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THE PARLIAMENT OF THE COMMONWEALTH OF AUSTRALIA

HOUSE OF REPRESENTATIVES

TAX AND SUPERANNUATION LAWS AMENDMENT (2013 MEASURES No. 2)
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EXPLANATORY MEMORANDUM

(Circulated by the authority of the
Deputy Prime Minister and Treasurer, the Hon Wayne Swan MP)

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Glossary

The following abbreviations and acronyms are used throughout this explanatory memorandum.

<i>Abbreviation</i>	<i>Definition</i>
AAT	Administrative Appeals Tribunal
ACMA	Australian Communications and Media Authority
ATI	adjusted taxable income
BAS	Business Activity Statement
Commissioner	Commissioner of Taxation
Cooper Review	The Review into the Governance, Efficiency, Structure and Operation of Australia's Superannuation System
DGRs	deductible gift recipients
DIRS	Disaster Income Recovery Subsidy
DSTO	dependent spouse tax offset
FHSA	First Home Saver Accounts
GST	goods and services tax
GST Act	<i>A New Tax System (Goods and Services Tax) Act 1999</i>
ITAA 1997	<i>Income Tax Assessment Act 1997</i>
ITAA 1936	<i>Income Tax Assessment Act 1936</i>
LISC	low income superannuation contribution
MLA 1986	<i>Medicare Levy Act 1986</i>
MYEFO	Mid-Year Economic and Fiscal Outlook
NMETO	net medical expenses tax offset
PDS	product disclosure statement
QAPE	qualifying Australian production expenditure
SIS Act	<i>Superannuation Industry (Supervision) Act 1993</i>
SIS Regulations	<i>Superannuation Industry (Supervision) Regulations 1994</i>
TIES	Taxation Issues Entry System

<i>Abbreviation</i>	<i>Definition</i>
TOFA	Taxation of Financial Arrangements
TOFA Act	<i>Tax Laws Amendment (Taxation of Financial Arrangements) Act 2009</i>
TOFA regime	Taxation of Financial Arrangements regime

General outline and financial impact

Documentaries and film tax offsets

Schedule 1 to this Bill amends the *Income Tax Assessment Act 1997* (ITAA 1997) to define ‘documentary’. It also clarifies that the exclusion of light entertainment programs from eligibility for the film tax offsets does extend to game shows.

Date of effect: The definition of ‘documentary’ applies to films that started principal photography on or after 1 July 2012. The exclusion of game shows from eligibility for the film tax offsets applies to films that start principal photography on or after the Royal Assent.

Proposal announced: 8 May 2012.

Financial impact: Nil.

Human rights implications: This Schedule is compatible with human rights. See *Statement of Compatibility with Human Rights* — Chapter 1, paragraphs 1.44 to 1.59.

Compliance cost impact: Low.

Chapter 1

Documentaries and film tax offsets

Outline of chapter

1.1 Schedule 1 to this Bill amends the *Income Tax Assessment Act 1997* (ITAA 1997) to define ‘documentary’. It also clarifies that the exclusion of light entertainment programs from eligibility for the film tax offsets does extend to game shows.

1.2 All references in this chapter are to the ITAA 1997 unless otherwise stated.

Context of amendments

1.3 The income tax law provides a number of tax offsets to encourage Australian investment in film production. There is:

- the ‘producer offset’ for Australian expenditure in making an Australian film;
- the ‘location offset’ for Australian expenditure in making any film; and
- the ‘PDV offset’ for Australian expenditure on post, digital and visual (PDV) effects production for any film.

1.4 The location offset and the PDV offset are not available for documentaries if they are feature films, telemovies or miniseries.

1.5 The producer offset is available for documentaries. It provides film makers with a refundable tax offset equal to 40 per cent of their ‘qualifying Australian production expenditure’ (QAPE) on feature films and 20 per cent of their QAPE on other films.

1.6 To be certified as eligible for the producer offset, a film must contain significant Australian content, must not be an excluded format, and must meet the relevant QAPE threshold for the format of the film. Excluded formats include news and current affairs programs, films for exhibition as advertising and light entertainment programs.

