Screen Producers Association of Australia

Submission to the House Standing Committee on Economics: Inquiry into the Tax and Superannuation Laws Amendment

The Screen Producers Association of Australia (SPAA) welcomes this opportunity to make a submission to the House Standing Committee regarding the proposed amendments to 'documentaries and film tax offsets'. This submission echoes many of the concerns outlined to Treasury following the release of the Exposure Draft.

Who do we represent?

SPAA represents Australian independent film and television producers on all issues affecting the business and creative aspects of screen production. Our members employ thousands of workers and make many of Australia's best-loved and most successful television shows, reaching millions every week.

A small sample of our documentary programs include *Who Do You Think You Are?, Go Back To Where You Came From, MythBusters, Gourmet Farmer, Hot Property, Bondi Rescue, Great Sothern Land, Two in a Tinnie, Submariners, The Making of Modern Australia, Mrs Carey's Concert, Paul Kelly: Stories of Me* and *The Burning Season*.

What is the position of our stakeholders?

It is the industry's view that the proposed revisions should be set aside for the following reasons:

1. The Producer Offset must adapt to changes in market demand. If definitions are calcified in legislation there is a very real risk that the criteria will be inflexible and ineffective in meeting the government's policy objectives.

2. The proposed changes undermine the *Lush House* decision at the Administrative Appeals Tribunal (AAT). This decision demonstrated an iterative process of how guidelines can adapt to meet the industry's contemporary practice.

3. SPAA, Free TV and ASTRA have all disagreed with the assertion that these changes would restore the industry's understanding of the documentary form. There is widespread belief that *Lush House* was always within the parameters of the guidelines and that supplementary legal advice states that these changes will not

rule out similar challenges in the future.

4. Screen Australia has dismissed concerns of an increased cost to government stemming from the *Lush House* decision. They recently revealed that there has not been a significant rise in the number of final certifications over the last 18 months.

5. If the government is determined to introduce new legislation, this legislation should be drafted following further consultation with the industry regarding what is not a documentary.

6. Any new legislation should not apply to projects whose principal photography began prior to the date of Royal Assent.

Why have our stakeholders taken this position?

Documentary is arguably the most dynamic, and financially vulnerable, genre in screen production. It is perhaps this very reason, that defining what a documentary is can be such a fractious issue; one that has to-date relied on flexible policy tools.

In Australia, the most commonly accepted definition dates back over 80 years with John Grierson's claim that a documentary is a 'creative treatment of actuality'. Its strength is that it is open to interpretation, that it recognises that documentary is an evolving practice with innovations that have continued to this day through major shifts in technique, from observational styles through to a more interventionist approach.

Creative approaches by filmmakers that combined information and education with entertainment have ensured the ongoing prosperity of the documentary form. This balance must be a guiding principle that is adhered to when considering approaches to industry assistance.

The government's most targeted support is offered through the grants and investments of Screen Australia. This evaluation approach ensures that the most culturally important content is supported. The Australian Content Standard has a slightly broader remit but is also still closely connected to cultural exchange.

In contrast, the expenditure requirement for subscription television and the Producer Offset are more aligned with industry building strategies. The Offset in particular lessens the need for direct subsidy by offering leverage to finance documentaries via the market.

The stated intention of the Producer Offset when introduced was to provide a real opportunity for producers to retain substantial equity, build stable and sustainable companies, increase private investment and act as a genuine incentive for productions with wide audience appeal.

To ensure that its intentions are met, the Producer Offset was crafted in a certain way to permit the policy outcomes to keep pace with change, both in regards to the documentary form and the tastes of contemporary audiences. To not allow for the industry support mechanism to be able to adapt, by calcifying definitions in legislation, is incredibly damaging to a sector.

Perhaps most pragmatically, the proposed changes will import many of the difficulties discussed during the AAT hearing of *Lush House* (Decision 2011 AATA 439). These difficulties surround the lack of clarity in the powers of discretion in the proposed new subsections 1 and 2 of section 376-25. SPAA has been advised that this level of discretionary power is not appropriate under administrative law (see Attachment A).

