



**Australian Writers' Guild  
Australian Writers' Guild Authorship Collecting Society**

**Senate Standing Committees on Environment and Communications**

**Inquiry into the National Cultural Policy**

16 March 2023

*The Australian Writers' Guild acknowledges we live and work on Aboriginal land. We pay our respects to Elders past and present. We thank them for their custodianship of land and waterways, stories, and song, and pay our respects to the oldest storytelling civilisation in the world.*

## WHO WE ARE

The Australian Writers' Guild (**AWG**) represents Australia's performance writers: playwrights, screenwriters for film and television, showrunners, podcasters, comedians, game narrative designers, dramaturgs, librettists, and audio writers. We represent 2,500 performance writers in Australia. Established by writers for writers, the AWG is a democratic organisation run by its members, who each year elect a National Executive Council and State Branch Committees. Our members work together to represent their fellow writers across the industry in a number of committees such as the Theatre, Television and Games committees to negotiate for fair pay and conditions, advocate to government, and serve members' professional needs.

The Australian Writers' Guild Authorship Collecting Society (**AWGACS**) is a not-for-profit collecting society for screenplay authors. With more than 2,000 members and 32 partnerships with overseas collective management organisations, AWGACS has collected more than \$25 million in secondary royalties and distributed the monies owed to screenwriters from Australia, New Zealand and around the world. AWGACS continuously advocates for the rights of authors to ensure they are fairly remunerated for the secondary exploitation of their works.

## **Executive summary**

*Revive* represents a return to actively enabling our sector to grow and by the Australian Government, a return that is welcomed by artists and creatives.

*Revive* reflects a trust in the creative workers and businesses of Australia: a confidence that our work is world class and ready to compete, and a dedication to giving us the stage we deserve to showcase our work. It provides a framework for understanding the priorities of government and sets out how it intends to regulate and invest in our sector.

While detail remains to be made public, as a policy *Revive* shows what government sees as its role, and what it does not: not a critic, not an arbiter of taste, and not where you go to pick winners. That is the role of audiences and artists. Instead, government is the platform onto which success can be built for workers and businesses, for those who meet the judgement of their peers, with artists returned to the heart of decision-making.

More than this, though, it sets out that the Government wants to create a sophisticated internal and external marketplace of ideas and content, where the cultural and economic power the sector can wield at home and abroad is actively built. *Revive* shows a commitment to driving Australia's sovereign capacity. Australia is a relatively small nation in terms of cultural production, but we are equipped to find a niche on the world stage and world platforms. *Revive* commits to building capacity here so we are not left to the cultural vagaries of other nations and seeks to give us the power to project our voice. The *Revive* plan seeks the strategic and diplomatic benefits of this soft power, which exist alongside the cultural benefits of a robust and confident cultural conversation at home.

As we should retain and rebuild the capacity to make the material essentials of our daily lives, we should be just as mindful for our culture, our stories, our songs, and our jokes. They tell us who we were, who we are, and who we might be in the future.

My members look forward to doing this, enabled by *Revive*.

*Claire Pullen*  
**Group CEO**

## **Key observations on *Revive* and recommendations for implementation**

Much of our submission reiterates issues that we have already engaged with Government on, before and since the release of the National Cultural Policy (NCP). We appreciate the opportunity to compile our recommendations here and inform the Senate Standing Committee.

As a headline matter for the Committee, it is our position that the NCP should be implemented swiftly, and that consultation should not delay its implementation.

In implementing the ‘pillars’ of the Policy, and to assist the Committee in formulating its recommendations, we provide the following.

### **1. First Nations First**

Key actions from *REVIVE* for Australian performance writers:

- Establish a dedicated First Nations-led Board within the newly established Creative Australia to invest in, create and produce First Nations works of scale and with priorities and funding decisions determined by First Nations leaders.
- Develop a First Nations Creative Workforce Development Strategy;
- Promote best practice cultural protocols, the principle of self-determination and cultural safety training, in partnership with First Nations communities, across arts and cultural organisations;
- Continue support for First Nations peoples to express, preserve and maintain their culture through languages and the arts, under the Indigenous Languages and Arts program;
- Provide \$13.4 million to introduce stand-alone legislation to protect First Nations knowledge and cultural expressions, including to address the harm caused by fake art, merchandise, and souvenirs;
- Support professional development and training for First Nations peoples to ensure that artists are treated ethically and receive a fair return for their work;
- Provide a comprehensive response to the Productivity Commission’s report on Aboriginal and Torres Strait Islander Visual Arts and Crafts, building on the commitment to introduce stand-alone legislation outlined above.