1.7 The QAPE threshold for a documentary series is lower than for other program formats. While a season of a drama has to have QAPE of at least \$1 million, as well as a minimum of \$500,000 per film hour, a documentary only needs QAPE of \$500,000, with a minimum of \$250,000 per film hour.

1.8 In addition, QAPE eligible expenditure on development and remuneration for the director, producers and principal cast ('above the line' expenditure) is normally capped for the purposes of the producer offset but the cap does not apply for a documentary.

1.9 Screen Australia is responsible for administering the producer offset, calculating a film's level of QAPE, determining whether it displays significant Australian content, and certifying its genre and format.

1.10 The term 'documentary' is not defined in the ITAA 1997. In the absence of a legislative definition of the term, Screen Australia has had regard to the Explanatory Memorandum that accompanied the introduction of the film tax offsets in 2007 and to the Australian Communication and Media Authority's (ACMA's) Guidelines: *Documentary Guidelines: Interpretation of 'documentary' for the Australian Content Standard*. The ACMA Guidelines define a documentary as 'a creative treatment of actuality other than a news, current affairs, sports coverage, magazine, infotainment or light entertainment program'.

1.11 In *EME Productions No. 1 Pty Ltd v Screen Australia* [2011] AATA 439 (the *Lush House* decision, decided on 24 June 2011), the Administrative Appeals Tribunal (AAT) considered Screen Australia's decision to refuse certification to *Lush House*, a six part television series. Applying the ACMA Guidelines, Screen Australia had determined that *Lush House* was an infotainment program, and not a documentary, and therefore had to meet the higher QAPE threshold to become eligible for the producer offset.

1.12 In the absence of a legislative definition of documentary, the AAT considered the ACMA Guidelines and the dictionary definition of a documentary before formulating its own definition. It concluded that, while close to the line, *Lush House* satisfied that definition.

1.13 The AAT's approach to determining the meaning of 'documentary' was upheld on 7 March 2012 by the Full Federal Court (although that Court did not consider the meaning of the term itself). The *Lush House* definition of documentary represents a departure from both the ACMA Guidelines and the long-held understanding of the term in the context of government regulation of, and support for, documentaries. That has created uncertainty for Government and industry in relation to the film tax offsets.

Summary of new law

1.14 The amendments insert a meaning of 'documentary' that is consistent with the intended meaning, which is explained in the ACMA Guidelines and in the Explanatory Memorandum that accompanied the

introduction of the tax offsets, and is understood by the screen production industry.

1.15 They do that by defining ‘documentary’ to be a creative treatment of actuality. It is also defined to exclude ‘infotainment or lifestyle programs’, and films that present factual information in multiple parts without an over-arching narrative structure or thesis (so called ‘magazine programs’).

1.16 The amendments also explicitly exclude game shows from eligibility for the film tax offsets to clarify the intended scope of the exclusion of light entertainment programs from eligibility.

1.17 The main amendments apply to a film if its principal photography commenced on or after 1 July 2012. The game show amendments apply to a film if its principal photography commences on or after the day the amendments receive the Royal Assent.

Comparison of key features of new law and current law

<i>New law</i>	<i>Current law</i>
Documentary is defined, in accordance with the ACMA Guidelines, as a creative treatment of actuality that is not an infotainment or lifestyle program or a magazine program.	There is no legislated definition of ‘documentary’
Game shows are in the list of light entertainment programs explicitly excluded from eligibility for the film tax offsets.	There is a list of light entertainment programs that are currently excluded from eligibility for the film tax offsets (for example, panel and quiz shows) but it is not clear whether this is wide enough to exclude all game shows.

Detailed explanation of new law

Documentary definition

1.18 The income tax law provides three tax offsets for Australian expenditure on making a ‘film’:

- the ‘producer offset’ for Australian expenditure in making an Australian film;
- the ‘location offset’ for Australian expenditure in making any film; and

- the ‘PDV offset’ for Australian expenditure on post, digital and visual effects production for any film.

