

DEFINITION OF DOCUMENTARY – EXPOSURE DRAFT

Screen Australia is the key Federal Government direct funding body for the Australian screen production industry. Its functions are to support and promote the development of a highly creative, innovative and commercially sustainable Australian screen production industry. It is also the ‘film authority’ for the purposes of the Producer Offset legislation (Division 376 of the *Income Tax Assessment Act 1997* as amended (**ITAA97**)), as further referred to below.

In this submission, Screen Australia provides specific comments on the draft legislation and Explanatory Memorandum. Further, while noting that the proposed amendments have application to the Location and PDV Offsets, Screen Australia’s comments are restricted to their application to the Producer Offset.

Screen Australia has also taken the opportunity to provide additional contextual information on the administration of the Producer Offset and how, if enacted, Screen Australia would see the amendments operating in practice.

For the purposes of this Submission, when using the term ‘documentary’, Screen Australia refers to a documentary which is not a feature film (i.e. seeks a 20% Producer Offset).

Background

As the film authority for the Producer Offset, Screen Australia manages the application and assessment processes, and determines applications, for both provisional and final certificates (pursuant to the ITAA97 and the *Producer Offset Rules 2007*).

Two of the critical decisions made by Screen Australia are the determination of eligibility for the Producer Offset (under s.376-65) and the determination of Qualifying Australian Production Expenditure (**QAPE**, under s.376-75). Each of these decisions, in the context of a final certificate application, is subject to rights of external review by the Administrative Appeals Tribunal, and, on questions of law, by the Federal Court of Australia.

The determination of a film’s QAPE fulfils a dual role. It is relevant to eligibility for the Producer Offset, as each film must meet a threshold level of QAPE which differs according to the type of film (outlined in item 1 the table in subs.376-65(6)). It also forms the basis of calculation of the offset which may ultimately be credited to the taxpayer by the Australian Taxation Office (**ATO**).

The concept of ‘eligibility’ for the Producer Offset embraces a number matters in addition to the applicable QAPE threshold. Relevantly to this Submission, the film for which the Producer Offset is claimed must not fall into an excluded category (subs.376-65(2)). The excluded categories cover, among others, reality programs (other than documentaries).

The ITAA97 does not define the term ‘documentary’, although it is used in important ways within Division 376. The term ‘documentary’ is relevant to the Producer Offset in the following contexts:

- There is a lower QAPE threshold for documentaries than that for drama (unless the film is a single-episode program)
- ‘A film of a public event’ or ‘a reality program’ is ineligible for the Producer Offset *unless* it is a documentary (paras.376-65(2)(d)(iii) and (vii)), and
- Documentary films are not subject to the 20% cap on QAPE claimed on ‘above the line’ items (subs.376-170(4A) and para.376-170(4)(b)).

The meaning of ‘documentary’

Films which are ‘documentaries’, whether they are single-episode programs, series, or seasons of series, are eligible for certification for the Producer Offset on meeting a lower QAPE threshold than that applied to films which are not documentaries. The QAPE thresholds for documentaries are an ‘overall’ threshold of \$500,000 and a per hour threshold of \$250,000 (determined by calculating QAPE divided by a film’s duration in hours). The QAPE threshold for series and seasons of series which are not documentaries are \$1 million ‘overall’ and \$500,000 per hour. This means that Screen Australia must decide whether a film seeking certification under the lower QAPE thresholds is, or is not, a documentary.

As noted above, ‘documentary’ is not defined in the ITAA97. The Explanatory Memorandum (**EM**) that accompanied the introduction of the Offset (Tax Laws Amendment (2007 Measures) No.5 Bill 2007) provided the following guidance:

10.57 A documentary will take its ordinary meaning. It is intended that it will mean a creative interpretation of actuality, other than a news, current affairs, sports coverage, magazine, infotainment or light entertainment programme.

