

APPLICATION FOR AUTHORISATION OF PROPOSED CONDUCT (NON-MERGER)

1 PARTIES TO THE PROPOSED CONDUCT

1.1 Applicant contact details

Australian Writers' Guild Authorship Collecting Society Limited ACN 073 648 076 (**AWGACS**) of Level 4, 70 Pitt Street, Sydney 2000.

Phone: +61 2 9319 0339

1.2 Contact person

Claire Pullen

Executive Director

Phone: [REDACTED]

Email: [REDACTED]

1.3 Description of business activities

Overview

AWGACS was established by the Australian Writers' Guild (**AWG**) in 1996 as a not-for-profit organisation with the purposes of collecting and distributing secondary royalties to Australian and New Zealand writers of scripts and/or screenplays for film, TV or any other audio-visual production (**Writer Members**). AWGACS has collected and distributed more than \$25 million (\$25,394,289 as at 31 May 2022) on behalf of Writer Members.

A proportion of these secondary royalties comprise Australian statutory royalties or "equitable remuneration" arising from the following statutory licences set out in the *Copyright Act 1968* (Cth) (**Copyright Act**):

- (a) cable and satellite retransmission rights under Part VC of the Copyright Act (**Retransmission Royalties**);
- (b) copying and communicating works and broadcasts by educational institutions under Division 4, Part IVA of the Copyright Act (**Educational Use Royalties**); and
- (c) use and reproduction by government agencies of previously broadcasted material under section 183 of the Copyright Act (**Government Use Royalties**),

(collectively, "**Australian Statutory Royalties**").

In addition to collecting and distributing Australian Statutory Royalties, AWGACS has reciprocal arrangements with 33 international collecting societies for the collection and distribution of secondary royalties arising from the use of copyright material in foreign jurisdictions (**International Royalties**).

AWGACS also provides general support and advice to its members regarding Australian Statutory Royalties and International Royalties (collectively, **Secondary Royalties**) and related rights and obligations.

Membership profile

AWGACS currently acts on behalf of more than 2100 members (2156 as at 20 June 2022).

Writer Members are not required to pay any registration fee or periodic membership fees to be an AWGACS member.

Collection Agreement

Individual royalty amounts comprising Secondary Royalties are typically derived from use of the copyright material across a number of platforms. This means that it is administratively impractical and often substantively difficult for individual members to monitor and collect these royalty amounts.

Accordingly, at present, Writer Members frequently elect to become a party to AWGACS's Collection Agreement for Secondary Royalties (**Collection Agreement**). Approximately 338 Writer Members have signed the Collection Agreement as at 29 June 2022. This represents a significant proportion of active Writer Members who are eligible to collect secondary royalties in practice (noting that only approximately 50% of all members ever become eligible to receive any royalties and a portion of these will not reach the de minimis threshold required for distribution). AWGACS has also been contemplating replacing the framework established by the Collection Agreement with the proposed conduct for some time and therefore has not been actively encouraging Writer Members to sign up to the Collection Agreement. Finally, AWGACS membership is not currently conditional on Writer Members signing the Collection Agreement and this presumption is naturally reflected in the total number of Writer Members who are parties to the Collection Agreement. In most cases, where AWGACS is actively collecting distributable royalties on behalf of a Writer Member, that member is a party to the Collection Agreement and such collection and distribution is performed by AWGACS pursuant to the terms of that agreement.

The key provisions of the Collection Agreement are as follows:

- (a) Writer Members licence the rights to administer their Australian Statutory Royalties and International Royalties (**Licence**) to AWGACS;
- (b) the Licence is an exclusive licence;
- (c) the Licence expressly permits AWGACS to collect Australian Statutory Royalties from Audio-Visual Copyright Society Ltd ACN 073 648 075 trading as Screenrights (**Screenrights**) on behalf of its Writer Members;
- (d) producers may still exploit primary rights in the Writer Members' works, in accordance with the terms of any contract or assignment deed between a Writer Member and the relevant producer;

- (e) the Licence extends to capture any future secondary royalties in circumstances where collective management is the most appropriate mechanism for effectively collecting and distributing those royalties; and
- (f) the Collection Agreement may be terminated by either AWGACS or the Writer Member by giving no less than six months' notice.

AWGACS proposes to replace the Collection Agreement with an arrangement which involves Writer Members assigning their rights to receive Secondary Royalties to AWGACS (**Rights Assignment**), as a condition of their membership with AWGACS being granted (in the case of prospective Writer Members) or continued (in the case of current Writer Members). AWGACS proposes to implement the Rights Assignment principally by amending its constitution following member approval of the proposed amendments at its annual general meeting in November 2023.