1.19 An entitlement to an offset depends upon obtaining a certificate from the Arts Minister or, in the case of the producer offset, from Screen Australia. The certificate can only be issued if the Minister or Screen Australia is satisfied that the film meets the relevant conditions. In the case of the location offset and the PDV offset, one condition is that a feature film, telemovie or a television miniseries cannot be a ‘documentary’. In the case of the producer offset, a reality program or a film of a public event can only be eligible for the offset if it is a documentary. Different (and generally less demanding) rules apply to the producer offset for a documentary than for other films.

1.20 The amendments define ‘documentary’ as a film that is a creative treatment of actuality, other than an infotainment or lifestyle program or a film that presents factual information in multiple parts without an over-arching narrative structure or thesis (a ‘magazine program’). The meaning given to ‘documentary’ is that described in the ACMA Guidelines. [*Schedule 1, items 3 and 11, section 376-25 and subsection 995-1(1) (definition of ‘documentary’)*]

Creative treatment of actuality

1.21 To qualify as a documentary, a film needs to be a creative treatment of actuality. To do that, it has to analyse, explore or interpret its subject matter. The treatment of the material needs to be more than merely superficial and needs to enhance the viewer’s understanding of the subject matter.

1.22 The treatment also needs to be creative through, for example, an innovative narrative structure or the manner in which the film is edited or constructed from a range of sources. That distinguishes a documentary from a factual program such as a news report.

Example 1.1: Documentaries versus news programs

Morbo’s News and Weather Hour is Channel 314’s nightly news show. It presents the day’s news in short, factual segments, with limited analysis and minimal original expression. The superficial treatment of the issues and lack of creative or original presentation means this program would not fit the definition of a documentary.

Elliott’s War is a program about the use of mercenaries and private military contractors in Afghanistan. It uses footage of a widely reported recent incident as a starting point, but incorporates additional elements, including interviews, dramatic reconstructions, and analysis of historical events and parallels, to increase the viewer’s understanding of the origins and implications of the practice. This in-depth investigation and creative treatment means the program meets the definition of a documentary.

1.23 The requirement that a documentary be based on actuality means that the subject matter must be grounded in fact or real life. Therefore, the context for the program exists independently of the film itself. That is, the documentary is an exploration of something that would have happened whether someone was there to film it or not. However, it would be possible for a situation that was contrived by a filmmaker to give rise to actual events that are explored and analysed as part of a documentary program.

Example 1.2: Effect of producer-devised events

Denial Ain't Just, a program about access to the legal system in Ancient Egypt, uses dramatisations and reconstructions to provide insight into historical events and further the audience's understanding of the workings of the Ancient Egyptian legal system. It also examines historical documents and includes interviews with subject matter experts. Although the reconstructions are created for the purposes of the documentary, the program's grounding in historical reality and in-depth exploration of the theme mean it satisfies the definition of a documentary.

The Coff-Off Club asks a variety of coffee drinkers to give up coffee and record the mental and physical effects in order to answer the question of whether coffee's benefits outweigh its risks. The experiences of the participants are supplemented by information about how caffeine works, coffee's use across different eras and cultures, and the economic and social effects of producing coffee. Although giving up coffee is a contrivance, the results are factual and serve to illustrate the primary theme of the consequences of coffee use. When combined with the in-depth exploration of other factual material that also illuminates the primary theme, the program satisfies the definition of a documentary.

Burley Griffin Shore puts a group of new university students in a Kingston share house and follows them as they go about their daily lives. The events depicted are predominantly outlandish and salacious and, while the edited footage is accompanied by narration, there is no attempt to explore a theme or idea. Because most of the events depicted would not have occurred without producer interference, and serve little purpose beyond entertainment, the program is not a documentary.

