidence that there was any agreement on the part of Mr Jace Pickard, or any other entity, to pay the cast and crew recruited by Mr Pickard.

18. On 9 February 2017, Mr Pickard commenced a "crowdfunding" campaign for the Film. The campaign stated that the budget for all the costs of the Film was \$10,000 (including the

costs of special effects and make-up, locations, accommodation, food for actors and crew, equipment and post-production).

19. At the start of April 2017, the Film's Facebook page stated that the campaign had ended and raised \$2,500 and that filming was to commence in the coming months with the Film expected to be completed by July 2017.
20. On 24 August 2018 the Film's "official trailer" was released on YouTube.
21. On 25 September 2018, a test screening of the Film occurred and a premiere in early 2019 was foreshadowed on the Film's Facebook page.
22. On 31 October 2018, the Film's "official poster" was published on the Film's Facebook page.
23. On 8 April 2019, a post on the Film's Facebook page announced the launch of the crowdfunding campaign on the Indiegogo platform referred to as the "Fragmentary Post Production Campaign" (**Indiegogo campaign**). The crowdfunding page recorded a statement by the Film's creator, Mr Jace Pickard, that the Film "has hit the 85 percent mark" and that \$12,000 was required to complete the Film, being the cost of colour grading, special effects, scoring, sound mixing and other costs.
24. On 3 May 2019, the applicant was registered as a company. On the same date, We're the Weirdos Productions Pty Ltd (**WTWP**) was also registered as a company. Mr Pickard is the sole director and shareholder of both companies.
25. On 6 May 2019, Mr Pickard posted an update on to the Indiegogo campaign stating, "*we have got funding!*" and that a producer "*approached the project and has signed on to make sure Fragmentary gets finished*".
26. On 20 May 2019, the applicant applied to Screen Australia for a provisional certificate for the producer offset. The applicant confirmed in its application that the applicant would carry out, or make arrangements for carrying out, all of the activities necessary for the making of the Film. The application for the provisional certificate required information about the 'Production Key Dates'. The applicant completed the form as follows:

- For 'research and development' - 7 November 2016 to 6 March 2017



- For 'pre-production' - 6 March 2017 to 7 April 2017
- For 'principal photography'- 8 April 2017 to 22 April 2018
- For 'post production: edit' - 7 January 2019 to 17 May 2019
- For 'post production: sound' - 13 May 2019 to 7 June 2019
- For 'post-production: CGI' - 1 April 2019 to 3 May 2019
- For 'post production: music' - 13 May 2019 to 7 June 2019
- For 'post production: mix' - 27 May 2019 to 14 June 2019

27. On 6 June 2019, Screen Australia issued a provisional certificate for the producer offset that stated that the conditions set out in subsections 376-65(2) to (6) *will be met, or are likely to be met, if the film is completed in accordance with the information provided in the application*. The provisional certificate incorporated a Schedule which outlined matters that may affect eligibility for a final certificate. Specific attention was drawn to 'QAPE thresholds' and 'Non arm's length arrangements'. The provisional certificate did not prevent a decision by the respondent to refuse a grant of a certificate for a producer offset: see Rule 18(2) of the *Producer Offset Rules 2018*, being a legislative instrument issued by the respondent under subsection 376-265(2) of the ITAA1997.
28. In May and June 2019, the applicant entered into a number of written agreements in relation to the Film, including:
- (a) a Screenplay Licence agreement was purportedly entered into between the applicant, WTWP and Mr Jace Pickard on 15 February 2019, providing for the applicant to acquire all rights to the screenplay for the Film in consideration of a licence fee of \$35,000. Payment was conditioned on production finance being obtained (Deal Terms – Licence Fee). The applicant suggests this document was dated incorrectly and, in any event, superseded by a Writer's Agreement dated 15 May 2019.
  - (b) The applicant purported to enter into a number of actors agreements based on the Actors Feature Film Collective Agreement Standard Contract for work performed in 2017 and 2018. The agreement with Mr Pickard is dated 11 May 2019 and the other actors' agreements are all dated 21 May 2019.
  - (c) a Production Finance Deed between WTWP and the applicant dated 26 May 2019 which provided that WTWP would provide an investment in the amount of \$285,241.

