

30 January 2013

General Manager
Small Business Tax Division
The Treasury
Langton Crescent
PARKES ACT 2600Email: filmtaxoffsets@treasury.gov.au**Exposure draft – changes to the definition of “documentary”**

Free TV Australia (Free TV) appreciates the opportunity to comment on the draft legislation and explanatory material for inserting a definition of ‘documentary’ into the tax law, for purposes of the film tax offsets.

Free TV represents all of Australia’s commercial free-to-air television broadcasters. Commercial free-to-air television remains the most popular source of entertainment and information for Australians, and on any given day is watched by around 14 million people.

Commercial free-to-air broadcasters are significant investors in Australian documentaries, ensuring that these important cultural stories are available to all Australians free of charge. Recent popular documentaries such as *Recruits: Paramedics* (Ten), *Great Barrier Reef* (Nine) and *Anh does Vietnam* (Seven) reflect the diversity of documentary programs on Australian commercial television, and demonstrate the broad appeal of the genre to Australian audiences.

This submission calls for an expansive interpretation of the new definition, as well as further consultation between the ACMA, Screen Australia and industry stakeholders, to ensure that the definition is applied consistently. Free TV oppose any changes that have the potential to limit the definition of documentary in a way that may stifle innovation or reduce incentives for investment in documentary programs.

Dynamic nature of documentaries

Like most forms of entertainment, documentaries have evolved over time. This evolution has increased rapidly as a result of the almost ubiquitous access to recording equipment, editing tools and distribution platforms (at least in the developed world).

The nature of the documentary makes it very difficult to define. To promote investment and enable the continued evolution of the genre, any definition must be expansive and flexible.

Nick Fraser, the Commissioning Editor of Storyville at the BBC notes that:

...those who watch documentaries as well as those who make them should realise that anything goes. There are traditions of film-making, to be sure. But the vitality of the documentary resides in the fact that it thrives at a series of crossroads scarred by accidents. You can arrive at the idea of a documentary through tabloid journalism or philosophy, out of a desire to change the world, or merely because there is a story you wish to tell. All you really have to want to do is say what happened.¹

In particular, Free TV is concerned at the statement in paragraph 1.28 of the explanatory materials, which states that relevant factors in ascertaining whether or not something is a documentary may include commercial arrangements underpinning the production, and the likelihood of the film having enduring appeal. A creative treatment of actuality can be simultaneously commercial, humorous, entertaining and informative, and still be a documentary (as opposed to “infotainment”).

¹ Fraser, Nick (2012) *Why Documentaries Matter* Reuters Institute for the Study of Journalism, University of Oxford; pp 21

The proposed definition of documentary aligns with the Guidelines made by the Australian Broadcasting Authority (ABA) (now the Australian Communications and Media Authority (ACMA)) in 2004. These Guidelines were developed by the then ABA after broad consultation with the broadcasting and production industries, and have provided certainty and transparency for nearly ten years.

For these reasons, Free TV generally welcomes the approach taken by Treasury in using the established ACMA Guidelines as the basis for the definition of documentary. However, the subjective nature of the definition and the need to weigh certain factors in making the decision about whether something is a documentary means that it is the interpretation that will be critical. The line between infotainment and documentary is often blurred, and it is not desirable for two federal agencies to rely on the same guidelines but with differing interpretations.

This is of particular importance in relation to issues such as contrivance. Recent documentaries such as *Dumb, Drunk and Racist*, *Who Do You Think You Are*, and *Go Back to Where You Came From* demonstrate that entirely contrived situations can successfully underpin the creative exploration of an idea or theme as part of an over-arching narrative.

Further, Free TV does not agree with the assertion made at paragraph 1.39 of the explanatory materials that the changes will restore the understanding of the provisions that were held by the screen production industry before the recent decisions about the program *Lush House* in the Federal Court² and the Administrative Appeals Tribunal.³

Free TV understands that a number of industry participants agreed that the *Lush House* program fell within the definition of documentary as set out in the ACMA Guidelines.

It is essential that the definition is applied in a consistent and flexible manner. Free TV therefore seeks a formal Roundtable Discussion for all relevant stakeholders (including Screen Australia, the ACMA and industry representatives) to consider these issues before the proposed amendments are finalised. Holding these formal discussions will promote industry certainty and allow for the identification of any potential discrepancies in interpretation of the relevant definitions before the changes come into effect.

Retrospectivity

Given these concerns about consistency, Free TV does not support the changes being applied retrospectively to films commencing principal photography from 1 July 2012. Producers and investors who have entered into arrangements since 1 July will be exposed to the risk that their project will not be considered eligible under the new rules. This may result in substantial and tangible financial losses.

Contact

Please do not hesitate to contact me if you would like to discuss this matter further.

Yours sincerely,

A handwritten signature in black ink that reads "Julie Flynn". The signature is fluid and cursive, with the first name "Julie" and last name "Flynn" clearly legible.

JULIE FLYNN

CEO

² *Screen Australia v EMA Productions No. 1 Pty Ltd* [2012] FCAFC 19

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