We are pleased to see Government’s commitment to implement the recommendations made in the Productivity Commission’s [Report on Aboriginal and Torres Strait Islander](#)

[visual arts and crafts](#) (the **Productivity Commission Report**). We support the legal recognition and protection of “cultural assets” and “traditional cultural expressions” owned by First Nations Traditional Owners, and that ownership of these cultural assets should be inalienable. We agree with articulations of the urgent need for a new legal framework and why it is essential for the scope of that framework to extend beyond visual arts and crafts.

AWG and AWGACS represent some of our best-known First Nations storytellers. We want to see First Nations story holders and knowledge bearers retain control over the way their stories are depicted on screen and stage and be fairly compensated when those stories are adapted and re-told. Whenever First Nations stories are told on Australian stages and screens, we want First Nations creatives to be front and centre in that project’s development and production, and for First Nations people to benefit from the ongoing exploitation of their work. The ongoing relationship to the work, as expressed by copyright, is a key mechanism for ensuring a stable source of income and therefore a career in the sector. Our current legal framework does not have the capacity to include collectively owned stories in it.

In practical terms, this copyright reform is what is most important to facilitating the step-change for First Nations creatives envisioned by *Revive*. Recognising the centrality of First Nation peoples to Australian culture means recognising both the individual First Nations artist’s inalienable right to a culturally significant story that they are telling, as well as a First Nations community’s inalienable right to commonly owned “cultural assets”.

AWG and AWGACS have taken part in the Attorney-General’s copyright reform stakeholder group and in those ongoing consultations we hope to assist in the design and implementation of the new legislative framework proposed in the Productivity Commission Report and the NCP. Extending the creation of “cultural assets” beyond works of visual art to song, oral story and performance – and further still, to works performed on stage and screen – is a high priority here and a key practical change that can be made to the scope of the reform.

We welcome the NCP’s commitment to a Centre for Creative Workplaces and the funding of First Nations work (particularly works of scale), all of which should form part of allowing First Nations creators to create new properties and – once legislative changes are made – benefit fully from their ongoing exploitation. In our view, if the allocated \$13.4 million for standalone legislation does not capture the full scope of works and created cultural assets, then there may be a need for expanding this funding.

**Recommendation:** To facilitate the speedy implementation of "stand-alone legislation to protect First Nations knowledge and cultural expressions" as far as screen and performances go, that a working group of relevant experts be formed: principally First Nations creatives in the screen and stage sector, whose representatives are supported by a relevant industry organisation, other relevant subject matter experts, and the collecting agencies. The working group would consider the translation of 'cultural assets' as a class of copyrightable assets into stage and screen contracts, terms of trade and contracts for performed/cinematographic works.

## 2. A Place for Every Story

Key actions from REVIVE for Australian performance writers:

- Increase support for regional arts and culture through an increase to the Regional Arts Fund of \$8.5 million, and continuation of the Festivals Australia program;
- Provide \$5.0 million for an Arts and Disability Associated Plan, under Australia's Disability Strategy 2021–31, to enable people with disability to access and participate fully in the cultural and creative life of Australia;
- Ensure bodies within the newly established Creative Australia represent contemporary Australia;
- Invest in a Local Multicultural Projects initiative, which includes support for local community artistic and cultural activities and celebrations;
- Establish an Office for Youth and new youth engagement model to embed the voices of young Australians in policy and programs across government, including in arts and culture;
- Invest in improved digital connectivity, including for First Nations communities and people in regional and remote areas, to support increased access to arts and cultural activities.

We support the increases in funding to the Regional Arts Fund and the funding committed to the creation of an Arts and Disability Associated Plan. In our submission, we called for investment in the discovery and creation of capable artists. We pointed out that while increased funding for projects led by artists from minority backgrounds was essential, it was just as important to fund the pathways which will foster emerging talents. This means creating a system that incentivises the development of creatives from diverse backgrounds, not merely tokenistic attachments to generate funding. Every level of talent needs to be invested in to wrap support around emerging diverse creatives. Excellence

in craft is developed over time, and direct investment is needed both to support emerging practitioners and the mentors who share their time and expertise.

