

24 August 2007

Committee Secretary
Senate Economics Committee
Department of the Senate
PO Box 6100
Canberra ACT 2600

By Email

Dear Secretary

Tax Laws Amendment (2007 Measures No. 5) Bill 2007: Australian Screen Production Incentive

ASTRA welcomes the opportunity to contribute to the Inquiry into the provisions of the Tax Laws Amendment (2007 Measures No. 5) Bill 2007 ('**Bill**'). ASTRA's interest is with particular regard to the 'Australian Screen Production Incentive' as it is known, detailed in Schedule 10 of the Bill.

ASTRA represents the interests of subscription television platforms and channel providers. A list of ASTRA's members can be found at www.astra.org.au/members.asp.

Summary of Drafting Concerns

The following summarises ASTRA's substantive concerns regarding the drafting of the Bill. Further explanatory and background information about each issue is contained in the detail of our correspondence.

s376-20 (3)(a)(iv)

ASTRA is uncertain as to the use and meaning of the word 'together' in this section. It is unclear what the intention of the word is in relation to production or exhibition.

s376-20 (4)(b)

ASTRA is uncertain as to the use and meaning of the word 'heavy'

s376-70(1)(e)

ASTRA believes it appropriate that the following be added to this **s376-70(1)(e)** of the Bill: "any other matters that the film authority considers to be relevant. **For example whether the program meets the Australian Content Standard as defined in the Broadcasting Services Act 1992.**" This could also be added as a note to the provision.



s376-65 (5)(iii) & 376-70 (2)

ASTRA is concerned that the drafting of the 'new creative concept' referred to in **s376-65 (5)(iii)** and defined in **s376-70 (2)** is poorly defined and will generate significant uncertainty. The drafting creates a discretion usable to stymie a worthwhile and otherwise eligible production. ASTRA views this as an unnecessary additional test that is inconsistent with the legislation's goal to stimulate all production - rather than judge some as superior to others.

s376-170 (4)(b)

ASTRA is uncertain whether the drafting of **s376-170 (4)(b)** of the Bill allows for development expenditure to be capped at 20% or whether the combination of development expenditure and remuneration provided to the principal director, producers and principal cast associated with the film is to be capped at 20%. If the interpretation is the latter, then ASTRA considers this a completely inappropriate combined parameter, defeating the ability to include any development funding within a realistic budget for a project such as an expensive television series.

Background

ASTRA's members have a crucial role to play in the development of both film and television production. Subscription television:

- promotes and makes available to Australian audiences a diverse range of broadcasting services through a variety of genres;
- facilitates the development of the Australian broadcasting and production industry through its own investment and productions (both 'commissioned' and 'in-house'); and
- continues to develop and reflect the Australian identity, character and the broad diversity of Australian culture like no other medium through its targeted niche programming.

Subscription television exceeds in delivering key objectives of the Broadcasting Services Act 1992 (**BSA**) with regard to developing and reflecting a sense of Australian identity, character and cultural diversity and providing a diverse range of high quality and innovative services while remaining efficient, competitive and responsive to subscribers' needs who decide via their monthly subscriptions what they want and what they are willing to pay for.

ASTRA's members are responsible for a broad range of television production covering genres such as sports and news coverage, magazine style shows, reality programming, documentaries, films and dramas.

In particular subscription television has been responsible for:

- generating high end award winning television productions including dramas (*Love My Way, Stupid Stupid Man, Dangerous, Yakkity Yak*); telemovies (*The King*); and documentaries (*He's Coming South [The Attack on Sydney Harbour]; The Battle of Long Tan*).
- supporting investments in television series premiering on other mediums (*Changi, Crash Palace, Head Start, McLeod's Daughters, Secret Life of Us*); and

- making significant investments in Australian Films and exported dramatic works (*Two Hands, Looking for Alibrandi, The Castle, The Proposition, Japanese Story, Oscar & Lucinda, The Sound of One Hand Clapping, The Wiggles, Innocence, Babe 2: Pig in the City, Rabbit-Proof Fence, The Dish, The Man Who Sued God*).

It is widely acknowledged that subscription television takes risks in developing new genres and Australian stories that are regularly overlooked in other more risk adverse environments. The edgy and highly applauded drama *Love My Way* would not have been produced save for the willingness of subscription television to invest. Similarly last year's celebrated comedy *Stupid Stupid Man* was seen as a successful return to screens for the Australian sitcom – a genre that was widely overlooked in the current conservative production climate.

As well as funding the original production of many films and television programs, subscription television also contributes to an Australian production's financial viability via license fees paid by channels to screen the product to their audiences. Subscription television channels Showtime and Movie Network therefore offer Australians the opportunity to see Australian films that they may not have viewed in cinemas. In many cases the audience viewing the film on subscription television will far exceed the audience the film realizes through theatrical release. For Government investments made either directly¹ or through rebates or offsets, the delivery of an audience to view that investment is significant.