While it may assist a Minister or Screen Australia to make an assessment, it does not provide sufficient clarity for legislation and includes nebulous concepts that are contestable. Thus, paving the way for more challenges and further cost to government and industry in seeking necessary clarity.

These changes come at a time when certainty has been successfully advanced by the judicial review achieved at both the AAT and Federal Court. Support mechanisms must be able to change. They must adapt. To do otherwise is to relegate an industry to the past and retard its growth. Finding the line between one form and another is an ongoing challenge and to stop the possibility for change or adaptation is deeply concerning.

Contact

Matthew Hancock
Manager, Strategy and Insights
Screen Producers Association of Australia
34 Fitzroy Street Surry Hills NSW 2010 Australia
Tel: +61 2 9360 8988
Email: spaa@spaa.org.au

Attached information

Attachment A: Memorandum of Advice, In the Matter of the Tax Law Amendment (2013 Measures No.1) Bill 2013: Film Tax Offsets, Simeon Beckett, Barrister, 7 February, 2013

Attachment B: SPAA submission to the Federal Treasury, Film tax offsets - definition of a 'documentary' for the purposes of the Producer Offset.

Attachment A

IN THE MATTER OF THE TAX LAW AMENDMENT

(2013 MEASURES NO. 1) BILL 2013: FILM TAX OFFSETS

MEMORANDUM OF ADVICE

1. I am asked for my advice about the amendments to the producer tax offset contained in the Tax Law Amendment (2013 Measure No. 1) Bill 2013 ("the Exposure Draft Bill"). I acted as counsel in the *Lush House* litigation for EME Productions No. 1 Pty Ltd in proceedings in the Administrative Appeals Tribunal[1] ("the AAT") and the Full Court of the Federal Court.[2] EME Productions No. 1 (a wholly owned subsidiary of Essential Media and Entertainment Pty Ltd) was successful in both matters.

2. Screen Australia had determined that *Lush House* was infotainment. Essential Media considered that the *Lush House* was within the term documentary and at all stages challenged Screen Australia's decision. The AAT found that the Screen Australia decision was not the "correct and preferable decision" and determined that *Lush House* was a documentary.

3. There is no definition of "documentary" contained in the *Income Tax Assessment Act* 1997 ("the ITAA"). The AAT approached the definition of that term by construing it according to its dictionary definition and utilising, where it could, the explanatory memorandum to the ITAA. The Explanatory Memorandum adopts parts of the ACMA guidelines under the *Broadcasting Services Act* 1992. The Full Court of the Federal Court approved the approach adopted by the AAT and said that the word "documentary" must be interpreted by a combination of the dictionary meaning of that term and the explanatory memorandum: at [32], [33].

4. The approach of the drafters of the Exposure Draft Bill is to attempt to add clarity and certainty to the interpretation of the term "documentary" in the

[1] *EME Productions No. 1 and Screen Australia* [2011] AATA 439
[2] *Screen Australia v EME Productions No. 1 Pty Ltd* [2012] FCAFC 19

ITAA. This is done through the amendment of s. 365-25 of the ITAA (at item 3 of the Exposure Draft Bill). My view is that the amendments do not add clarity and certainty because of the following reasons.

5. First, the proposed s. 365-25(1) introduces a definition for "documentary" which is, in fact, a formula used for an administrative decision.[3] A properly drafted definitional clause should state with clarity the meaning of a word. The proposed definition, however, requires a court to "have regard to" the factors set out. It provides no assistance as to what weight is to be given to each matter by the court. Further, the court is being asked to have regard to "the extent" of the three matters set out at (a), (b) and (c). This is, in itself, ambiguous. It is unclear as to whether a high or low extent of each of those three matters should sway a court towards or away from a film being a documentary. The task proposed has the effect of not providing a common definition but rather inviting a *different definition* depending on the film concerned. One may expect that the proposed definition will confuse the application of the term not clarify it.

6. Second, the words "creative treatment of actuality" are already implied in the definition of documentary in the ITAA as it stands. The Tribunal applied the term in its decision in *EME Productions*[4] and the Federal Court agreed this was appropriate.[5] Nothing is added by including it in the statute itself.