WTWP was entitled to recover the Investment from the Film's 'Gross Receipts' and was also entitled to a share of Copyright and Profit (as defined);

- (d) a Services Agreement between the applicant (contractor), WTWP and Mr Pickard (contributor) dated 4 June 2019, providing for Mr Pickard to direct and produce the Film and to receive a total payment of \$120,000 *in accordance with the cashflow schedule for the Production and receipt of contractor's invoice*. The Service Agreement also included for the assignment of rights to the work, treatment, and production (as defined).
- (e) an Executive Producer Agreement between the applicant, Red Curtain Enterprises Pty Ltd and Mr Spencer McLaren dated 4 June 2019, which provides for Mr McLaren to be Executive Producer of the Film and to receive payment of \$25,000 *in accordance with the cashflow schedule of the Film and receipt of contractor's invoice*.
- (f) an Executive Producer Agreement between the applicant and Mr Phil Hunt (care of Head Gear Films (the other party)) dated 21 June 2019 providing for Mr Hunt to be an Executive Producer of the Film and to receive a fee of \$3,109.
- (g) a Post Services Agreement between the applicant and Serve Chilled Pty Ltd dated 21 June 2019, providing for Service Chilled Pty Ltd to provide post services in consideration for \$350,000, *in accordance with the Payment Schedule. Payment of the Fee is further subject to the cashflow of the respective investments of the investors in the film in accordance with the Drawdown schedule for the Film*. The 'Production Schedule' at Schedule A of the agreement includes all activities described in the applications for the provisional and final certificates including principal photography. The 'Payment Schedule' is Schedule C to the agreement and provides that, "Payable in accordance with the cash flow of the film".
- (h) a Loan Agreement between the other party as 'Lender' and the applicant and WTWP together as 'Borrowers' dated 21 June 2019, providing for the Lender to advance the amount of \$132,971 by way of loan ('Advance Amount'), being the loan 'Principal' (\$155,460) less \$22,489 by way of 'Arrangement Fee' and a 15-month 'Interest Reserve'.

- (i) a Production Investment Deed between WTWP and the applicant dated 25 June 2019, providing for WTWP (as 'Investor') to invest the amount of \$190,006 in the Film ('Investment') and for WTWP to recoup the Investment and the 'Profit Entitlement' in accordance with an attached 'Recoupment schedule'. The agreement also provides for a copyright share.
  - (j) a Production Investment Deed between post-production company Serve Chilled Pty Ltd (as 'Investor') and the applicant dated 25 June 2019, providing for Serve Chilled Pty Ltd to invest the amount of \$225,000 ('Investment') in the Film and for Serve Chilled Pty Ltd to recover the Investment from the 'Profit Entitlement' in accordance with an attached 'Recoupment schedule'. The agreement also provides for a copyright share.
  - (k) a Production Investment Deed between Red Curtain Enterprises Pty Ltd and the applicant company dated 25 June 2019 providing for Red Curtain Enterprises Pty Ltd to invest the amount of \$24,020 ('Investment') in the Film and for Red Curtain Enterprises Pty Ltd to recover the Investment from the 'Profit Entitlement' in accordance with an attached 'Recoupment schedule'. The agreement also provides for a copyright share.
  - (l) a Loan Deed between Mr Lachlan Parker (lender) and the applicant dated 25 June 2019, which provided for Mr Parker to advance a loan to the applicant in the amount of \$10,000 to be applied to meet the cost of production and marketing of the Film, and for Mr Parker to recoup the Loan and the Premium from Gross Receipts in accordance with an attached Recoupment Schedule.
  - (m) a Composer Agreement between WTWP and Mr Lachlan Parker (composer) dated 25 June 2019, providing for Mr Parker to compose music for the Film in consideration for \$15,000 payable in accordance with the cashflow requirements of the film and, on receipt of composer's invoice. The agreement also provided for the rights of the music and soundtrack royalties.
29. Key entitlements and obligations of the agreements referred to in the prior paragraph, including entitlements to receive or recover amounts, were defined by reference to the content of a 'drawdown schedule', 'cashflow schedule' and, 'Disbursement Agreement'. These purported referenced documents are not in evidence.