10.58 A reality television programme is not a documentary. It is intended that the term ‘reality programme’ be applied to programmes in which contestants or participants are usually placed in contrived situations, where the primary purpose is to provide a vehicle within which their characters can be observed and assessed by the viewer. The primary purpose of such a reality programme would not be to explore and interpret an idea. Where there is a competitive element in the programme between participants it is intended the programme would generally be considered a reality programme.

10.59 By contrast, a programme is more likely to be classed as a documentary when, even though it may be based around a contrived situation, the contrivance will serve to explore a creative idea, concept or theme. Observations about the character of a participant will tend to illustrate the idea, rather than serve as the primary purpose. Such programmes may contain a strong information component within which the idea is explored. There will often be critical commentary which interprets or provides context for the activity depicted.

The meaning of ‘documentary’ outlined in paragraph 10.57 of the EM is substantially the same as that utilised by the Australian Communications and Media Authority (**ACMA**) in its *Documentary Guidelines* (**ACMA Guidelines**, which were made by one of its predecessor agencies, the Australian Broadcasting Authority). The ACMA Guidelines’ test of ‘documentary’ is in turn drawn from the Australian Content Standard (**ACS**). The ACMA Guidelines also provide additional information about the operation of the definition in practice.

Documentary program means a program that is a creative treatment of actuality other than a news, current affairs, sports coverage, magazine, infotainment or light entertainment program.

In its capacity as the film authority, Screen Australia had relied on the ACMA Guidelines in giving meaning to the term ‘documentary’ in Division 376. In doing so, Screen Australia gave effect to long-standing industry practice, given the widespread acceptance of the ACMA Guidelines among documentary practitioners.

Screen Australia considered that there are obvious advantages in documentary having consistent definitions and treatment across regulatory and funding regimes (in this case, the Producer Offset and the ACS).

The decision of the Administrative Appeals Tribunal (**AAT**) in *EME Productions No. 1 Pty Ltd and Screen Australia* [2011] AATA 439 (**the Lush House proceedings**),¹ effectively displaced the test of documentary found in the EM, in the ACMA Guidelines and in the ACS. In its place, the AAT substituted its own test to determine whether a film is a documentary for the purpose of Division 376. The essence of the AAT test is:

A useful process for determining whether a program is a documentary may be to examine the program to see if it is a creative recording of facts for the purpose of informing or educating. If it satisfies these requirements and, additionally, is not frivolous, then it will be a documentary. The most difficult aspect of any assessment may well be determining whether the program sufficiently tips the scale in favour of seriousness. (para.15)

It is the view of Screen Australia that the practical outcome of the decision in the *Lush House* proceedings was, potentially, to require filmmakers to satisfy two different tests: one, to determine whether a film is a documentary for the purposes of the ACS, and another for the purposes of determining eligibility for the Producer Offset. Both determinations are critical for a documentary film made for broadcast by an Australian commercial television broadcaster.

Administration of the Producer Offset

Most Producer Offset decisions made by Screen Australia are made under delegated authority of the Screen Australia Board. Depending on whether the decision pertains to a Provisional or Final application, the level of Offset claimed,

¹ The Federal Court subsequently concluded that there was no error of law in the AAT’s decision and, accordingly, it was not necessary for the Court itself to consider the meaning of the term ‘documentary’ (*Screen Australia v EMA Productions No. 1 Pty Ltd* [2012] FCAFC 19).

the level of Australianness of the project and any potential controversy in the decision, a Producer Offset decision may be made by:

- The Board
- The CEO, acting on the advice of Screen Australia's Producer Offset and Co-production Committee (**Committee**)
- The CEO, acting on the advice of the Senior Manager, Producer Offset and Co-production (**SMPOC**), or
- The SMPOC.

As a matter of practice, all potentially contentious decisions as to the format of a film and all decisions not to issue a certificate are considered at least by the Committee and usually the Board.