Investments

ASTRA notes its members' substantial commitment to Australian content as evidenced in their investment in and production and transmission of a significant amount of Australian drama and non-drama content above and beyond any legislated requirement.

ASTRA's members invest hundreds of millions of dollars annually in the film and television production sector, creating all forms of Australian content.

The Independent Production Industry

The investment is extremely effective for the growth of employment opportunities and the earnings of the independent production industry. The independent production community has and will continue to have a crucial role to fulfill in supplying product to the subscription television industry – evidenced by historical and current levels of involvement and production.

From the most recent calculations, over 90% of television and film drama production expenditure that the subscription television industry makes is provided to independently produced productions. ASTRA acknowledges the very healthy relationship between ASTRA's members and the independent production sector.

¹ The stated situations where such funding will continue to occur was made via a joint media release by Ministers Coonan and Brandis of 9 May 2007. Projects that have a “*strong cultural significance or which are justified on other public interest grounds such as documentaries or children's television programming*” were identified.

Location Offset

A number of ASTRA's members are owned by or have shareholders that are producers of international films, telemovies, mini-series and television series. Consequently ASTRA is very interested in the opportunities this regulation offers.

ASTRA is supportive of the announced changes to the Location Offset. However, in ASTRA's view (garnered in part from those international producers who have assessed the policy announcement) greater flexibility is needed to make Australia a truly attractive proposition to international film and television productions. To encourage the broader desirable range of productions from high end to smaller scale, the regulation needs to enable bundling of projects in order to meet the Qualifying Australian Production Expenditure (QAPE) eligibility threshold. Without bundling, only higher end movies would be likely to hit the threshold, limiting the range of experiences that Australian crews can hope to receive on international productions as well as restricting the range of investment and expenditure likely to be achieved through the proposed scheme.

Flexibility is particularly important in the production of telemovies where the bundling of a number of (for example, 3-5) productions together from the one producer would permit the threshold of \$15 million to be met.

ASTRA notes that a bundling scheme exists in South Africa which permits the threshold expenditure to be realised through combining projects from a common overseas source (having common copyright holding) so long as the expenditure is made in a determined time frame.

ASTRA also notes the recent announcement of the New Zealand Government to extend its Location Offset to permit bundling of projects.

Specific comments about the drafting of the Location Offset are:

s376-20 (3)(a)(iv)

ASTRA is uncertain as to the use and meaning of the word 'together' in this section. It is unclear what the intention of the word is in relation to production or exhibition.

s376-20 (4)(b)

ASTRA is uncertain as to the use and meaning of the word 'heavy'

Producer Offset

ASTRA is supportive of the proposed offset approach. Offering incentives to television and film production via this approach provides opportunities to strengthen the quality of production. In ASTRA's view this will encourage increased levels of Australian screen content.

ASTRA recognises the Government's aims and the intention of the Producer Offset to generate more drama programming and to improve the viability of both producer's businesses as well as the viability of the broader film and television industry. There are a multitude of often complex arrangements and matrixes through which commercial

arrangements between producers and broadcasters are made. Consequently and for example, the benefit of the rebate to one party may be offset by the release of various rights in the film or television product to another; or the agreement to invest more extensively in a production. ASTRA considers that prescriptive regulation of these commercial arrangements would have an unhealthy distorting effect upon investment decisions

Television vs Film / The Offset Amount: s376-60

It is unclear to ASTRA why there is a large difference in the percentage offset offered to television productions when compared to theatrical film productions. In ASTRA's view a guiding principle should be a consistent offset to Australian content regardless of the format or distribution mechanism for delivering that content. The cultural objectives of having Australian stories produced and viewed are more readily realised via television content than through feature film so if anything a percentage offset should favour television. Past funding priority models from Government agencies suggest an historical imbalance biasing against television content and it is concerning that this is being perpetuated in the proposed Producer Offset scheme. It is not clear to ASTRA why this imbalance should continue.

Producer Eligibility

ASTRA's view is that any producer should be eligible for consideration under the proposed Producer Offset scheme. This should be regardless of whether the producer is also a subscription television channel. This is consistent with the 10BA scheme for example where nothing prevented a channel from claiming any benefit arising and was indeed used by ASTRA's members. By any standard, it would be highly inappropriate to restrict this opportunity or any benefit arising from those obliged to produce Australian television content. ASTRA understands that some representations have been made to Government that attempt to limit ASTRA's members' opportunities under the scheme. ASTRA again notes its members' strong relationship with the independent production industry and significant investment in this community which will not be affected by the proposed Producer Offset.

The 'Australian' Test: s376-70

ASTRA notes that Government agencies currently have different eligibility tests to determine what is considered an 'Australian' program or production and the drafting contained in the Bill will perpetuate this which is frustrating given the opportunity for reform.

The Australian Content Standard is used by the Australian Communications and Media Authority (ACMA) to determine if content that is broadcast on commercial television services is defined as 'Australian'. With regard to the Producer Offset, the drafting is based on the previous 10BA definition. The only change to this concerns ownership of copyright and sources of funding which are no longer to be considered influential in determining eligibility.