7. Third, a catch-all matter is provided by proposed s. 265-25(1)(d) of "any other relevant matters". Such a category is inapt for a definitional clause because relevance must be determined by reference to the statute as a whole and the other parts of s. 265-25(1).

8. It is important to point out that where a broad term such as documentary is to be used in legislation it makes sense, from a policy point of view, to exclude certain categories rather than attempt to provide an overall definition. One can readily see the policy behind not providing the producer offset to a game show or quiz program. However, it is important that any excluded categories be precisely defined.

---

[3] Such as by a Minister, public official or statutory authority.
[4] At [13]
[5] At [35], [36], [48].

9. The proposed s. 365-25(2) is also problematic for a number of reasons. First, the definition proposes to exclude "an infotainment or lifestyle program". The policy intent is clear but the way it is executed is not. The definition of that term is drawn from Schedule 6 to the *Broadcasting Services Act* 1992 which is as follows:

> *"infotainment or lifestyle program* means 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."

10. The AAT in *EME Productions No 1* said the definition of infotainment in the Explanatory Memorandum was "problematic": at [32]. One can readily see why. The definition found in the *Broadcasting Services Act* 1992 invites ambiguity. For example, it would be hard to deny that a classic documentary such as David Attenborough's *Life on Earth* does not present "factual information in an entertaining way". If such a program had many instances of penguins being eaten by sharks, sexual congress by primates or carnivorous plants would that make it a program with a "heavy emphasis on entertainment value"? In my view the definition of infotainment or lifestyle program is ambiguous and overly wide. It adds uncertainty to the definition of documentary.

11. Second, the excluded category at s. 265-25(2)(b) is also problematic. One can readily envisage a bona fide documentary which has two or more discrete parts, each dealing with a different subject matter or a different aspect of the same matter. For example, a program, which documented burial rituals in three different and disparate countries joined only by the theme of burial ritual, would fall foul of this exclusion. The fact that it invited the viewer to draw his or her own conclusions and left the thesis to the viewer would fall foul of s. 265-25(2)(b)(ii) and (iii). Much experimental, cutting-edge and observer-led documentary would be caught by such a definition. The effect of the provision is much wider than the magazine type programs it is intended to exclude.[6]

12. In my view greater consideration needs to be given to defining the categories of lifestyle, infotainment and magazine beyond those found in the ACMA Guidelines in order to provide certainty in applying the producer offset.

[6] See Explanatory Memorandum at [1.32-33]

13. The objection of Screen Australia to *Lush House* was that it was too close to a number of 'makeover' programs regularly screened on the Lifestyle Channel. In my opinion the new definition would not exclude *Lush House* because it had both an overarching narrative structure (the family has a problem, Shannon Lush gives then advice, the advice is followed, their living circumstances are changed and the problem addressed) and a thesis (an ordinary family can solve household problems through re-organisation and cleaning techniques). If the new definition was intended to exclude programs such as *Lush House* then, in my opinion, it will not succeed.

14. Finally, the assertion in the Explanatory Memorandum to the Exposure Draft Bill at [1.13] that the Tribunal's definition of documentary is "a departure from both the ACMA guidelines and long-standing practice in the screen production industry" is contestable, to say the least. The ACMA guidelines are imprecise and ambiguous, as one would expect from policy guidelines. Nonetheless the AAT took into account those parts which were reproduced in the explanatory memorandum. The Screen Producers Association of Australia ("SPAA") is best placed to advise as to whether the decision in *EME Productions No 1* caused "uncertainty within the industry". One would expect to turn to the industry for evidence of such uncertainty.

15. In conclusion, proposed s. 265-25(1) is ambiguous and is unlikely to provide clarity to a court or the industry. Secondly, s. 265-25(2) is troubling because of its breadth and apparent overreach.

Simeon Beckett
Barrister
7 February 2013

Attachment B

SUBMISSION TO THE FEDERAL TREASURY

Film tax offsets - definition of a 'documentary' for the purposes of the Producer Offset

Response to the Exposure Draft of proposed amendments to the Income Tax Assessment Act 1997 (Cth) and Explanatory Memorandum

February 8, 2013.

34 Fitzroy St, Surry Hills, NSW 2010. P: 612 9360 8988

1. SPAA's position and recommendations

Documentary is arguably the most dynamic, innovative and constantly changing genre in film and television production.