Relevant factors

1.24 When assessing whether a film is a creative treatment of actuality, and therefore a documentary, regard must be had to the extent and purpose of any contrived situation featured in the film, the extent to which it explores an idea or a theme, and the extent to which it has an overall narrative structure. These elements are drawn from the ACMA Guidelines. [*Schedule 1, item 3, subsection 376-25(1)*]

1.25 A documentary's primary purpose is to creatively examine actual events. The greater the level of contrivance of the matters being

depicted, the greater the likelihood that the film is not a documentary. However, films featuring dramatised sequences may be documentaries and some documentaries may start with contrivance and then record and analyse the resultant events to explore a theme. In such cases, consideration of the extent to which the contrivances explore an idea or theme would be relevant. [Schedule 1, item 3, paragraph 376-25(1)(a)]

1.26 The extent to which a film explores an idea or theme is central to the definition of a documentary. Films that are superficial in their treatment of the subject matter would generally not be characterised as documentaries. The exploration or analysis of a topic or theme is also integral to the concept of documentary, accepting that the exploration or analysis need not be serious in tone. Films that have factual subject matter, but lack exploration or analysis, would be more likely to fall within the non-documentary categories of infotainment, lifestyle or magazine programs. [Schedule 1, item 3, paragraph 376-25(1)(b)]

1.27 The narrative style of a program is very likely to have an impact on the way in which it treats its subject matter. A program without an over-arching narrative structure, such as one consisting of brief and unrelated aspects of a broad topic, is unlikely to be a program that explores and analyses its subject in some depth, which is a key characteristic of documentaries. [Schedule 1, item 3, paragraph 376-25(1)(c)]

Example 1.3: The need for a narrative structure

Finding the Angle reports developments in the world of fishing and angling. Segments are short, superficial and connected only by the common subject matter of fishing. Facts are presented without question, analysis or wider context. The lack of in-depth consideration, narrative structure and over-arching theme means the program is a magazine or infotainment or lifestyle program rather than a documentary.

Doctor W's Death from the Skies! is an astronomy series that increases the viewer's understanding of the power of the galaxy by examining the different astronomical phenomena that could destroy life on Earth. Although each episode focuses on a different phenomenon (supernova, black holes, meteorite strikes and so on), each episode builds on the information discussed in previous episodes. The series is united by a common narrative theme: the weird and wonderful phenomena in the Milky Way and the implications they have for life on Earth. Each subject, and the galaxy as a whole, is examined in some depth, with a narrative structure that spans all the episodes. The program satisfies the definition of a documentary.

1.28 These are not the only factors that can be taken into account; anything else that is relevant should also be considered in deciding whether a film is a creative treatment of actuality. For example, relevant factors in appropriate cases might include the commercial arrangements underpinning the production, the likelihood of the film having enduring

appeal, and the breakdown of the film's budget. [*Schedule 1, item 3, paragraph 376-25(1)(d)*]

Infotainment, lifestyle and magazine programs

1.29 Documentaries do not include infotainment or lifestyle programs. [*Schedule 1, item 3, paragraph 376-25(2)(a)*]

1.30 'Infotainment or lifestyle program' has the same meaning as in Schedule 6 to the *Broadcasting Services Act 1992*. There it is defined as 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'. [*Schedule 1, item 3, paragraph 376-25(2)(a)*]

1.31 At the margin, it is this emphasis on entertainment that distinguishes an infotainment or lifestyle program from a documentary that presents facts but in a creative and entertaining way. In a documentary, the entertainment serves the more serious purpose rather than the other way around. Infotainment or lifestyle programs are also likely to share a number of observable characteristics that differentiate them from documentaries:

- The programs are usually episodic in nature, comprising a series of distinct or loosely connected segments rather than an overall story arc.
- The treatment of the material tends to be superficial and unquestioning. There is likely to be limited engagement with, or analysis of, the subject matter.
- The primary purpose of the program is often to highlight goods or services available to the viewer, or to give the viewer advice on 'how to' do something.

1.32 Documentaries also do not include films that present factual information in multiple discrete parts, each dealing with a different subject, or a different aspect of the same subject, but without an over-arching narrative structure or thesis. These are what the ACMA Guidelines call 'magazine programs'. [*Schedule 1, item 3, paragraph 376-25(2)(b)*]

1.33 Like an infotainment or lifestyle program, a magazine program does not contain an over-arching narrative. It may deal with several subjects but, even if it deals with one broad subject matter, it will touch upon a number of aspects of the subject. Each part of the program is discrete from the others. It typically imparts superficial factual information without presenting an original thesis, exploration or interpretation.