Good Australian stories are found everywhere, and we will all benefit from their telling. AWG is pleased to support the work of regional (Western Sydney, First Nations language) organisations and community groups to tell their stories, preserve their language and to create copyrightable properties. Consistent with the principles of *Revive*, the guidance and enforcement available to relevant agencies should ensure decision-making from members of diverse and marginalised communities.

In keeping with our other observations, decision-making and funding should be overseen by a community of practitioners and experts, particularly disabled creative experts.

**Recommendation:** To facilitate decision-making consistent with the ‘nothing about us without us’ principle, representative and decision-making around projects is led by those impacted and members of community, whether those be disabled, multicultural or young creatives assisted by relevant experts.

Consistent with the practical recommendations of taking national collections to all of the country, we have a number of suggestions on the use of public creative space to facilitate cultural conversation and work to make that fall below the level of scrutiny of a Senate Committee, and we look forward to working with Creative Australia on those.

### 3. Centrality of the Artist

Key actions from *REVIVE* for Australian performance writers:

- Include Award coverage of the arts sector and minimum standards as part of the upcoming Review of Modern Awards;
- Develop information about the flexibility available for artists to be looking for work or working in the creative arts sector, and to have this recognised as part of their mutual obligation requirements for unemployment payments. This will assist artists and other creative workers to work with job providers so that they can continue their creative practice while connecting to paid work;
- Establish a Centre for Arts and Entertainment Workplaces, within the newly established Creative Australia, to provide advice on issues of pay, safety and welfare in the arts and entertainment sector, refer matters to the relevant authorities and develop codes of conduct and resources for the sector;

- Introduce conditional funding that requires government-funded artistic and cultural ventures to adopt and adhere to minimum workplace safety standards, and meet legislated minimum employment standards;
- Fully implement all fifty-five recommendations of the *Respect@Work* Report to better prevent and address workplace sexual harassment, including by:
  - expressly prohibiting sexual harassment in the *Fair Work Act 2009*
  - introducing a positive duty in the *Sex Discrimination Act 1984* that will require employers to take reasonable and proportionate measures to eliminate certain forms of unlawful sex discrimination, including sexual harassment, as far as possible, and
  - increasing access to justice for those who experience workplace sexual harassment through the establishment of an additional pathway for workers to quickly deal with sexual harassment disputes before the Fair Work Commission, through improvements to representative actions and cost protection provisions, and through the provision of \$32.0 million in the October 2022–23 Budget to fund working women’s centres in every state and territory.
- Implement regulations on managing psychosocial risks, including bullying and harassment, in the *Commonwealth Work Health and Safety Regulations 2011* and work with other jurisdictions to strengthen existing work health and safety laws and guidance;
- Undertake a broad and comprehensive review of the effectiveness of Australia’s copyright enforcement regime to make sure it remains fit-for-purpose, and consider opportunities to improve Australia’s copyright framework by working with copyright owners and users;
- Work with the arts and culture sector to undertake a scoping study to understand current and emerging workforce challenges and skills needs across the cultural and creative sector, and inform the development of industry-driven solutions by the Arts, Personal Services, Retail, Tourism and Hospitality Jobs and Skills Council, to address identified issues;
- Promote the new Self-Employment Assistance program to the arts community, including to First Nations peoples, to encourage new and existing arts businesses to access free business mentoring and support to develop business plans and strategies that more effectively monetise their cultural contributions to Australia.

Artists are workers and ensuring adequate remuneration is critical to allowing artists and creatives to have the enduring practice to create great work over a lifetime. From a practical point of view, this relies on two things: the acceptance and payment of industry minima, in whatever format that may take, and the ongoing exploitation of created works via royalties and secondary royalties.

Our industrial relations system does not currently have the jurisdiction to cover many creative workers, including some within our membership.