Given such change there are many challenges in defining what constitutes a documentary. The most commonly accepted definition is by John Grierson who claimed they are a 'creative treatment of actuality'. This definition stems from his experience as a factual producer at the British GPO Film Unit[1] in the 1930s and was used to distinguish new program types from newsreels.

Grierson's definition recognised that documentary is an evolving practice with innovations that have continued to this day through major shifts in technique, from verite or observational styles through to a more interventionist model. It is this guiding principle that must be adhered to when considering the need for industry support.

The Producer Offset needs to adapt to changes in documentary form, if not it risks being ineffectual as a financing mechanism and out of touch with audience tastes.

The ongoing success of Australian documentaries is equally important for audiences and the production sector. Documentaries speak to a diverse range of topics and account for a significant proportion of production activity. To ensure that this culturally significant content continues to be financed amid challenging market forces, the Federal Government provides support through regulation, tax incentives and direct subsidy.

Their most targeted support is offered through the grants and investments of Screen Australia. This evaluation approach ensures that the most culturally important, yet financially vulnerable, content is supported. In contrast, the Producer Offset and the Australian Content Standard have a broader remit, lessening the need for direct subsidy by offering leverage to finance documentaries via the market.

When introduced, the stated intention of the Producer Offset was to provide a real opportunity for producers to retain substantial equity, build stable and sustainable companies, increase private investment and act as a genuine incentive for productions with wide audience appeal.

To ensure that its intentions are met, the Producer Offset must keep pace with change, both in regards to the documentary form and the tastes of contemporary audiences. In this way it will support the sector without further demands on Screen Australia.

[1] The British General Post Office Film Unit made information films for the British Government and is widely acknowledged as a founding institution of documentary filmmaking.

The proposed changes to legislation do not provide greater certainty regarding eligibility and are therefore likely to result in more appeals, adding further cost to government.

The industry, like the Federal Government, is keen for greater clarity around Producer Offset eligibility. However, SPAA is concerned that the proposed changes to the legislation are a regressive step.

The new definition attempts to narrow the kinds of factual programs that Australian producers will be able to finance through the market. This has the potential to place pressure on producers' capacity to be responsive to local and international demand as well as undermining the stability of their businesses during the development cycle.

The legislation will import many of the difficulties discussed during the Administrative Appeals Tribunal (AAT) hearing regarding the application by EME Productions No 1 for a Producer Offset Certificate for the documentary series Lush House (Decision 2011 AATA 439). These difficulties surround the lack of clarity in the powers of discretion in the proposed new subsections 1 and 2 of section 376-25.

SPAA has been advised that this level of discretionary power is not appropriate under administrative law.[2] While it may assist a Minister or a government agency to make an assessment, it does not provide sufficient clarity for legislation and includes nebulous concepts that are contestable. Thus, paving the way for more challenges and further cost to government and industry in seeking necessary clarity. This comes at a time when certainty has been successfully advanced by judicial review achieved at the AAT and Federal Court in the Lush House case.

Furthermore, SPAA also understands that the perceived need to introduce a definition may have been based on a speculative assessment of an increased demand for documentary tax offset rebates following the AAT decision. However it is our understanding that very few additional productions would have been eligible over the last eighteen months after the AAT decision. The AAT decision has created an incremental change, slight, but vital in terms of driving innovation for Australian producers competing in world markets in this genre.

By enshrining the definition of a documentary in legislation the industry will have to adhere to a rigid framework that does not offer the required flexibility for further refinement.

What is needed in the support mechanisms for the contemporary world of factual programming is flexibility, not further prescription.

SPAA is of the view that the AAT decision advanced the understanding of what a documentary is and reached a conclusion that is better adapted to contemporary

[2] Refer to attached Memorandum of Advice

practice and audience and broadcaster demand. In our view the best outcome for industry and government alike is that the current situation should stand but if the government is determined to introduce legislation then it should be focused on the exclusions - what is not a documentary rather than what is.