1.34 Infotainment or lifestyle programs and magazine programs are not necessarily excluded from the producer offset. However, because they

are not documentaries, they must meet the higher QAPE threshold and other existing criteria.

Example 1.4: Magazine program is not a documentary

Better House, Better Life is a program that provides viewers with information on how to improve their living spaces. Each episode has a number of segments demonstrating how to complete a different do-it-yourself project.

The superficial treatment, loosely connected segments and ‘how to’ nature of the program mean it is a magazine program and so not a documentary. It may still be eligible for the producer offset as a non-documentary program if it satisfies the higher QAPE threshold and different format criteria.

Excluded formats

1.35 When they were developed, the film tax offsets were intended to exclude light entertainment programs. This exclusion was achieved by providing that the necessary certificate cannot be issued for a film that is ‘a discussion program, a quiz program, a panel program, a variety program, or a program of a like nature’.

1.36 There is some doubt whether game shows are covered by that description, although, as light entertainment programs, they were always intended to be excluded.

1.37 The amendments remove that doubt, and ensure that the original intention is achieved, by adding game shows to the list of formats that are ineligible for the film tax offsets. [*Schedule 1, items 2, 5 and 6, subparagraphs 376-20(2)(c)(iii), 376-45(2)(c)(iii) and 376-65(2)(d)(ii)*]

Application and transitional provisions

1.38 Most of the amendments apply to films that commence principal photography on or after 1 July 2012. [*Schedule 1, subitem 12(1)*]

1.39 Although this means that those amendments will have a retrospective operation, that operation restores the understanding of the provisions that was generally held in the context of government regulation of, and support for, documentaries before the recent *Lush House* decision. The amendments were also announced as part of the 2012-13 Budget and Screen Australia adopted the practice from July 2012 of advising applicants for the producer offset whether their film was a documentary under both the meaning adopted by the AAT and the meaning set out in the ACMA Guidelines. It follows that film makers would have embarked on making their films fully aware of the amendments that were proposed and of the consequences of those amendments for their film.

1.40 These amendments do not apply to films if their principal photography commenced *before* 1 July 2012. That ensures that they do not affect films on which significant expenditure had occurred by that date.

1.41 ‘Principal photography’ is the phase of film production where the film is actually shot. It can be distinguished from the pre-production phase, where scripts are finalised, suppliers and crew engaged and production planned. Principal photography is almost always the most expensive part of making a film.

Application rule for game show amendments

1.42 The amendments that ensure that the exclusion of light entertainment programs extends to game shows apply in relation to films that commence principal photography on or after the amendments receive Royal Assent. This reflects the fact that the clarification of this issue was not covered by the Government’s announcement about changes to the film tax offsets. [*Schedule 1, subitem 12(2)*]

Consequential amendments

1.43 Consequential amendments insert asterisks before the term ‘documentary’ to indicate that it is defined. [*Schedule 1, items 1, 4, and 7 to 10, subparagraphs 376-20(2)(c)(i), 376-45(2)(c)(i) and 376-65(2)(d)(iii); paragraph 376-65(3)(c) and subsections 376-65(6) and 376-170(4A)*]

STATEMENT OF COMPATIBILITY WITH HUMAN RIGHTS

Prepared in accordance with Part 3 of the *Human Rights (Parliamentary Scrutiny) Act 2011*

Documentaries and film tax offsets

1.44 This Schedule is compatible with the human rights and freedoms recognised or declared in the international instruments listed in section 3 of the *Human Rights (Parliamentary Scrutiny) Act 2011*.

Overview

1.45 The income tax law provides a number of tax offsets designed to encourage expenditure on films in Australia if certain criteria are satisfied.

1.46 Some types of films are not eligible for the offsets at all unless they are a documentary and some of the criteria are easier to satisfy for documentaries than for other films. The producer offset, for example,

requires a lower minimum level of qualifying expenditure for documentaries than for other films.