As the Committee would be aware, ongoing consultation around reforms of our workplace laws are taking place concurrent with the work to implement the NCP. AWG has begun the work of giving effect to the principles set out in *Revive*, that:

*“Funding bodies should continue to affirm the principle that artists should be paid for their work, including through recognition of Awards, mandated rates of pay and codes of practice such as the Live Performance Award 2020, the Broadcasting, Recorded Entertainment and Cinemas Award 2020, Australian Society of Authors rates of pay, **Australian Writers’ Guild benchmarks**, and the National Association for the Visual Arts Code of Practice.”*

How these minima are given statutory effect is part of ongoing discussion and from our perspective, is well underway.

This also includes the importance of ensuring all funding bodies ensure recognised minima are paid as a condition of funding arrangements, a key enforcement tool not available in many workplaces.

Other actions of this pillar go to ensuring the arts and creative industries are included in our national employment frameworks, and not treated as a class outside protections. This work must include industry-specific expertise, as well as subject matter expertise. To give one example, the implementation of the positive duty identified by the *Respect@Work* report is one grounded in the ongoing relationship created by an employee-employer legal foundation. How this can apply to gig economy jobs is a matter for further consideration.

**Recommendation:** That the Centre for Workplace ensures expertise is available at all levels of its function around industry practice and relevant statutory and other protection, and that these are incorporated into advice to industry bodies. Resources developed should support the growth and sustainability of a sector and make participants aware of all avenues of support available.

Artists are workers that are paid when they achieve an end result – a script, a play, a TV show, or video game – and often this compensation does not square with the hours of planning, effort, skill, and expertise of creation. There are currently very few market incentives for writers to work in Australia. There are Australian writers who have been forced to work in the USA and UK to sustain their careers and their families and express

a desire to work at home. In the case of one AWG member, they work in a writers' room in Los Angeles for a show that is shot in Melbourne. Production is enticed here by generous incentives, but development and creative work is not.

Writing work is insecure. Writers work on a commission basis and have little job security. The hours are irregular and there is often an expectation of engaging in unpaid work. It is common for writers not to be paid superannuation.

Making the artist central means creating an economic framework in which an artist can pay the bills and create. This means a living income, whether it be from commissions, secondary royalties, some other ongoing exploitation of their work- or more likely, a combination of all these.

In pursuit of this, the 'works of scale' funding will be critical, as it gives artists the capacity to turn an existing property, perhaps one they already hold the copyright to, into another income generating property. By converting a play into a screenplay or TV show, a documentary into a drama, a work of prose into a piece of interactive media, artists will be enabled to have an ongoing financial relationship with their property as it iterates through formats.

To deliver this, we have consulted with Government on a number of key copyright reform issues that are not directly addressed in the NCP but, we believe, are crucial to a robust and sustainable local screen sector without relying on any additional, direct investment from Government.

Firstly, we recommend that Government introduce an unwaivable, inalienable statutory right to proportionate remuneration as seen in [Article 18 of the EU Copyright Directive 2019](#) by creating a statutory presumption to secondary royalties in favour of the authors of audio-visual works.

The *Copyright Act* 1968 (Cth) creates a number of **renumerated exceptions** to unauthorised uses of a copyrighted work, provided that the entity making the unauthorised use pays remuneration to the relevant collecting society for that unauthorised use. In the screen sector, these payments are collectively referred to as "secondary royalties" because they relate to a 'secondary use' that flows on from the primary use, being the broadcast itself.

In the original Schedule of Allocation, 22.1% of all royalties collected for audio-visual products were designated as the "Script" portion (meaning that the author of the script should be paid those amounts). However, the declared collecting society, Screenrights,

currently allocates these royalties based on the contractual position of the parties **not** authorship of the Script. Therefore, contrary to the intention of the legislation, authors can only claim “Script” royalties from Screenrights *if* their contract with a production company contains a clause **expressly reserving** those royalties. Inequalities in bargaining power often result in scriptwriters signing away their entitlement to secondary royalties.

This money represents a substantial portion of some screenwriters’ income. In the 2021-2022 collection period, AWGACS collected \$1.7 million for its members. In 2020-2021, we collected \$2.1 million.