SPAA's recommendations are aimed at ensuring industry wide agreement and reducing the opportunity for disputes and legal challenges. In addition our approach is also more likely to achieve the Government's policy objectives for the Producer Offset by helping to build stable and sustainable businesses that make programs that are responsive to changing audience expectations.

Recommendations

1. **That the proposed revision of the legislation be set aside on the basis that the current understanding of the definition of documentary following the AAT decision provides greater certainty for industry and government and better achieves the government's policy objectives.**

2. **That if the government is determined to introduce new legislation this legislation should be drafted following further consultation with the industry regarding what is not a documentary.**

3. **That any new legislation will not apply to projects whose principal photography began prior to the date of Royal Assent.**

2. Historical context and policy intentions

2.1 The Screen Producers Association of Australia

The Screen Producers Association of Australia (SPAA) is the industry body that represents Australian independent film and television producers on all issues affecting the business and creative aspects of screen production. Our members include television, feature film, animation, documentary, TV commercial and interactive media production companies as well as services and facilities providers such as post-production, finance, distribution and legal practices.

Independent film and television companies produce the overwhelming majority of original Australian drama and documentary programs turning out over 1,000 hours of original television programming per year worth in excess of $500 million and employing thousands of highly skilled Australians. For over 30 years SPAA has been a leading advocate for Australian content and integral to the setting of industrial standards and work practices in negotiation with actors and technical crew unions and rights and royalties regimes with Australian creative personnel.

SPAA members make many of Australia's best-loved and most successful television shows reaching millions of Australians every week. A small sample of drama programs produced by our members include *Underbelly, Offspring, Howzat!, The Slap, Miss Fisher's Murder Mysteries, Angry Boys, My Place, Rake, Dance Academy, The Librarians,* and *Summer Heights High.* Documentary programs include *Who Do You think You Are?, Go Back To Where You Came From, Myth Busters, Gourmet Farmer, Hot Property, Bondi Rescue, Great Sothern Land, Two in a Tinnie, Submariners, Mrs Carey's Concert, The Making of Modern Australia, Paul Kelly: Stories of Me* and *The Burning Season.*

2.2 The policy intention of the Producer Offset incentive

The Producer Offset was one of a number of legislative measures introduced by the Federal Government in 2007 under the title of the Australian Screen Production Incentive (ASPI). This package of measures included tax offsets to encourage foreign production to film in Australia via the Location Offset, and a Post, Digital and Visual Effects (PDV) Offset to encourage utilisation and employment in Australian computer generated effects businesses.

The ASPI was a complete remodelling of Government support for the Australian screen sector that included the merger of three formerly separate agencies: Film Finance Corporation, Australian Film Commission and Film Australia. Furthermore, the ASPI was also designed to replace the former tax incentive regime under sections 10B and 10BA of the

Income Tax Assessment Act 1936. Introduced by the Federal Government in June 1981, the 10B and 10BA legislation was designed to encourage private investment into the film and television industry.

In September 2007, the Government repealed the 10B and 10BA sections and replaced them with the new mechanism of the Producer Offset, retaining the policy intention of using the tax base to stimulate industry and investment. In his announcement Arts Minister George Brandis made clear the policy intention of the legislation declaring that "the Government expects the Producer Offset will provide a real opportunity for independent producers to retain substantial equity in their productions and build stable and sustainable production companies, and should therefore increase private investor interest in the industry."[3]

Communications and Technology Minister Helen Coonan elaborated this policy intention by adding that it was designed also to encourage production that was responsive to audiences. Senator Coonan said the Producer Offset "represented a once in a generation structural reform package for the industry, which will introduce a genuine incentive for film and television productions with wide audience appeal."[4]

This was endorsed in the Explanatory Memorandum of the Tax Laws Amendment (2007 Measures No. 5) Bill 2007: "the 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."[5] It was further endorsed in the legislation, Section 376-1 states that "[t]he offsets are designed to support and develop the Australian screen media industry by providing concessional tax treatment for Australian expenditure".

Unlike the highly targeted approach of direct subsidy, the primary intentions of the tax based mechanisms used by the Federal Government since 1981 have been to encourage investment and develop industry. In order to achieve the policy goals of the government the settings must be adaptive and responsive to the marketplace.