30. On 21 June 2019, Ratio Partners provided a written report to other party on its independent valuation of QAPE in the budget of the Film. In summary, Ratio Partners said that *after review of the documents and discussions with the Producer, we confirm the Total Estimated QAPE of \$863,664*. The report noted several ‘related party transactions’ comprising 73% of the Film’s budget and *advised the Producer as to the requirement for any related party transaction to be entered at rates that are commercially acceptable and that involve a real exchange of money*. It is noted that the Producer “*confirmed all related party transactions are at arm’s length rates and involve a real third party behind this transaction and supplied alternative quotes by third parties to help validate the commerciality of the rates...*” The report includes a list of assumptions and exclusions. Relevantly, the QAPE opinion is not to be relied upon in circumstances (inter alia), *where QAPE is reduced as a result of the Producer completing non-commercial related party transactions ... We cannot guarantee the commerciality of these transactions and accepts [sic] no liability or responsibility for QAPE being reduced where the Producer has entered into those types of transactions*. Also excluded were circumstances *[w]here the production fails to meet the QAPE threshold and as a result does not qualify for the film tax offset*.
31. As already noted, on 21 November 2019, the applicant company applied to the respondent for a final certificate for the producer offset for the Film pursuant to section 376-65. The application for a certificate for the producer offset records the applicant’s claim for QAPE of \$857,670 and a total film expenditure for the Film of \$900,166. The tax offset for a film that is a ‘feature film’ is 40% of QAPE (for the applicant’s claimed QAPE, \$343,068). On 4 August 2020, the respondent determined not to issue a certificate under subsection 376-65 of the ITAA1997.
32. In a statutory declaration of Jace Pickard sworn 26 June 2024, attaches ‘*true and correct copies*’ of bank statements, invoices to related parties and spreadsheets of related payments. The invoices relate directly to a number of written agreements outlined in para [28] above. Also of note is invoices for cameras and related equipment, and sound equipment which was said to be used during principal photography in 2017/2018. In evidence, the applicant confirmed that the cameras and related equipment including sound equipment used during filming were owned by his friend Mr Nicholas Price who made them available *gratis* to Mr Pickard or at least without any agreement as to payment of a fee. The applicant later withdrew the invoices.

### CONDITION IN PARAGRAPH 376-65(1)(a) – ‘MAKING OF THE FILM’

33. The respondent’s statutory duty to issue a final certificate under subsection 376-65(1) is conditioned on the respondent being satisfied that *the company either carried out, or made the arrangements for the carrying out of, all the activities that were necessary for the \*making of the film*: paragraph 376-65(1)(a).
34. The applicant does not have to personally carry out all the activities, it is sufficient if the applicant *made the arrangements* for the carrying out of the activities. Including, arranging and securing finance and investment, securing rights and consents and signing contracts, and licensing works and other subject matter that already exist such as raw footage, and then co-ordinating and arranging and paying the production expenditure, to enable a film to be made that can be distributed broadcast or exhibited to the general public.
35. The term ‘making’ used in section 376-65 is a defined term. Section 995-1 provides that *make, in relation to a film, has the meaning given by s 376-125, which is defined as the doing of the things necessary for the production of the first copy of the film* and expressly includes pre-production activities, post-production activities, and *any other activities undertaken to bring the film up to the state where it could reasonably be regarded as ready to be distributed, broadcast or exhibited to the general public*: subsections 376-125(2) and (3). On any reasonable construction of the provisions, those activities must include storyboarding, scriptwriting, casting actors, developing a shooting schedule, directing performances by actors, shooting the footage to be used in the film, and editing that footage into a first cut of the film (but does not include developing the proposal for undertaking those activities: paragraph 376-125(4)(a)).
36. The applicant appears to contend that you do not just look at the activities necessary for the making of the Film, but should instead look to the legal rights, namely the actor contracts and signing of rights, copyright licenses or acquisitions, and that this is *common practice* in the industry. There is no basis in the legislation for that interpretation. It is directly contrary to the use of the word ‘activities’ in paragraph 376-65(1)(a).
37. In a statutory declaration of Jace Pickard sworn 2 September 2021, he said that only *2 cuts* of the Film were made, one by himself which he described as *the assembly cut of raw footage, which I put together with the help of James Manera, and the final feature cut*