Secondary Royalty collection procedure

AWGACS collects Secondary Royalties for its Writer Members from within Australia and all around the world. AWGACS requires Writer Members to represent and warrant that they are the authors of the applicable works before collecting any royalties on their behalf.

In Australia and New Zealand, AWGACS collects Secondary Royalties from Screenrights, which is the designated royalty collecting society for audio-visual works under the Copyright Act. AWGACS collects and then remits these amounts to its Writer Members in accordance with its Distribution Policy. The process is administered through the MyScreenrights portal.

In relation to international works, AWGACS and other Confederation of Societies of Authors and Composers "**CISAC**" members either use shared CISAC databases or communicate via email to register Writer Members' works. AWGACS is rarely involved in disputes about international royalties. In AWGACS's opinion, this is due to the widespread use of additional legislative protections which seek to further protect the interests of writers (by making their rights to receive Secondary Royalties inalienable, for example), with the objective of ensuring that writers actually physically receive the equitable remuneration that is intended to be received by them.

Conversely, in Australia and New Zealand, anyone can make a claim to the "script" portion of Screenrights royalties and this frequently results in lengthy disputes in the form of "competing claims" (**Competing Claims**), some of which are never resolved.

1.4 Email address for service

awgacs@awg.com.au

2 CLASS OF PERSONS WHO ALSO PROPOSE TO ENGAGE, OR BECOME ENGAGED, IN THE PROPOSED CONDUCT AND ON WHOSE BEHALF AUTHORISATION IS SOUGHT

The proposed conduct would involve all future and current AWGACS members who write, or may write, either a script or screenplay for a film, television program or any other audio-visual production, which would thereby entitling them to receive Secondary Royalties.

3 THE PROPOSED CONDUCT

3.1 Description of proposed conduct

Background information – Secondary Royalty payments

The Copyright Act establishes a statutory scheme which allows third parties to use an author's copyright material for certain purposes prescribed by the legislation in exchange for payment of equitable remuneration to the relevant collecting society. The declared society for audio-visual material is Screenrights under section 135ZZT of the Copyright Act.

The three categories of entities which routinely use copyright material in exchange for mandatory payment of equitable remuneration are:

- (a) government organisations (e.g. which have the right to copy works from radio, television and the internet for government use);
- (b) educational institutions (e.g. which have the right to copy or communicate copyright material for educational purposes); and
- (c) audio-visual service providers (e.g. which have the right to retransmit free-to-air broadcasts).

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.

Screenrights collects these payments and apportions them to the different categories of persons involved in the creation of an audio-visual work according to a scheme of allocation. For example, AWGACS collects monies paid for the "script" portion of an audio-visual work. The current scheme of allocation for Educational Use Royalties is as follows:

(a)	cinematograph film:	68.5%
(b)	literary and dramatic works:	22.1%
(c)	commissioned sound recordings:	0.67
(d)	musical works:	7.40%
(e)	library sound recordings:	0.21%
(f)	commercial sound recordings:	1.11%

Currently, Screenrights designates 22.1% of all royalties collected for audio-visual products as the “script” portion – meaning that, in theory, the author of the script should be paid those amounts.

Background information – Circumstances which have led to formulation of the proposed conduct

In or around 2000, Screenrights ceased distributing the “script” royalties to the scriptwriter(s) of the audiovisual works and instead commenced making allocations based on the contractual position of the parties. Under this new process, scriptwriters could only claim “script” royalties from Screenrights if their contract with the producer contained a clause expressly reserving those royalties to the scriptwriter. If the contract between the scriptwriter and the producer was silent in respect of royalties, no claim could be made by the scriptwriter and in most cases, the “script” royalties would be paid to the producer.

Industry template agreements (e.g. the Series and Serials Agreement 2008 (**SASA**) and the Miniseries and Telemovie Agreement 2010 (**MATA**)) contain clauses that expressly reserve Secondary Royalties to the scriptwriter. However, these agreements are not always used. Many production companies, free-to-air broadcasters, and international media companies have their own internal templates. An inequality in bargaining power often results in scriptwriters “signing away” their entitlement to Secondary Royalties.

AWGACS is therefore frequently involved in resolving disputes between its members and producers. These disputes are referred to as “Competing Claims” and typically occur between AWGACS members, who are the original authors of scripts and production companies, which have purchased copyright in the scripts, which leads to a lack of agreement in relation to which one of them is entitled to the script portion of royalties.