2.3 The policy intention of the Australian Communication and Media Authority's Documentary Guidelines

The Australian Communications and Media Authority (ACMA) are responsible for the regulation of Australia's media utilising public spectrum. Their responsibilities include overseeing the Australian Content Standard for commercial television. They took over these functions from predecessor authorities: the Australian Broadcasting Control Board, the Australian Broadcasting Tribunal and the Australian Broadcasting Authority (ABA).

[3] http://www.minister.dcita.gov.au/brandis/media/media_releases/2007/111
[4] http://www.minister.dcita.gov.au/coonan/media/media_releases/backing_the_australian_film_industry
[5] Explanatory Memorandum for the Tax Laws Amendment (2007 Measures No. 5) Bill 2007, p.184

Over time ACMA and its predecessors developed definitions and directions in their guidelines to assist their capacity to assess and administrate what content would qualify under the Australian Content Standard. This includes the *Documentary Guidelines: Interpretation of 'documentary' for the Australian Content Standard* that was produced by the ABA in December 2004.

These guidelines provide the regulator with the ability to amend the definition of documentary as the genre evolves, and as the authority deems appropriate in order to best achieve the policy objectives as specified in the Broadcasting Services Act.

The policy intention of these guidelines is to ensure that there is a minimum production and broadcast level of Australian content on commercial television with licensees currently required to screen 20 hours of first release qualifying documentary. But there is some suggestion that the ACMA guidelines themselves need revisiting to ensure they remain relevant as the documentary form continues to change.

For example, in the 2004 review of the guidelines, Film Australia recommended "that broadening the definition of documentary, if considered necessary to include new and emerging forms of factual programming that also meet the test of being a "creative treatment of actuality", is an opportunity for the ABA to review the existing regulatory framework to examine whether the sub-quota is operating effectively, to ensure that commercial television audiences have access to a diverse range of quality Australian programs into the future."[6] However, the recommendation was not followed.

The opportunities and potential for flexibility and reform this kind of review may offer is in stark contrast to that which is currently being considered in the proposed legislative approach.

2.4 Separate policy intentions

To the extent that the word 'documentary' is not defined in the *Income Tax Assessment Act 1997*, SPAA understands that Screen Australia has sought guidance elsewhere to assist in the administration of the Producer Offset. This has included the ACMA guidelines and the Explanatory Memorandum to the amending Act adding Division 376.

However the Producer Offset and the Australian Content Standard (that the ACMA guidelines were designed to interpret) have different policy intentions.

[6] Response to draft Documentary Guidelines Australian Broadcasting Authority, Film Australia Limited, 2004, p3

Linking the two schemes together risks limiting the effectiveness of the Producer Offset legislation. The Producer Offset requires flexibility within its framework to produce the policy outcome that the government intended: in this instance, sustainable businesses producing programs of wide audience appeal.

In principle, SPAA does not object to the ACMA guidelines being used as a reference in defining documentaries, but enshrining it in legislation restricts the flexibility that will best produce intended policy outcomes. In this instance the industry believes that the AAT decision regarding *Lush House*[7] has provided industry and government with a definition that better serves the policy intentions of the Producer Offset.

[7] The AAT said that: "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." Administrative Appeals Tribunal, Decision and Reasons for Decision, June 24, 2011 (Decision 2011 AATA 439), p 8, para 15.

3. Comments on Exposure Draft

SPAA has made recommendations above to best ensure industry wide agreement, reduce legal challenges, and achieve the Government's policy objectives for the Producer Offset. We maintain that the current understanding of the definition of documentary following the AAT decision will best achieve these outcomes. (Recommendation 1 above)

However if the government is determined to proceed with new legislation, SPAA's position is that legislation should be drafted after industry consultation on what is not a documentary. (Recommendation 2 above)

While producers have embarked on programs knowing that amendments would be forthcoming, they were not aware of the detailed amendments that have been proposed, particularly in subsection 2. SPAA feels that it is unfair for producers to be subjected to retrospective action and possible financial loss when the only alternative would have been not to proceed with projects thereby affecting producer's businesses and relationships with the market. (Recommendation 3 above)

With regard to the proposed legislation, SPAA has the following comments:

SPAA is concerned at the very high level of discretion required in the proposed definition and at the importing of the imprecise term "extent" into the legislation. This imports a lack of clarity into the definition. Extent refers to an amount. How much is too much is not at all clear. Therefore, SPAA is concerned that this proposal will only import grounds for dispute into the legislation.