*produced by the applicant.* He further stated that in regard to the Facebook post on 26 September 2018, in which he refers to the *whole film* and a *test screening...will have its premiere early 2019*, Mr Pickard said he was referring to the assembly cut of raw footage. He further went on to state that he later learnt about associated rights to the footage and suitability for broadcast and exhibition. Mr Pickard said it wasn't until he received the provisional certificate and finance in 2019, that he was able to contract contributors and secure the rights to the footage.

38. The applicant relies on the evidence of Antony Ginnane, an experienced producer, accepted that pre-production, production (principal photography) and post-production were steps in making a film. His evidence distinguished said that shooting footage of actors without any rights or consent was just a *weekend frolic* and not part of the production of the Film, *unless people are being paid, documentation has been done and rights have been acquired for the purpose of looking at those different subsets of activity, and do they – are they creating – are they activity relating to the – to the creation of a completed film that's potentially eligible for the future offset.* Mr Ginnane conceded in relation to his opinions as to when production or the making of a film commenced:

*What I'm relying on is the clear fact that the – a film, to be eligible for the producer offset, it needs to be able to be screened; it needs to be in a position – at a point where it can be screened publicly or broadcast, et cetera, as the legislation sets for, and without rights acquired and until rights are acquired, that cannot happen.*

39. Mr Ginnane further confirmed that his opinion was *based on an understanding that none of the components, the activities involved in creating a completed film can be activities described in that way unless all the legal rights are taken care of in terms of copyright acquired, agreements in place and so on as for the completed film.* He said that the practice is that you need a *budget schedule and finance plan right to the end before your work on a film can be called pre-production.*
40. Mr Ginnane's evidence is limited in the sense that his perspective on what is involved in *making a film* wrongly assumes that it is only when activities conform to the producer offset eligibility conditions that one is *making a film*. This cannot be correct. A film can be produced even if it does not satisfy the conditions for the producer offset.

41. Mr Craig Deeker, founder and owner of the post-production facility The Gingerbreadman, provided a statutory declaration dated 23 August 2021 and a written report dated 28 April 2022. He also gave evidence orally at hearing. Mr Deeker said he reviewed the 'assembly cut' of the film and opined that *the assembly cut consists of raw footage that would not reasonably be regarded as ready to be broadcast on television or exhibited in a cinema to the general public*. He opined that the final version of the Film, the 'feature film', *may reasonably be regarded as ready to be broadcast on television or exhibited in a cinema to the general public*. Mr Deeker gave detailed evidence of the extensive work involved in post-production.
42. At hearing, Mr Deeker conceded that *the filming of raw footage* is part of the film production process. He also described how some films don't have pre-production, and may not even have principal photography, only post-production, made from only pre-existing footage. He referred to fan films which are mashups or re-cuts of a Marvel film or Star Wars films.
43. Mr Deeker further said that a *call sheet* was important to film production and matters concerning ownership of rights is based no doubt on what he has observed in commercial film-making, and on his opinion that a film is only being made in circumstances where the activities conform with the eligibility conditions for the producer offset. This does not conform neither with the ordinary meaning of the phrase *making a film* nor the legislation.
44. Jane Maguire, a postproduction supervisor who has worked in the Australian film industry for over 30 years, outlined in her report dated 18 March 2022, the stages of production and specifically, when pre-production, production and post-production activities for the Film took place. Relevantly, she stated (inter alia):