A significant administrative burden and cost is also created when production companies claim the royalties due, or owing, to script authors. This is known as a ‘competing claim’ and AWGACS are currently dealing with over one thousand. When a competing claim is not resolved through Screenrights’ processes and by a deadline set by Screenrights, the royalties ‘expire’ and neither party receives them. (It is unclear whether Screenrights then keeps those royalties.) Screenrights is currently facing serious issues administrating the statutory royalty schemes. As a result of the sheer number of competing claims, Screenrights’ dispute resolution system has become so time consuming and cumbersome to use that it is effectively unworkable.

By introducing a **statutory** presumption to secondary royalties in favour of the authors of audio-visual works, the collection process can be significantly simplified. Production companies will still receive the majority of the royalties, but the portion reserved for the **script** will be paid to the authors of the script, as intended.

We also recommend that Government update the Australian secondary royalty framework and create a **new category of equitable remuneration for the online exploitation of works**. Currently, international distributors such as streaming platforms are able to exploit audio-visual works throughout the world, for the entire duration of copyright, without any payment beyond what was agreed in the original writer’s contract or distribution agreement with a producer.

Again, there is a huge and unaddressed imbalance of power between local production companies and international streamers and studios; an imbalance that often results in a non-negotiable “full buy out” of a creator’s rights (i.e., in totality without any ongoing payments).

Many EU countries – including Spain, France, Italy, Belgium, Slovenia, and Estonia – have sought to address this imbalance. They recognise the immense value of the worldwide exploitation of a copyright owner ‘s work and the fact that the compensation

received by audio-visual creators for rights was often not “proportionate” per the EU Copyright Directive 2019. These jurisdictions sought to rectify this imbalance through law reform and future-proof a stream of income for artists as audiences consume their media in a completely different way with the advent of streaming and online content distribution.

**Recommendation:** The introduction of a statutory presumption to secondary royalties in favour of the authors of audio-visual works modelled on Article 18 of the EU Copyright Directive 2019 **and** a new category of remunerated exception for online exploitation of audio-visual works.

#### 4. Strong cultural infrastructure

Key actions from *REVIVE* for Australian performance writers:

- Restore funding cuts (\$44.0 million) to the Australia Council <sup>[L]</sup><sub>[SEP]</sub> to address underfunded areas like youth arts and expand its functions to establish Creative Australia, totalling \$199.0 million;
- The establishment of a dedicated First Nations-led Board (\$35.5 million) to invest in, create and produce, from 2024, <sup>[L]</sup><sub>[SEP]</sub> First Nations works of scale, with priorities and funding decisions determined by First Nations leaders, develop a <sup>[L]</sup><sub>[SEP]</sub> First Nations Creative Workforce Development Strategy, and promote best practice cultural protocols, self-determination and cultural safety training across arts and cultural organisations;
- The establishment of Writers Australia (\$19.3 million) to provide direct support to the literature sector from 2025, including for writers and publishers, to grow local and international audiences for Australian books and establish a Poet Laureate for Australia;
- The establishment of a Centre for Arts and Entertainment Workplaces (\$8.1 million), to provide advice on issues of pay, safety and welfare in the arts and culture sector, refer matters to the relevant authorities and develop codes of conduct and resources for the sector, and investment in Support Act;
- Investment in a works of scale fund (\$19.0 million), to support the commissioning of new Australian artistic works of scale;
- Increase funding to the newly established Creative Australia to support more small and medium arts organisations and drive the development of new artistic works of scale.

AWG was pleased to see funding returned to the Australia Council. Our discussions with the Council as it becomes ‘Creative Australia’ will focus on supporting the small and mid-

sized theatre companies which were hit hardest by the previous government's funding cuts and pandemic-related shutdowns as a means of supporting our playwright members.

Unlike the boon it represented for screen, the pandemic devastated theatres. Theatres closed, and playwrights, dramaturgs and librettists lost work. Some of the playwrights who have had their shows cancelled or postponed have not seen their work up on Australian stages for up to two years. Audience numbers are still down, and some fear they may never recover. In the 2020-21 financial year, playwrights reported an average income of just over \$11,000. Yet a playwright might still earn that amount – or less – in a given year pre-COVID.

