



**Submission to the Treasury on the Exposure Draft of amendments to the
Income Tax Assessment Act 1997 (Cth) to insert a definition of
“documentary” for the purposes of the Producer Offset**

30 January 2013

Introduction

The Australian Subscription Television and Radio Association (ASTRA) welcomes the opportunity to comment on the Exposure Draft of amendments to the *Income Tax Assessment Act 1997* (Cth) to insert a definition of ‘documentary’ for the purposes of administering the Producer Offset scheme.

About ASTRA

ASTRA is the peak industry body for subscription television (STV) in Australia. ASTRA was formed in September 1997 when industry associations representing subscription (multi-channel) television and radio platforms, narrowcasters and program providers came together to represent the new era in competition and consumer choice. ASTRA’s membership includes the major STV operators, as well as channels that provide programming to these platforms. A list of ASTRA members is attached to this submission.

Overview of the STV Sector

The STV sector gives Australians access to quality, live, original and award-winning international and Australian programming across many genres, including movies, news, children’s, documentaries, light entertainment, lifestyle and drama, live local and international sport, music, ethnic language, local weather and pay per view events.

In 2011–12, the Australian STV industry invested \$667 million in new Australian content across all genres of programming, an increase of 13% from 2010–11. Deloitte Access Economics estimates the overall direct contribution made by STV to the Australian economy at \$1.4 billion in 2011–12 and at least \$7 billion overall since the start of STV in 1995.

With over 200 channels (including HD and Plus 2) from over 20 different media companies broadcast on the Foxtel platform and channel packages offered through Telstra T-Box and Xbox360, the breadth, range and diversity of STV programming remains unsurpassed in the Australian broadcasting environment. Received by 34% of Australians through their homes and over a million more through hotels, clubs and other entertainment and business venues, STV provides 24 hour news, sport and entertainment.

Comments on the draft legislation

More extensive review required

The proposed amendments would insert a definition of documentary derived from the definition of documentary in the Australian Content Standard (the ACS) – in effect since 1999 – as interpreted according to guidelines published by the Australian Communications and Media Authority (ACMA) in 2004. The amendments also specifically exclude from the definition of documentary infotainment, lifestyle and magazine programs based on a broad definition of such programs which solely emphasises the “entertainment value” of such programs.

ASTRA submits that, before a definition of documentary and specific types of excluded programs are mandated for the purposes of the Producer Offset and become enshrined in primary legislation, the Government should commission an extensive review of contemporary understanding of what constitutes a ‘documentary’ as opposed to other forms of factual programming, particularly given that:

- the definition in the ACS was developed specifically for the purposes of regulating content on one particular platform (commercial free-to-air (FTA) television);
- there has been little examination of the continued appropriateness and relevance of a definition of documentary that has been in use since 1999; and

- the explanatory memorandum makes assumptions and conclusions about the characteristics and meaning of documentaries without reference to any authorities or data.

The review then should involve a detailed consultation document which outlines and seeks comment on different options for the definition of 'documentary', and takes into account research about the current nature of documentary production and the types of factual programming that are value to viewers.

It should also critically evaluate which types of documentary and related/peripheral programs should be eligible for the producer offset in making a documentary. Such an evaluation should be based on the requirements and needs of the production industry, so to ensure ongoing production of all these types of programs, as well as the proper allocation of public capital.

The currently proposed definition of documentary is based on a 1990s formulation to determine whether a factual program broadcast by a commercial FTA television broadcasting licensee can be counted towards the minimum number of hours of Australian documentary content that licensee is required to broadcast each year under the ACS. The ACMA Guidelines were developed to provide guidance for commercial FTA television broadcasters and the production industry on what programming is likely to meet the test for documentary for the purposes of Australian content requirements.

Neither the development of the definition nor of the guidelines took into account issues relating to the production of factual programming for platforms other than commercial television, such as STV. As ASTRA submitted at the time of the development of the ACMA Guidelines, STV's multi-channel environment and the niche nature of STV programming should be taken into account in formulating any definition of 'documentary' that is applied to STV programming.¹

Furthermore, the definition itself has not been reviewed for ongoing appropriateness or relevance since its introduction. While the ACMA did undertake a consultation process before finalising the 2004 guidelines, this consultation did not examine the base definition of documentary in the ACS. The styles and formats of factual programming have evolved significantly since the 1990s. At the same time, audience expectations regarding the form, style and substance of factual programming are also evolving, meaning producers and broadcasters are constantly exploring new and innovative ways of delivering factual programming for viewers that are engaging and entertaining, and in formats and styles that are relevant and accessible to changing audience demands. Therefore, it would seem incongruous to impose a 14 year old definition without any regard to contemporary and evolving notions of documentaries.