Statistics

Since the commencement of the Producer Offset on 1 July 2007, and up to 22 January 2012:

- 335 Provisional certificates for the Producer Offset have been issued to documentary programs (noting again that documentary in this context refers only to non-feature documentaries)
- 319 Final certificates for the Producer Offset have been issued to documentary programs
- Decisions to issue provisional and/or final certificates have been made on 458 individual documentary programs.
- Applications have been lodged for a total of 476 documentary programs overall.
- The 18 programs which have not been issued with certificates are made up of:
 - Some which withdrew the application,
 - Those still under assessment at 22 January 2013
 - Programs considered ineligible for reasons unrelated to format, and
 - Six programs were found (1.31%) to be ineligible as they were not considered documentaries.
- The total Producer Offset for the 319 documentary programs issued with final certificates is \$62.28 million.

Screen Australia's documentary decision-making process

On receipt of an application for either provisional or final certification for a program self-describing to be documentary, the Producer Offset and Co-production Unit (**POCU**) will undertake an initial and preliminary assessment to determine whether the project is *clearly* a documentary or not. At a minimum, the relevant information considered by the POCU at this stage would be the synopsis, script, bible and copy of the film (if available).

For the vast majority of applications, a decision can readily be made at this preliminary stage that the project is quite clearly a documentary. In such a case, the remainder of the application is then processed in the usual way. It is only in a small minority of cases that any further action is taken in relation to the issue of whether the film is, or is not, a documentary.

In these cases, further information is sought from the applicant in order to provide Screen Australia with sufficient information on which to make a decision. This could include any footage already shot/edited, further information on the creation of the project, financial and production documentation and, most importantly, a statement from the applicant addressing why it considers the film is a documentary. The intent of this statement is to explain and identify the characteristics of the program which support its treatment as a documentary.

Before the decision in the *Lush House* proceedings, applicants were asked address the test of documentary as outlined in the ACMA Guidelines. Since the decision in the *Lush House* proceedings, applicants have been asked to submit a statement which addresses the test outlined in the AAT's decision.

Once all of the available relevant information is provided, it is carefully assessed and analysed before any decision is made.

In the vast majority of cases, the project is considered to be a documentary and is certified.

Draft Legislation

Screen Australia sees the effect of the draft instrument as re-establishing the pre-*Lush House* proceedings interpretation of documentaries by the film authority.

Quiz programs

Items 2, 5 and 6 of the draft schedule would add 'game shows' to the list of ineligible formats. The existing legislation excludes from eligibility quiz programs, panel programs or 'programs of a like nature' to those formats. Screen Australia considers that most – if not all - game shows would be considered programs of a like nature, but the proposed amendment removes any doubt and is welcome.

The definition of 'documentary'

Item 3 of the draft schedule would insert a new section into the ITAA97 which defines 'documentary' for the purposes of the Producer Offset. Screen Australia considers that the amendment would effectively re-establish the test outlined in the ACMA Guidelines (quoted above), breaking the ACMA Guidelines' test into its two constituent parts: 'creative treatment of actuality' and 'other than an infotainment or magazine program'.

Draft subs.376-25(1) contains the first limb of the documentary definition. In providing that a documentary is a 'creative treatment of actuality', the draft borrows directly from the ACS and ACMA Guidelines. Screen Australia considers that draft paras.376-25(1)(a) to (d), which outline factors to which regard must be had by the film authority in applying the definition, capture the essence of the issues raised by the ACMA Guidelines test of documentary, as outlined in pages 3-4 of the ACMA Guidelines. This provides welcome consistency. The mechanism, involving a mandatory, but non-exhaustive, set of considerations for Screen Australia to consider, is structurally similar to the 'significant Australian content' (**SAC**) and 'new creative concept' (**NCC**) provisions in s.376-70 with which Screen Australia is extremely familiar.

Screen Australia is aware that there has been some discussion amongst stakeholders regarding the ‘any other relevant matters’ factor in draft para.376-25(1)(d). Screen Australia notes that this provision reflects the inherent flexibility of the ACMA Guidelines and provides necessary flexibility for the film authority in practice. The drafting recognises that it is impossible for the legislature to foresee and prescribe all factors which could be relevant to a decision as to whether a particular film is a documentary, particularly given continuing innovation and evolution in the sector.