*I have viewed both the assembly cut and the final feature cut of Fragmentary referred to in Jace Pickard's statutory declaration. It is clear in my view that both pre-production and production activities for Fragmentary were complete when the assembly cut was created. Except for minor exterior shots it appears that almost all the footage used in the final film was already present in this assembly cut. Facebook posts state this assembly cut was screened to Jace Pickard on around 26 September 2018.*

...

*It appears from Facebook posts that a teaser announcement clip was shot to promote an initial crowdfunding campaign for the film. These are in line with development activities.*

### *Pre-production*

*In my opinion pre-production activities for Fragmentary commenced in late December 2016 and continued at least until the commencement of principal photography.*

*The original crowdfunding page for the film on the Australian Cultural Fund stated that the \$10,000 budget for the film would be spent on special effects and makeup, locations, accommodation, food for actors and crew, equipment and postproduction ... this indicates that a budget for the film was being considered at that time. In the following months, roles were cast...and crew were brought on. These activities are in line with pre-production.*

### *Production*

*... principal photography for Fragmentary commenced on or about 8 April 2017 and completed on or around 22 April 2018, and was shot on odd days over that period rather than in a single block. In my opinion these dates mark the “production” or principal photography stage in the making of the film.*

*This is consistent with various Facebook posts...*

*It also appears that during this period there was assembly editing work being done by James Manera.*

### *Post-production*

*In my view, post-production activities for Fragmentary commenced at the conclusion of principal photography on around 22 April 2018 and continued until the film was completed.*



*Some of the work performed after principal photography was complete is shown in Facebook posts, including further editorial with James Manera, the creation of a trailer and colour grading, poster design, and score and special effects. This work is all in line with post-production activities.*

*In April 2019, a further crowdfunding campaign was announced to raise more funds for post-production. The Indiegogo page for the crowdfunding campaign states that a further \$12,000 would be required to cover editing, colour grading, VFX, sound design, music production, Cinema hard drive, poster and promotional roadshow costs...*

45. In a reply report dated 8 July 2022, Ms Maguire agreed that *it is usual custom and practice that pre-production commences at the “greenlight” of a project. I agree that the introduction of crowdfunding, streaming etc does not disturb the definition of “pre-production”, and accept that “pre-production” is not necessarily defined in the offset guidelines. However, under custom and practice, the activities involved in “pre-production” are understood as including things like casting, set design, location scouting, as noted in her first report. She further agreed:*

*...that a production company does not necessarily need be set up prior to pre-production commencing and that assets such as sizzle reels may be created by individuals, partnerships, or companies to gauge market interest, attract financing, distribution etc.*

*However, in my view, the 90 minute assembly cut of Fragmentary prepared prior to the applicant SPV being registered is not a “sizzle reel” by general industry standards.*

46. Ms Maguire further stated that from the materials she had reviewed *it appears that Mr Pickard and those he was working with thought they were “making a film” and described their activities as such all through the two-year pre and production period.*
47. On 27 July 2022, Ms Maguire and Mr Deeker participated in a conclave and produced a joint report which concentrated on the issues surrounding the post-production expenditure of the film, and whether it reflected reasonable arms-length rates.