Original Australian work seen on Australian stages was in decline well before the pandemic. It has always been cheaper and less risky for an Australian theatre company to license a stage-tested foreign work than to commission an Australian play. Between 2017 and 2022, only 34% of the Sydney Theatre Company's professionally performed plays were Australian. In the same period, only 31% of Melbourne Theatre Company's performed plays were Australian. Yet these companies are supported by government funding and philanthropy precisely so they can be bold with their programming, take creative risks, and support up and coming Australian talent. By unhooking funding from outcomes for Australian artistic workers, we have seen industry and employment shrinkage and cultural retreat.

Often, the Australian works that *are* presented are older and popular Australian works. In those cases, no additional commissioning or development fees are paid to the original author of the play – and no new Australian works are created, no emerging or mid-career Australian playwright is given a chance.

Of course, the Australian canon should be celebrated, and older works should be seen by new audiences. At the same time, the theatre companies should have a responsibility to give working Australian playwrights the opportunity to have their work shown on Australian stages to Australian audiences. Few such opportunities exist for Australian playwrights already and we cannot have them diminish further. The theatre companies must contribute to a strong and sustainable local theatre industry, or we risk losing a generation of Australian playwriting talent to more lucrative genres, like television, or to better paying theatre companies overseas.

**Recommendation:** Australia Council funding for the theatre companies – including companies funded through Four-Year Funding and through the National Performing Arts Partnership Framework – must come with a clear mandate for

minimum requirements in the development and staging of new Australian work, and the possibility that this funding be removed if not used for this purpose.

This funding should not simply be paid into the consolidated revenue of a company, and reporting should be required against the development and production of new Australian works. It follows from this that we expect there to be inspection and enforcement activity of this funding, which would require a function within Creative Australia.

All funding contracts with theatre companies and Creative Australia require the payment and enforcement of agreed industry minima.

## 5. Engaging the audience

Key actions from *REVIVE* for Australian performance writers:

- Introduce a Digital Games Tax Offset to support growth in large-scale games development in Australia;
- Provide \$12.0 million to increase investment to support digital games developers and small and medium independent games studios through Screen Australia;
- Continue support for investment in large-scale screen productions in Australia through film tax offsets and location-based production incentives;
- Introduce requirements for Australian screen content on streaming platforms to ensure continued access to local stories and content in the third quarter of 2023 and to commence no later than 1 July 2024, with the Minister for the Arts and the Minister for Communications to undertake further consultation with industry in the first half of 2023 on the details of actions to be taken and implementation as part of the Commonwealth's broader reforms to media legislation;
- Provide security of funding and independence for Australia's national broadcasters, ABC and SBS, by delivering five-year funding terms, and reinstating indexation for ABC funding;
- Appoint an Ambassador for First Nations People and establish an Office for First Nations Engagement to embed First Nations voices, perspectives, and experiences into Australia's foreign policy, and help grow First Nations' trade and investment.<sup>[1]</sup><sup>[SEP]</sup>

Our support for a 20% local content reinvestment obligation international streaming services is a matter of record. We look forward to working with Government to implement this regulation, announced to commence in July 2024.

In our original submission, we called on Government to restore the local content obligations on the commercial broadcasters to previous levels. The obligations on the broadcasters to produce a certain number of hours of Australian content were suspended, and eventually reduced, by the Morrison government during COVID. By reducing the number of hours of drama on television, the previous government reduced employment for thousands of Australians in the screen sector and worsened the pandemic-created under-employment and unemployment crisis, weakened the career trajectories of content creators and limited opportunities for emerging writers from all backgrounds to develop their craft. In order to facilitate the industry's recovery, these changes must be reversed.

We recently made several recommendations to Senate Economics Legislation Committee in relation to the Digital Games Tax Offset in the Treasury Laws Amendment (2022 Measures No. 4) Bill 2022. Our submission is attached at **Appendix A**.

In summary, while we supported the introduction of the offset, we were concerned it would primarily be large, international, and foreign-owned studios – rather than the small to medium-sized local studios – that would participate in the offset if the minimum development expenditure threshold was too high. We therefore proposed a reduction of the threshold from \$500,000 to \$250,000.

We also argued that the legislation should do more to incentivise large studios to recruit Australian talent including by (a) including professional development for junior and mid-career talent as a qualifying Australian development expenditure and (b) requiring applicants to ensure that the key creatives involved in the project are Australian, or that a majority of staff in key departments are Australian, (similar to the 'Significant Australian Content' test for the Producer Offset) to access the offset.