Having two different tests does not appear to be helpful or practical given that an increasing number of productions are likely to need to meet both tests. The scenario could arise that the 'Australian' test is met for the broadcast but not for the production of the program and vice versa.

ASTRA's view is that the eligibility test for what is considered 'Australian' should be ACMA's Australian Content Standard. This appears logical given that most Australian content that is made is also broadcast on television services. ASTRA notes that this has also been suggested by the Australian Film Commission (AFC).²

ASTRA finds little comfort in opportunities for administrative appeal against decisions made here given the time sensitive nature of ASTRA's members' expenditure requirements under the BSA.

In light of these views, ASTRA believes it appropriate that the following be added to this **s376-70(1)(e)** of the Bill: "any other matters that the film authority considers to be relevant. **For example whether the program meets the Australian Content Standard as defined in the Broadcasting Services Act 1992.**" This could also be added as a note to the provision.

New Creative Concept: s376-65 (5)(iii) & s376-70 (2)

ASTRA is concerned that the drafting of the 'new creative concept' referred to in **s376-65 (5)(iii)** and defined in **s376-70 (2)** is poorly defined and will generate significant uncertainty. The drafting creates a discretion usable to stymie a worthwhile and otherwise eligible production.

For example, the second series of a production would not be considered a 'new creative concept'. Similarly, the adaptation of a book or play could be seen as ineligible under the current definition. In fact any argument could be mounted that the concept is unoriginal when considered in a global context given the range of potential domestic and international storylines and experiences which a production could be compared to.

ASTRA views this as an unnecessary additional test that is inconsistent with the legislation's goal to stimulate all production - rather than judge some as superior to others.

Australian Screen Authority

ASTRA is concerned that the Department of Communications, Information Technology and the Arts has no role to play in determining eligibility, given the department's experience and possible opportunity for a mediation function. While there may be merit in the centralisation of various administrative tasks, there are concerns that there may also be negative consequences for the film and television community having one agency being responsible for so many aspects of a project's funding. The Australian Screen Authority (ASA), will be responsible for determining a project's eligibility based on whether it is deemed 'Australian', whether it possesses a 'new creative concept' (in the case of television series), what will be QAPE; and also whether it has access to any direct funding. A balanced, representative staff and directorship will be crucial to the ASA's ability to succeed in achieving its functions.

QAPE

ASTRA supports development expenditure made prior to certification being able to be included towards QAPE.

² AFC's August 2006 submission to the Department of Communications, Information Technology and the Arts with reference to the variety of current and emerging platforms for visual content.

ASTRA also believes it is sensible to include ‘hyphenate producers’ as part of QAPE. Subscription television channels who engage independent producers to deliver a series or documentary or film also often engage a producer to act directly on their behalf during the production. This provides a prudential safeguard for the investment by the channel. The ‘hyphenate producers’ are tasked with a role in relation to the creation, production and post-production of the film or series but are not responsible for the end delivery of that product. This can mean the expenditure that is incurred by the producer may not be counted for QAPE when clearly it is a crucial expenditure incurred by the production.

Payments that should **not** be treated as QAPE include monies sourced from funding bodies that are not later repaid to those bodies (and therefore remain with the production). This is consistent with the drafting of the Bill.

However ASTRA is uncertain whether the drafting of **s376-170 (4)(b)** of the Bill allows for development expenditure to be capped at 20% or whether the combination of development expenditure and remuneration provided to the principal director, producers and principal cast associated with the film is to be capped at 20%. If the interpretation is the latter, then ASTRA considers this a completely inappropriate combined parameter, defeating the ability to include any development funding within a realistic budget for a project such as an expensive television series.

An expensive television series might have a budget of say \$15million. Therefore a 20% above the line cap would amount to \$3million. With directors fees of say \$1.5million and cast fees being conservatively at \$1.5million there is no parameter to consider here any other creatives (eg: writers), option and rights fees, and producer fees, let alone development funding.

The policy intention to include development funding as eligible QAPE will be defeated in such situations and amendments to the Bill’s drafting should be made.

Thresholds

In ASTRA’s view the current QAPE thresholds and episode minimums, for the most part recognize the reality of formats and production costs for the subscription television industry.

ASTRA’s only outstanding concern relates to short form animation which should have a minimum QAPE of \$100,000 per quarter hour as opposed to the current \$250,000 and for a series containing a number five minute episodes (a realistic animation length for Children’s television programming which focused on short form product), threshold expenditure should be able to be apportioned into thirds in order to meet QAPE requirements.

Given its contribution and success in producing Australian content, ASTRA welcomes the opportunity to provide comments to the Senate Economic Committee regarding the Bill which in our view will extend the considerable investments ASTRA’s members make - generating more quality Australian film and television programs.

Do not hesitate to contact ASTRA if there is anything further that we may be able to provide to assist further.

Yours sincerely

A handwritten signature in black ink that reads "Debra Richards". The signature is written in a cursive, flowing style.

Debra Richards
CEO