The thorough review of the definition of 'documentary' that ASTRA recommends should be conducted before any legislative change is made should also inform updates by the ACMA to its documentary guidelines—to the extent that these would remain in force to inform decisions about documentaries under various regulatory and funding schemes.

However, should the Government be minded to proceed on its current course, ASTRA makes submissions below about the definition and explanatory material currently released for comment.

Factual programming that is entertaining

An underlying theme of the explanatory statement seems to assume that the more a factual program is produced with an eye to its 'entertainment' potential, the less likely it would be regarded as a documentary for the purposes of the Producer Offset scheme.

¹ ASTRA submission to the Australian Broadcasting Authority, *Draft Documentary Guidelines*, 3 November 2004 – available at <http://www.acma.gov.au/webwr/aba/tv/content/requirements/australian/documents/astra%20submission%20november%202004.pdf>.

While ASTRA agrees that there needs to be limits to the type of programming eligible under the Producer Offset, we submit that a factual program should not automatically be disqualified from eligibility for the Producer Offset merely because that program does not necessarily conform to traditional understandings of what a documentary is 'meant' to be.

The minimum \$250,000 per hour QAPE threshold, while lower than for drama, remains a significant investment for factual programming, meaning any factual program supported by the Producer Offset will have high production values and significant creative input. It is also a reasonable level of investment for such programs when compared to scripted productions given the significantly higher production values and techniques required for those productions.

In relation to the specific wording, the proposed new section 376-25(2) provides that a film is not a documentary if it is an "infotainment or lifestyle program". That term is defined in Schedule 6 of the Broadcasting Services Act 1992 (BSA) to mean:

"a program the sole or dominant purpose of which is to present factual information in an entertaining way, where there is a heavy emphasis on entertainment value."

The explanatory memorandum states that this sole or dominant entertainment purpose test can be determined by reference to the "serious purpose" of the film. If the entertainment purpose outweighs the serious purpose then the film is an infotainment or lifestyle program and not a documentary. This is an unusual characterisation. While a serious purpose may be a crucial element for a documentary, such a purpose is not the antithesis of entertainment. Arguably documentaries should "please and instruct".

Industry recognised documentary films such as *Super Size Me*, *Murderball* and *Storm Surfers* had very high entertainment value, as do popular television series like *Whale Wars*, *Border Security* and *Go Back To Where You Came From*.² And in many respects, each also has a serious or significant purpose. In the *Lush House* decision of the AAT³, the Tribunal said a documentary may contain humour however a "frivolous program" will not be a documentary.⁴

It is submitted by ASTRA that this blanket exclusion of "entertaining" programs does not take into account other elements of such programs which would otherwise characterise it as a documentary, including whether the program will inform or educate, the production methods and techniques, the absence of any material or monetary incentives for participants which may influence program outcomes, and, as suggested by the AAT in the *Lush House* decision, whether the program was frivolous.

In addition, there is a practical question as to how Screen Australia will be in a position to assess whether a proposal seeking the producer offset certification meets the sole or dominant entertainment test. That is, how will it ascertain from such written proposals that a yet to be filmed and produced program will be predominantly entertaining, and have no prevailing serious purpose?

Assessment of 'other relevant matters'

ASTRA supports, in principle, the ability in proposed 376-25(1)(d) for Screen Australia to consider other relevant matters when determining whether a factual program falls within the definition of 'documentary'. The provision would appear to give Screen Australia the ability to consider matters beyond those explicitly listed in the draft legislation (i.e. the extent and purpose of any contrivance, exploration of an idea or theme, and overall narrative structure), and may give Screen Australia scope to encompass more novel and innovative factual program formats.

² Winner of the Best Documentary Series at the 2nd AACTA Awards, held on 28 January 2013.

³ *EME Productions No.1 Pty Ltd v Screen Australia* [2011] AATA 439

⁴ *Ibid*, at [14].