It is AWGACS’s understanding that Screenrights is facing significant issues administrating the statutory royalty schemes. In AWGACS’s opinion, this is likely due to, at least in part, the significant number of Competing Claims. Whilst the nature of those issues is not a focus of this application, AWGACS’s experience as a key stakeholder in Screenrights’ dispute resolution system is that it is currently time consuming and cumbersome.

In order to address these contextual issues, AWGACS has formulated the proposed conduct on the basis that it would:

- (a) ensure scriptwriters are, more often than not, equitably remunerated for secondary uses of their works as intended by the legislation and Screenrights’ policy;
- (b) reduce the number and complexity of Competing Claims and the associated administrative burden and costs of handling these claims; and
- (c) streamline processes and reduce the administrative costs associated with collecting and distributing Secondary Royalties in Australia.

Amendment to constitution

The proposed conduct comprises AWGACS amending its constitution to:

- (a) require all prospective Writer Members to complete the Rights Assignment as a condition of their AWGACS membership application being approved;
- (b) require all existing Writer Members to either complete the Rights Assignment or resign as an AWGACS member (subject to limited exceptions); and
- (c) make the necessary ancillary amendments required to implement the Rights Assignment,

(collectively, **Constitutional Amendments**).

The processes implemented by the Constitutional Amendments will replace the existing practice of Writer Members being able to “opt in” to the Collection Agreement.

Comparison of Writer Members’ rights and obligations under the Collection Agreement and the proposed conduct

Because the Licence granted by a Writer Member to AWGACS under the Collection Agreement is exclusive, the practical differences between a Writer Member’s rights and obligations under the Collection Agreement as compared with their rights and obligations under the proposed conduct will be minimal. The main differences are that Writer Members would be required to agree to the Rights Assignment as a condition of their application for AWGACS membership being accepted or their existing membership continuing.

Rights Assignment (future members)

It is proposed that each prospective Writer Member will be required to sign relevant documentation to give effect to the Rights Assignment, in a form prescribed by the Board from time-to-time, as part of their membership application (**Assignment Documentation**). AWGACS membership will not be granted to a prospective Writer Member who does not sign the Assignment Documentation as part of their Membership Application.

Rights Assignment (existing members)

In respect of existing members, AWGACS will issue the applicable Assignment Documentation to each Writer Member. If a Writer Member does not sign and return the Assignment Documentation, then in most circumstances, they will be requested to resign as an AWGACS member (**Resigning Writer Member**). In limited circumstances, the AWGACS Board may allow a member who does not sign the Assignment Documentation to maintain their AWGACS membership pursuant to the exercise of its discretion, in accordance with the provisions of the amended constitution.

Collection and distribution of Secondary Royalties

On and from the date of execution of the Assignment Documentation, AWGACS will collect Secondary Royalties derived from the works of the relevant Writer Member

from Screenrights and/or international collecting societies. AWGACS will then distribute amounts comprising the Secondary Royalties to the Writer Member in accordance with its Distribution Policy.

Reassignment of rights on resignation

A Resigning Writer Member will receive a reassignment of rights relating to the collection and distribution of Secondary Royalties, which were previously assigned by the Resigning Writer Member to AWGACS pursuant to the Assignment Documentation (**Reassignment**). Each Reassignment will be on terms which include:

- acknowledgement that there is a minimum 12 months' period during which the Resigning Writer Member will not be able to re-register as an AWGACS member (unless the Board exercises its discretion to permit the application to be registered); and
- a delayed effective date which coincides with AWGACS' reporting periods (i.e. either 1 January or 30 June of the relevant year).

3.2 Relevant provisions of the *Competition and Consumer Act 2010 (Cth)* (Competition and Consumer Act)

The provisions of the Competition and Consumer Act that could potentially be contravened by the proposed conduct are those that relate to:

- concerted practices (section 45); and
- exclusive dealing (section 47).

The proposed conduct is similar to the conduct proposed to be undertaken by the Australian Screen Directors Authorship Collecting Society Ltd (**ASDACS**) (authorisation number: AA1000474-1). However, the conduct proposed by AWGACS covers a slightly broader set of secondary royalties because it includes not only the assignment of Retransmission Royalties, but also the assignment of Educational Use Royalties and Government Use Royalties.

In relation to whether the proposed conduct would breach the Competition and Consumer Act if the conduct was not authorised, AWGACS highlights that the conduct does not seek to change, in substance, how the beneficial entitlement to these rights is held as between writers and third parties.

Instead, the conduct gives effect to the statutory framework underpinning payment of equitable remuneration by way of Secondary Royalties. Accordingly, AWGACS's view is that because the aim of the conduct is to affirm the prevailing status quo, it should not have the effect of substantially lessening competition in the relevant market.