In its [Report on the Treasury Laws Amendment \(2022 Measures No. 4\) Bill 2022](#), the Senate Committee wrote that the “broader measures announced by the government [in *Revive*] will support smaller and medium studios with project budgets of up to \$500,000 will complement the DGTO and allow them to compete and grow within the sector.”

However, in our view the balance is still very much in favour of the larger international games studios, particularly in terms of recruiting skilled industry talent of which there is a shortage in Australia and around the world.

A small studio must put business case together to access Screen Australia funding. They must justify their project creatively, alongside additional criteria based on diversity, inclusion, and path to market. This is all **in addition** to actually developing a prototype game. The success rate for Screen Australia applicants is between 5% and 30%, so it

cannot necessarily be relied upon to make significant business decisions, especially something as risky as scaling a small project up above the \$500,000 threshold.

The large, foreign-owned companies, in contrast, will easily be able to meet the threshold and automatically participate in the offset. They will be much more competitive in recruiting skilled workers which, again, is the critical problem that the industry is facing.

In our view, lowering the offset threshold to \$250,000 would ensure there is a safe path for any commercially successful small Australian studio to scale up and therefore evenly compete with the larger studios for talent and publisher support.

## Appendix A



### **Australian Writers' Guild**

### **Submission to the Senate Economics Legislation Committee on the Treasury Laws Amendment (2022 Measures No. 4) Bill 2022**

### **The Digital Games Tax Offset**

23 January 2023

The Australian Writers' Guild (**AWG**) is the professional association representing writers for stage, screen, radio and online and has protected and promoted their creative and professional interests for 60 years. The Guild represents 2,500 performance writers in Australia and includes the creators of national and international works. Established by writers for writers, the AWG is a democratic organisation run by its members, who each year elect a National Executive Council and State Branch Committees. Our members work together to represent their fellow writers across the industry in a number of committees to negotiate for fair pay and conditions, advocate to government, and serve members' professional needs. This submission was written in consultation with the AWG Games Committee. We appreciate the opportunity to comment on the Digital Games Tax Offset.

## **BACKGROUND**

In the Australian sector, the most critically acclaimed and commercially successful work is developed by small studios: teams comprised of fewer than twelve people. These small studios are usually wholly Australian-owned, as opposed to large developers that are generally owned by overseas companies and create Australian intellectual property for export. Small studios have produced work like *Florence*, *Untitled Goose Game*, *Unpacking* and *Cult of the Lamb* which have been met with critical acclaim and commercial success. Large developers, in contrast, are generally owned by overseas companies and they do not create Australian intellectual property.

The Digital Games Tax Offset (DGTO), introduced by the Morrison government, is an important first step to addressing the disparity between the games sector and other screen content. However, the Guild is sceptical that this new regime will actually assist Australian small studios which will generally **not** be able to meet the \$500,000 expenditure requirement proposed in the new legislation. The DGTO cannot replace, or must exist alongside of, a program of **sustainable** growth through small studio enterprise funding, improvements to education pathways, and incentives for workplace training.

## EXECUTIVE SUMMARY

We recommend that government consider the following:

- (a) Lowering the qualifying expenditure from \$500,000 to \$250,000;
- (b) Incentivising professional development of emerging and mid-career local talent;
- (c) Incentivising accessibility features;
- (d) Incentivising the employment of Australian talent in key creative positions;
- (e) Clarifying whether Screen Australia funding grants and the DGTO are mutually exclusive;
- (f) Offering a more robust definition of “completed game”;
- (g) Creating fulsome and detailed public guidelines that inform the relevance test;
- (h) Prohibiting games with “loot boxes”, gambling/gambling simulation games, and games that engage in predatory design elements relating to in-app purchases from accessing the DGTO.

## RECOMMENDATIONS

### (a) Offset amounts

The \$500,000 minimum development expenditure requirement is a significant hurdle for a small Australian studio to meet, without taking on unnecessary risk or pressuring them to scale up even when it is not appropriate to do so. Recent critical and commercial success has been made by a number of studios, in Australia and internationally, with games between \$250,000 and \$500,000.