However, ASTRA believes that further clarification of the purpose and intent of this provision is required in the explanatory material. ASTRA would be concerned if consideration of ‘other relevant matters’ could exclude a program from the Producer Offset because of a conservative assessment of the commercial arrangements behind a documentary. For example, the explanatory material (at para 1.28) notes that “the commercial arrangements underpinning a production, the likelihood of the film having enduring appeal, and the breakdown of the film’s budget” could be relevant in determining eligibility. ASTRA submits that the viewer experience of the end product should be the only relevant consideration, not any commercial arrangements that may operate behind the scenes.

Retrospectivity

Given the retrospective implementation proposed in the draft legislation, such that the new definition would apply to programs that commenced principal photography on or after 1 July 2012, ASTRA seeks clarification that provisional certification, or certification, granted by Screen Australia since 1 July 2012 would be sufficient. ASTRA believes it would be highly inappropriate for provisional certification or certification for a program to be un-wound because of retrospective application of the definition of documentary.

Distinction between direct Screen Australia investment and assessment for eligibility for the Producer Offset

ASTRA submits that the Government should consider differentiating the applicable criteria for decisions on direct funding through Screen Australia programs under the *Screen Australia Act 2008* (Cth) on the one hand, and Screen Australia’s assessment of eligibility under the Producer Offset scheme under tax legislation.

Under the *Screen Australia Act 2008* (Cth), the functions of Screen Australia include to:

- support and promote the development of a highly creative, innovative and commercially sustainable Australian screen production industry;
- support or engage in the development, production, promotion and distribution of Australian programs, and the provision of access to Australian programs; and
- support and promote the development of screen culture in Australia.

In providing its support through grants, financial assistance or other means, Screen Australia must, as far as practicable, ensure the development of a diverse range of Australian programs that deal with matters of national interest or importance to Australians, or that illustrate or interpret aspects of Australia or the life and activities of Australian people, with an emphasis on documentaries, children’s programs, and programs with a high level of artistic and cultural merit.

Where Screen Australia is to make a decision on directly investing in a documentary project, ASTRA believes it appropriate that Screen Australia has the discretion to determine funding criteria that, in its opinion, would lead to the funding the documentary programs forms that it considers would be consistent with its broader public policy objectives. However, ASTRA submits that such specific criteria are not appropriate for decisions relating to factual programs that, while not necessarily confirming to ‘traditional’ forms of documentary, are nonetheless programs likely to be directed to a niche market and may otherwise be commercially unviable without the assistance available from the Producer Offset.

In contrast to the objectives laid down for Screen Australia, the public policy purpose of the Producer Offset has been focused on encouraging investment in commercially viable content that is responsive to audience demands. The Explanatory Memorandum of the Tax Laws Amendment (2007 Measures No. 5) Bill 2007, which introduced the Producer Offset, states that:

“[t]he introduction of the producer offset represents a major new support mechanism for film producers and it will assist the industry to be more competitive and responsive to audiences. It provides a real opportunity for producers to retain substantial equity in their productions and build stable and sustainable production companies, and aims to increase private investor interest in the industry.⁵

If the Government is minded to enshrine in legislation a definition of documentary for the purposes of the Producer Offset, ASTRA urges the Government to refrain from imposing a definition so narrow that it may undermine the original public policy purpose of the Producer Offset scheme.

Please contact Petra Buchanan, CEO, or Simon Curtis, Policy and Regulatory Affairs Manager, on (02) 9776 2684, if you wish to discuss further anything in ASTRA’s submission.

⁵ Explanatory Memorandum for the Tax Laws Amendment (2007 Measures No. 5) Bill 2007, p.184.

ATTACHMENT: ASTRA Members

Subscription Television Platforms

Foxtel
Telstra

Program Channel Providers

Aurora
Australian Christian Channel
Australian News Channel
BBC Worldwide Channels Australasia
Discovery Networks
E! Entertainment
ESPN
Eurosport
Expo Networks
FOX Sports
MTV Networks
National Geographic
NBC Universal
Nickelodeon
SBS Subscription TV
Setanta Sports Australia
Sky Racing
Turner International (Australia)
TV1
TVN
TVSN
Walt Disney Company (Australia) Pty Ltd

Communications Companies and Other Associate Members

Ai Media
Ignite Media
Multi Channel Network
BSA