3.3 Rationale of proposed conduct

A key purpose of the legislative framework set out in the Part IVA Division 4, Part VC and Part VII, Division 2 of the Copyright Act, was to set out ongoing revenue streams

which were statutorily guaranteed in order to ensure screenwriters were fairly compensated for the mandatory exploitation of their work. This minimum equitable remuneration comprises Secondary Royalties.

While the industry has implemented template agreements (for example, the MATA and the SASA) which, if used, would ensure that screenwriters received their minimum equitable remuneration in the form of Secondary Royalties, these industry template agreements are not always used by Writer Members and producers in practice. In particular, Writer Members occasionally agree to assign (or purport to assign) their Secondary Royalties to producers.

This has led to a situation where AWGACS is frequently involved in resolving disputes between Writer Members and producers in respect of their Competing Claims to Australian Statutory Royalties which have been collected by Screenrights.

The proposed conduct would help clarify which party is properly entitled to receive Secondary Royalties, thereby reducing the number of Competing Claims. This is because AWGACS, as the assignee under the Deed of Assignment, will be entitled to collect Australian Secondary Royalties on behalf of relevant Writer Members. In those circumstances, any subsequent purported assignment of those Australian Statutory Royalties by a Writer Member to a producer would be ineffective because those rights are subject to a prior assignment in favour of AWGACS and this would be able to be proved with documentary evidence with relative ease.

Accordingly, the key rationales of the proposed conduct are to:

- (a) help clarify who owns Secondary Royalties at any point in time;
- (b) reduce disputes in relation to Competing Claims; and
- (c) streamline processes and reduce the administrative costs associated with collecting and distributing Secondary Royalties.

3.4 The term of authorisation sought

AWGACS seeks an authorisation period of 10 years on the basis of the stability of the core legal principles (which have a legislative basis) relevant to the context within which the proposed conduct is to occur.

4 CLASSES OF PERSONS WHO MAY BE DIRECTLY IMPACTED BY THE PROPOSED CONDUCT

Producers and their industry representative bodies (including Screen Producers Australia ABN 46 091 470 324 (**Screen Producers Australia**)) may be directly affected by the proposed conduct. This is because if the proposed conduct is not authorised, there may be circumstances where a producer might otherwise have obtained an assignment of rights to receive Secondary Royalties from a Writer Member.

However, if the proposed conduct is authorised, unless a Writer Members consciously decides that they wish to assign their rights to receive Secondary Royalties to a third party, Writer Members will remain entitled to receive these amounts comprising their Minimum Equitable Remuneration and these amounts will be collected by AWGACS on their behalf.

The proposed conduct should not cause any flow-on effects to consumers.

5 PRODUCTS AND/OR SERVICES

AWGACS is the royalty collecting society established by the AWG, which is the industry representative body for Writer Members. It operates exclusively for the benefit of its members and has no direct competitors. There are no other Australian organisations that offer or provide similar services to writers. Screenrights is the closest comparable organisation. A list of collecting societies which are bound by the Copyright Collecting Societies Code of Conduct can be viewed at: <https://www.copyrightcodeofconduct.org.au/collecting-societies>.

Additional parties and industry associations within the Australian script and screenplay writing industry are as follows:

- directors;
- the royalty collecting society for directors, ASDACS;
- producers and production companies;
- the representative body for producers and production companies, SPA
- composers and musicians;
- the royalty collecting society for composers and musicians, APRA AMCOS;
- Screenrights; and
- New Zealand Writer's Guild.

Writer Members are often creators of project concepts in addition to being writers. Therefore, they frequently compete with each other to secure project funding and/or the production of project concepts in addition to script and screenplay writing services for film, TV or any other audio-visual productions (**Services**).

6 RELEVANT INDUSTRY

As above.

7 MARKET SHARE

While there are a small number of Writer Members who have a significantly higher proportion of works either in progress or forming part of their repertoire as compared with the mean and/or median of other Writer Members, the nature of the Services is such that they are mostly provided personally and are therefore not typically scalable from a commercial perspective. Accordingly, each Writer Member holds a very small share of the relevant market.

8 ABILITY TO COMPETE

Any Writer Member who wishes to collect Secondary Royalties directly is free to do so. AWGACS membership is voluntary and Writer Members are not prevented or impeded from receiving their Minimum Equitable Remuneration by not signing up as an AWGACS member.

Although the process is likely to be administratively more difficult for writers who choose to collect royalties independently of AWGACS (particularly in respect of International Royalties), this is due to long-standing systemic issues in the way that copyright royalties are collected and administered worldwide and are unrelated to the proposed conduct.