48. On 28 July 2022, Ms Maguire and Mr Ginnane participated in a conclave and provided a joint report which concentrated on the issues surrounding 'pre-production' processes and the 'making of a film', and when those steps began for the Film. Mr Ginnane noted that it is *not uncommon to shoot some footage for a film before any financing or mean of distribution has been established* and accepted that a *90-minute edit of a film/footage shot does not constitute a sizzle reel*. Points of disagreement included *whether the 'making of a film' is inherently connected to ownership (or chain of title) being established by the producer to enable distribution of the film for public viewing*. Ms Maguire reiterated that in her opinion, *all individuals involved in this case, were willing participants through phases of pre-production, production, ad post-production, all understood the activities, times and services being performed, and described the ongoing activities as 'making a film'*. Evidenced through numerous timelines and information published on Facebook, in interviews, published articles, blogs, for crowdfunding and on industry websites. Ms Maguire and Mr Ginnane disagreed on when pre-production commenced on the Film in this case. Mr Ginnane maintained that pre-production did not occur until the applicant was incorporated and the subsequent budget and finance plan was secure including a clear chain of title to be able to exhibit the Film was established.
49. Ms Maguire acknowledged in cross examination that if the producer did not have the rights or consents to use the actors' performance, then the footage was unusable and could not be part of the film. She acknowledged in cross examination that casting discussions may or may not be characterised as pre-production activities, but she said in cross examination that the only clear test was when a deal memo had been signed. Ms Maguire acknowledged that pre-production activities sometimes bleed into production activities, and that post-production activities are sometimes involved in production activities such as principal photography.
50. Statutory declarations from executive producers Andrena Finlay dated 20 July 2021, David Goss dated 2 August 202, Steve Jaggi dated 2 August 2021, Neal Kingston dated 20 July 2021, Spencer McLaren dated 7 July 2021, Michael Robertson dated 11 July 2021, Kate Whitbread dated 16 July 2021, Anthony Wright dated 9 July 2021, and John Maynard dated 8 July 2021, all opine that pre-production cannot commence without a budget, a finance plan, and a production schedule in place.

51. Michael McIntyre, a producer, said in a statutory declaration sworn 2 September 2021, that raw footage may become part of a film, specifically on reference to documentaries. He further opined, *running around with a camera is shooting footage, and 'pre-production' does not commence until you have a structure in place which is a path to audience. This structure includes a budget, a finance plan and a production schedule to complete a film.*

52. Caroline Verge, lawyer, said in a statutory declaration sworn 2 May 2022:

*...In my experience it is relatively common for individuals to start filming material on a speculative basis, and this is often done without a treatment, script, funding or any contracts. This might be because the individual has an idea and wants to test its viability, or to film time-sensitive material. Sometimes writer/directors do speculative filming as a pitch or proof of concept. The footage could end up being abandoned, or a production company could acquire it and start the financing process in order to produce a film.*

*In those circumstances my experience is that the production company is only incorporated after the producer has secured financing, which is when written agreements are signed to secure rights, to secure finance and to require the production company to pay cast and crew in relation to their contributions, their work and their intellectual property rights...*

53. The applicant has also filed written statements from Spencer McLaren. Mr McLaren was the Executive Producer of the Film. He was identified as the 'additional contact' in the provisional and final certificate applications and played an active role in producing and promoting the Film. His company (Red Curtain Enterprises, trading as McLaren House) claimed a significant fee for those services (in addition to the fee for supplying sound equipment claimed by McLaren House. In a statutory declaration sworn, 2 September 2021, he said he agreed to assist Mr Pickard in the production of the Film. He said,

*Although the footage shot by Jace was very raw and not suitable for exhibition in theatres (or even broadcast), it showed promise as a cinematic film and I agreed to come on board as executive producer because Jace was very green and inexperienced in filmmaking.*

*It became clear as we progressed that Jace did not understand almost all the professional elements involved in making a first-class feature film including but not limited to the legal requirements and company structure needed to ensure he had the right to use the footage, the distribution requirements and in particular the post pathway. I note that the version of the film Jace brought to us was not ready for exhibition in any form and required additional editing and significant work done on the image and sound before it could be presented to a sales agent for consideration.*