Below are specific comments we have in relation to the Exposure Draft and its explanatory material:

3.1 Exposure Draft: Tax Laws Amendment (2013 Measure No. 1) Bill 2013: film tax offsets (definition of documentary)

- ***376-20 Meaning of documentary***
  (1) A *film is a documentary if the film is a creative treatment of actuality, having regard to:
  (a) the extent and purpose of any contrived situation featured in the film; and

  SPAA is of the view that the AAT deliberations around the nature of contrivance were useful and contributed to an advanced understanding of contrivance where it should be regarded in light of its contribution to the creative interpretation of actuality providing it does not contain a fictional element. Without the benefit of this further understanding, the new definition is less clear and reliant on subjective interpretations of the 'extent'.

(b) the extent to which the film explores an idea or a theme; and

SPAA submits that both of these concepts are vague and that in practice there is a very large variation in the extent to which documentaries explore themes and ideas. This provides too much latitude for subjective interpretation and the application of elitist cultural positions. The industry and audiences support the view that documentaries need to inform and educate and not be frivolous. The extent of the depth of which they explore an idea or theme is we would suggest secondary.

(c) the extent to which the film has an overall narrative structure; and

SPAA submits that traditional narrative structure, in the post modern digital multi platform world characterised by innovative editing techniques is less relevant to modern audiences. In a world where there are more innovative story telling techniques, the extent of an overall narrative structure becomes a matter of subjective opinion.

(d) any other relevant matters.

SPAA submits that 'any other relevant matters' is impossibly broad and again could give rise to disputes around the interpretation of 'relevant'.

- ***Exclusions of infotainment or lifestyle programs and magazine programs***
  (2) However, a *film is not a documentary if it is:
  (a) an infotainment or lifestyle program (within the meaning of Schedule 6 to the Broadcasting Services Act 1992); or

SPAA notes that Schedule 6 of the Broadcasting Services Act defines infotainment thus: "*infotainment or lifestyle program* means 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."

SPAA submits that there are a number of problems with this definition. The first is the conflation of 'lifestyle' with 'infotainment'. This is further complicated when you consider that Lifestyle is a subscription television channel that shows documentaries that qualify for the Producer Offset. We believe it is dangerous to introduce lifestyle into the legislation.

The difficulties with 'infotainment' were explored during the AAT hearing. Almost all documentaries entertain. Audiences demand it and therefore so do broadcasters, making it almost impossible for documentaries that do not entertain to be made. SPAA submits that the Schedule 6 definition is unhelpful. Almost all of David

Attenborough's films present factual information in an entertaining way. It would be absurd if they were not considered to be documentaries. Entertainment and entertainment value are not defined, further mitigating against the capacity of Schedule 6 to provide further clarity to a definition of documentary.

SPAA submits that the schedule 6 definition is simply out of touch with contemporary practice and audience tastes, is unduly vague, and unhelpful in providing further clarity to the definition of documentary.

(b) a film that:
(i) presents factual information; and
(ii) has 2 or more discrete parts, each dealing with a different subject or a different aspect of the same subject; and

SPAA submits that the concept of "2 or more discrete parts" is very fraught and likely to give rise to considerable disputes. As described above, documentary story telling has evolved into a very dynamic form that uses a multitude of approaches. This very prescriptive addition to the legislation will impose unnecessary creative limitations of the way in which subjects can be explored.

Would a film that explored Christmas rituals in three different countries in three different segments for example be disqualified as a documentary? There are many documentaries that contain discreet parts that are not 'magazine' programs. If the intention is to use this section to exclude magazine programs it is redundant as they are already excluded in the Explanatory Memorandum.

(iii) does not contain an over-arching narrative structure or thesis.

As detailed above in 376-25 1 (b) and (c), both of these characteristics are problematic.