Screen Australia notes that an ‘any other relevant matters’ provision does not provide a licence for Screen Australia to take *anything* into account in making a decision. Well-understood principles of statutory interpretation limit SA to considering things that are objectively relevant and broadly consistent with the other matters listed.

Draft subs.376-25(2) represents the second half of the ACMA Guidelines test of documentary –excluding ‘Infotainment’ and ‘Magazine’ programs from ‘documentary’.

The definition of ‘infotainment’ in draft para.376-25(2)(a) incorporates the definition of the term in Schedule 6 to the *Broadcasting Services Act 1992* (BSA). Again, Screen Australia supports consistency, where possible, as between the broadcasting regulatory framework and the Producer Offset regime. The ACMA guidelines provide industry with additional information on the administration of the definition.

Draft para.376-25(2)(b) excludes magazine programs from the concept of documentaries. Screen Australia notes that the provision itself does not refer to ‘magazine programs’. The three elements listed in subparas.376-25(2)((b)(i) to (iii) are substantially similar, if not identical, drawn from the ACMA Guidelines (c.f. page 9). Screen Australia is satisfied with these elements and notes that the fact that the elements must all be present in order for a project to be considered a magazine program provides solid guidance as to the sort of projects that may be considered a magazine program.

Consequent amendments

Item 11 of the draft schedule inserts a reference to the proposed definition of documentary in the dictionary of the ITAA97 in section 995-1. Items 1, 4, 7, 8, 9 and 10 are consequent amendments following the defining of ‘documentary’. Screen Australia makes no comment on these items.

Commencement provisions

Item 12 of the draft schedule outlines the commencement provisions for the proposed amendments. In the case of the amendments relating to documentary, infotainment and magazine (subitem 12(1)), the commencement provisions are consistent with the intention of Government as announced in the press release of 5 July 2012; that is, the amendments would apply to films commencing principal photography on or after 1 July 2012.

The intended effect of the amendments has been well forecast by Government; the July 2012 press release indicated that any legislative change would be consistent with the ACMA Guidelines. Since the Government's press release in July 2012, Screen Australia has been explicitly taking into account the proposed legislative change in issuing provisional certificates to documentaries which expect to commence principal photography on or after 1 July 2012 and which could therefore be subject to amended legislation.

For such applications, Screen Australia has been determining the question [of whether the program is a documentary] based on the definition of 'documentary' outlined by the AAT, but has provided a view on whether the film would be considered to be a documentary under the ACMA Guidelines..

As a result, it is unlikely that there are any projects in production that would be unfairly impacted by the commencement provisions. The issues arising in the aftermath of the Lush House proceedings have been discussed broadly with the screen industry and Screen Australia has endeavoured to provide certainty to industry where possible.

However, Screen Australia notes that sub-item 12(2) of the draft, which specifies the commencement of the provisions relating to the exclusion of game shows, has a different commencement date. Screen Australia notes the explanation outlined in the draft EM at para.1.42, but considers that this different commencement date may lead to confusion amongst stakeholders as to the text of the legislation which applies to a given program.

It would mean that, effectively, four versions of the Producer Offset legislation would be operative at the same time, with the date of principal photography for a film defining which version of the legislation would apply to it:

- The original offset legislation (prior to the passage of *Tax Laws Amendment (2011 Measures) No.7 Act 2011* (TLAB11))
- The legislation as amended by TLAB11, but before the passage of this instrument
- The legislation as amended by the 'documentary' definition provisions, and
- The legislation as amended by the 'documentary' and 'game show' provisions.

The first three are unavoidable, but it introduces unnecessary complexity to split the commencement of the provisions of this instrument in two. Screen Australia considers it preferable for the commencement of this provision to be consistent with the remainder of the draft instrument. Screen Australia does not consider that this would prejudice any applicant.