Recommendation: **The minimum development expenditure threshold should be lowered from \$500,000 to \$250,000.**

### (b) Incentives to develop local talent and recruit Australians into key creative roles

The Australian industry is still a small one, and countries like the United Kingdom and Canada have industries that are ten times the size of the Australian industry. Sector growth must be a priority. The Interactive Games & Entertainment Association (IGEA) [recently noted](#) that “expanding [Australian] studios are facing the key hurdles of gaining access to mid to senior talent...and dedicated financial support”. Professional development of emerging and mid-career talent must be incentivised by the

legislation. With a worldwide shortage of experienced developers in key fields, predominantly software engineering, local mid-sized businesses are forced to compete with large, international companies for the same talent.

**Recommendation: Professional development for junior and mid-career talent should expressly be included as a qualifying Australian development expenditure.**

**(c) Accessibility**

The development of features and tools to aid in accessibility for deaf and disabled players should be expressly eligible for the offset.

**Recommendation: The development of accessibility features should expressly be a qualifying Australian development expenditure.**

**(d) Australian talent in key roles**

Business applying for the DGTO should be incentivised to employ Australian talent in key creative roles. This would be similar to the existing 'Significant Australian Content' test for the Producer Offset for film and television which places particular emphasis on the nationality of the writer, director, and producer of a project in the determination of whether the Producer Offset should apply. In a games context, this might take the form of a majority of Directors and Principals (i.e. over 50%) – including Creative Director, Principal Game Designer, Narrative Director and Art Director or equivalent – having an Australian nationality.

This consideration is essential to ensure that the Australian games sector benefits and grows from the offset and equip creators with the experience they need to work in large studios and start their own Australian businesses.

Recommendation: **Applicants should satisfy a test similar to the ‘Significant Australian Content’ test to access the DGTO: chiefly, that the key creatives involved in the project are Australian, or that a majority of staff in key departments are Australian.**

**(e) Clarity on multiple sources of federal funding**

The legislation does not appear to prevent a business accessing federal funding (through Screen Australia) and then the DGTO at a later date. Currently, direct funding is the only source of federal funding small studios will have access to. In order to access Screen Australia funding, a project’s budget must be less than \$500,000 but the legislation is silent on the situation where a game project’s budget grows in scale and budget and thus qualify for the DGTO while also accessing Screen Australia funding.

Recommendation: **The legislation should clarify whether a studio that has accessed Screen Australia funding can then, at a later date, access the DGTO.**

**(f) Revise definition of a “completed game”**

The current version of the legislation only requires that a game be “released to the public”. As self-distribution is quite easy and cheap, there appears to be no requirements on what state the game should be in when released. A more robust definition of completion would prevent potentially fraudulent activity. For example, a game could be in a completely unplayable state and announce that updates would be forthcoming without any intention to do so. A company might claim the maximum offset but the game that is eventually “released” might be in a such a poor quality or incomplete state. There are no robust requirements to ensure that declared expenditure has actually been spent on a project.

Recommendation:

- **A more robust definition of a game being “completed” is essential – further guidelines may elaborate on this.**
- **In the case of new games, applicants should supply reasonable evidence that claimed expenditure was in fact spent on the game applied for before a “certificate is issued”**

- **In the case of games being updated or live service games, applicants should supply reasonable evidence of changes from the original game to the released version before a “certificate” is issued**

**(g) The Relevance Test**

There “relevance test” set out in section 378-40(2) provides insufficient guidance to a Minister and the decision-making process is unnecessarily opaque. Without clear and transparent guidelines, this could represent a significant regulatory burden to businesses.

**Recommendation: Clear and transparent public guidelines should inform the Minister’s decision under the relevance test.**

**(h) Gambling games and loot boxes**

There is a growing call in Australia and overseas to regulate games that include ‘loot boxes’, gambling and gambling-like mechanics, and predatory design elements regarding in-app purchases.

Currently this legislation is silent on whether such potentially harmful games are able to access the DGTO. Screen Australia already prohibits certain game projects such as “gambling or gambling simulations” and “games which are substantially advertising or promotions” from accessing federal funding. The DGTO should be consistent with those requirements.

**Recommendation: Prohibit games that include loot boxes’, gambling and gambling-like mechanics, and predatory design elements regarding in-app purchases from accessing the DGTO.**