3.2 Exposure Draft: Chapter 1, Documentaries and film offsets

- ***Paragraph 1.10***: Given that documentary is not defined in the ITAA 1997 and that it is a dynamic, innovative, and fast evolving genre, SPAA acknowledges that Screen Australia has had to have regard to extrinsic sources including the ACMA guidelines. However SPAA is of the view that the ACMA guidelines need revisiting in the light of developments in the genre and can no longer be relied upon to adequately define documentary in the mind of the production industry, the broadcasters, or the or public.
- ***Paragraph 1.13***: SPAA contends that this paragraph is incorrect. It is not the view of the production industry that the Lush House decision represents a departure from

long-standing practice in the screen industry. It is also not the view of the production industry that the AAT decision created uncertainty. Rather, for the reasons outline above the industry feels the understanding of what a contemporary documentary is has been enhanced by the AAT decision. Also for the reason outlined above, the production industry is of the view that the ACMA guidelines need revisiting if they are to truly be relevant to contemporary practice and market and audience demand.

- ***Paragraph 1.14***: This paragraph is incorrect and unclear. Which legislation is the 'intended meaning' meant to apply to? The BSA or the ITAA? As mentioned above in reference to 1.13, the proposed legislation is not what is understood to be the meaning of documentary by the production industry.

- ***Paragraph 1.17***: SPAA submits that the retrospective application of the new legislation could plunge some producers into financial difficulty if they had financed a program either with a provisional certificate or on the basis of the previous guidelines and will now be refused a final certificate.

- ***Paragraph 1.19***: SPAA finds this paragraph unclear. It is uncertain if it is intended that the phrase 'generally less demanding rules apply to the Producer Offset for a documentary than for other films' means that the threshold of eligible expenditure is lower than other films; or if it is intended to mean that the qualifying definitional tests are less demanding.

- ***Paragraph 1.20***: As detailed above in 1.13, It is not correct to state that the draft definition restores the meaning of 'documentary' described in the ACMA guidelines. It was not the intention of the Producer Offset legislation that documentary be restricted to the confines of the ACMA definition. The Explanatory Memorandum explained the intention in paragraph 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."

- ***Paragraph 1.21***: The issues around the limitations of the Grierson definition for contemporary documentary were discussed in the AAT hearing leading to the finding that a less prescriptive definition that a film that is a creative recording of facts for the purpose of informing or educating and is not frivolous should be a documentary. SPAA submits that this broader interpretation is more in line with the contemporary practice of documentary.

  SPAA members have also voiced concerns about the insertion of the term 'merely superficial' into the memorandum. As superficial is not defined, it is likely to be a

matter of subjective interpretation and therefore provide grounds for dispute.

- ***Paragraph 1.24***: SPAAs concerns about these factors are detailed above in comments about the legislation.
- ***Paragraph 1.25***: We are uncertain of this paragraph advances an understanding of contrivance and submit that the examples given should not be exclusive.
- ***Paragraph 1.26***: As argued above it is by no means certain in contemporary practice that the extent to which a film explores an idea or theme is "central' to the definition of a documentary. This is a further example of an overall prescriptive approach that seeks to narrow the definition in a time when the opposite impulse is at work in real practice
- ***Paragraph 1.27***: This a further narrowing of the definition that is not in step with contemporary practice.
- ***Paragraph 1.28***: We are uncertain about the relevance of the 'commercial arrangements underpinning the production'. The program should be judged on its merits regardless of how it has been financed.
- ***Paragraph 1.29 and 1.30***: See comments above in relation to subsection 2 of the proposed new legislation.
- ***Paragraph 1.31***: This paragraph conflates infotainment with lifestyle and neither is clearly defined in the BSA as detailed above.
- ***Paragraph 1.32***: see comments on subsection 2 above.
- ***Paragraph 1.39***: As previously detailed it is incorrect to state that the amendments restore the understanding of the provisions that was generally held by the production industry before the Lush House decision.

  Also, while producers have embarked on programs knowing that amendments would be forthcoming, they were not aware of the detailed amendments that have been proposed, particularly in subsection 2.

  SPAA feels that it is unfair for producers to be subjected to retrospective action and possible financial loss when the only alternative would have been not to proceed with projects thereby affecting producer's businesses and relationships with the market.