54. Other evidence of Spender McLaren contained in a statutory declaration sworn 7 July 2021, goes to the reasonableness of executive producer fees, accounting fees, and market rates.
55. Mr McLaren was requested for cross-examination at hearing but was not available. In a statutory declaration of Ms Janine Pearce's sworn 9 July 2024, it is said that *his mother was incapacitated, and he would not be able to attend the hearing*. Despite the circumstances, Mr McLaren was not available for cross-examination and his evidence remains untested. As such, I give very limited weight to his evidence.
56. In submissions and some aspects of the evidence, the applicant relies on comparisons and references to the films "Saving Otto" and "Jirga". However, the specific legal and factual circumstances surrounding the satisfaction of conditions for the producer offset for these films is unknown. Any submissions regarding comparisons with these films are merely speculative and unsupported.
57. Having carefully considered the evidence and background chronology in this matter, it is plain that development, pre-production and production of the Film occurred prior to the applicant's registration as a company. Jace Pickard wrote the script for the Film, planned a filming schedule, arranged actors and camera equipment for filming, undertook and directed nearly all of the principal photography for the Film, sought crowdfunding, promoted the making of the Film, edited the footage, and held a screening of the first cut of the Film. One month prior to the applicant's registration, Jace Pickard promoted the Film *has hit the 85 percent mark* of completion. The activities undertaken by Jace Pickard are plainly all pre-production and production activities for making of the Film. Clearly, the applicant did not carry out, or arrange to carry out, many pre-production activities for the Film. I accept that additional production and post-production work was carried out or was arranged to be carried out by the applicant to complete the Film.

58. I accept that pre-existing footage, scripts, music compositions, etc., may be licensed and incorporated in a Film, that would appear to be common practice. However, this is not the circumstances of this case. While the applicant contends that the first cut of the Film made by Jace Pickard prior to the registration of the applicant was merely pre-shot footage licensed to the applicant, the evidence does not support such a contention. The work undertaken by Jace Pickard prior to the applicant's incorporation was more than a *mere frolic or running around with a camera*. He undertook a significant endeavour to make a film in 2017 and 2018. Although the film was 'raw' by industry standards and needed further significant production and post-production work before it could be screened commercially, it cannot be said that the work completed by Jace Pickard was anything other than the development, pre-production and production of 'making the Film'. As already stated, significant activities were undertaken by Jace Pickard to get the Film to a point of 85% completion and to a format able to be screened to the public (albeit not commercially). Additionally, the evidence indicates that the applicant purported to enter contracts, and incur expenditure, for the activities and services involved in producing that footage prior to its registration.
59. In circumstances where it is common ground that section 376-180 does not apply, the applicant cannot satisfy the condition in subsection 376-65(1) because it did not carry out, or make the arrangements for the carrying out of, all activities necessary for the making of the Film. That is fatal to the application.
60. It is not necessary for me to determine if the condition in subsection 376-65(6), the 'QAPE' is satisfied.

## **DECISION**

61. For these reasons, the applicant cannot satisfy the conditions in subsection 376-65(1) with the consequence that the statutory obligation to issue a final certificate in relation to the producer offset is not enlivened.
62. The decision under review is affirmed.

*I certify that the preceding 62 (sixty-two) paragraphs are a true copy of the reasons for the decision herein of Senior Member A Poljak*

.....[SGD].....  
Associate

Dated: 18 September 2024

<b>Dates of hearing:</b>	<b>14 August 2024</b>
<b>Counsel for the Applicant</b>	<b>Ms T Catanzariti</b>
<b>Solicitor for the Applicant</b>	<b>Ms J Pearce, JP Media Law</b>
<b>Counsel for the Respondent</b>	<b>Mr R Lancaster SC</b>
	<b>Mr C Peadon</b>
<b>Solicitor for the Respondent</b>	<b>Mr S Tonkin, Simpsons Solicitors</b>
<b>Other Party</b>	<b>Self-represented</b>