1.47 The law does not currently define what a documentary is. Screen Australia (which certifies whether a film is a documentary and whether it meets the minimum expenditure level for the producer offset) has used the definition from the Australian Communications and Media Authority's Guidelines since the offsets were enacted in 2007. That interpretation is consistent with the Parliamentary intention explained in 2007.

1.48 A decision of the Administrative Appeals Tribunal in 2011 used a different definition and found that the television program *Lush House* was a documentary that qualified for the producer offset. Programs of that sort were not intended to be eligible for the concessional tax offset treatment available to documentaries.

1.49 The Schedule amends the income tax law to add a definition of 'documentary' that is consistent with the definition that has been applied since 2007, ensuring that the provisions apply in the way they were understood before 2011. These amendments apply to films that start their principal photography on or after 1 July 2012.

1.50 The tax offsets also do not apply to light entertainment programs. The law achieves that by listing types of programs that are not eligible for the offsets. Some doubt has been raised about whether that list is wide enough to exclude all game shows. The amendments remove any doubt by stating that game shows are not eligible for the offsets. Those amendments apply to films that start their principal photography on or after Royal Assent.

Human rights implications

Cultural rights

1.51 Article 15 of the *International Covenant on Economic, Social and Cultural Rights* requires Australia, as a party, to recognise the right of everyone to take part in cultural life and to take steps to achieve the full realisation of the right, including those steps necessary for the conservation, development and diffusion of science and culture.

1.52 The *Committee on Economic, Social and Cultural Rights* noted in its General Comment 21 on the right of everyone to take part in cultural life (paragraph 13):

The Committee considers that culture, for the purpose of implementing article 15(1)(a), encompasses, inter alia, ways of life, language, oral and written literature, music and song, non-verbal communication, religion or belief systems, rites and ceremonies, sport and games, methods of production or technology, natural and man-made environments, food, clothing and shelter and the arts, customs and

traditions through which individuals, groups of individuals and communities express their humanity and the meaning they give to their existence, and build their world view representing their encounter with the external forces affecting their lives. Culture shapes and mirrors the values of well-being and the economic, social and political life of individuals, groups of individuals and communities.

1.53 Encouraging expenditure on films in Australia via tax offsets can be seen as an appropriate step for the development and diffusion of culture in Australia and documentaries are more likely than most films to do that because they try directly to help people understand cultural issues and cultural phenomena.

1.54 There being only limited funding available for promoting the right to culture, it is appropriate that the film tax offsets target those films where the funding will have the most effect. It is more likely to have a useful effect if used to encourage films, such as documentaries, that are more likely to promote the right to culture, and that are less likely to be made without the offsets than those that would be made anyway because of their greater commercial viability.

1.55 The limit on the scope of the tax offsets that Parliament intended to enact in 2007 is therefore both appropriate and consistent with implementing Australia's human rights obligations. Amending the law to restore that intention is therefore similarly appropriate and consistent.

Retrospectivity

1.56 The amendments to restore the intended meaning of 'documentary' apply to tax offsets for films that began their principal photography on or after 1 July 2012. They can therefore be argued to have a retrospective operation.

1.57 However, the amendments, and the application date for them, were announced in the 2012-13 Budget in May 2012. Further, since July 2012, Screen Australia, when providing certificates to applicants for the producer offset, on the basis of the Administrative Appeals Tribunal's understanding of the meaning of 'documentary', has also provided them with its view on whether their film is a documentary under the original understanding of that term. Film makers have therefore been aware when commencing their films that the Government proposed to change the law and what the consequences of that change would be for them. Consequently, the retrospectivity does not produce any disadvantage that film makers were unaware of.

1.58 The amendments to exclude all game shows from eligibility for the tax offsets apply to films that begin their principal photography on or after the day the amendments receive the Royal Assent. This reflects that fact that those amendments were not previously announced.

Conclusion

1.59 This Schedule is compatible with human rights. It promotes the right to take part in cultural life.

Assistant Treasurer, the Hon. David Bradbury MP