9 PUBLIC BENEFIT

AWGACS submits that it is in the public interest if the parties to the development of creative projects are fairly remunerated for their skills, personal exertion and artistry. The public benefits from a vibrant creative industry that is set up to continue to attract talent to perform the various roles making up that industry (i.e. screenwriters, directors, producers, musicians etc.).

What constitutes fair remuneration is not fixed or necessarily certain. However, the prevailing standards in respect of the payment of Secondary Royalties and Minimum Equitable Remuneration are substantially as set out in the Copyright Act. The proposed conduct is consistent with upholding the statutory regime.

The proposed conduct should also reduce the number of Competing Claims by establishing a stronger presumption that AWGACS (and ultimately, the relevant writer(s)) is the party rightfully entitled to receive Secondary Royalties from Screenrights for the “script” portion of works. This is because once a writer becomes a Writer Member, their right to receive Secondary Royalties will be assigned to AWGACS and any subsequent purported assignment of those rights to a third party producer, for example, whilst the writer is a Writer Member, will be ineffective.

For context, AWGACS is currently has 1291 Competing Claims under management for the year 2022/2023, which are due to expire in June 2023. There are also a further 449 cases which are likely Competing Claims, pending lodgement of the formal documentation by the 30 April 2023 deadline. If these Competing Claims are not able to be resolved before they expire, the amounts representing the Secondary Royalties which are the subjects of the Competing Claims will not be distributed to any of the parties to the Competing Claims and will instead revert to a fund which is maintained by Screenrights for this purpose. The total amount which is due to expire in June 2023 is \$135,205.41 (**Expiring Royalties**). Of this, approximately \$17,159.13 would be expected to be recouped by AWGACS as a result of previous Secondary Royalties related to the Competing Claims having been paid to AWGACS.

It is anticipated that the proposed conduct would reduce the number of Competing Claims and this would, in turn, result in a greater proportion of the Expiring Royalties being distributed to parties involved in the underlying projects, rather than expiring and not being able to be distributed to any of the stakeholder parties.

AWGACS intends to collaborate with Screenrights to explore what changes could potentially be made to how the Australian Secondary Royalty scheme is administered in practice having regard to the changes which would be implemented by the proposed conduct relating to Writer Members’ increased ability to establish proof of legal ownership of Secondary Royalty rights more quickly and easily and with less contention. It follows that a reduction in the number of Competing Claims would be expected to reduce the overall associated administrative burden and costs of handling these claims.

10 PUBLIC DETRIMENT

AWGACS does not consider that the proposed conduct will have any detrimental effect on the public.

11 CONTACT DETAILS OF RELEVANT MARKET PARTICIPANTS

12.1 Screen Producers Australia

Email: info@screenproducers.org.au

Phone: +61 2 9360 8988

Suite 2, Level 1, 36 Fitzroy Street, Surry Hills NSW 2010.

12.2 New Zealand Writers Guild

Email: guildhq@nzwg.org.nz

Phone: +64 9 360 1408

PO Box 47886, Ponsonby, Auckland, New Zealand 1144

12.3 Australian and New Zealand screenwriters who are not AWGACS members

12.4 Screenrights

Email: info@screenrights.org

Phone: +61 2 8038 1300

PO Box 853, Broadway NSW 2007

12.5 APRA AMCOS

Email: info@apra.com.au

Phone: +61 2 9935 7900

Locked Bag 5000 Strawberry Hills NSW 2012

12.6 Cable and satellite providers and other retransmitters of free-to-air broadcasts

12 DECLARATION BY APPLICANT

The undersigned declare that, to the best of their knowledge and belief, the information given in response to questions in this form is true, correct and complete, that complete copies of documents required by this form have been supplied, that all estimates are identified as such and are their best estimates of the underlying facts, and that all the opinions expressed are sincere.

The undersigned undertake(s) to advise the ACCC immediately of any material change in circumstances relating to the application. The undersigned are aware that giving false or misleading information is a serious offence and are aware of the provisions of sections 137.1 and 149.1 of the Criminal Code (Cth).



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Signature of Claire Pullen
Executive Director, AWGACS

25/05/23

.....

Date signed



Contact officer: Jaime Martin
Contact phone: (03) 9290 1477

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tel: (02) 6243 1111

8 March 2023

exemptions@acc.gov.au
www.acc.gov.au

Molly Ulm
Manager
Australian Writers' Guild Authorship Collecting Society

Via email: molly.ulm@awgacs.com.au

Dear Ms Ulm

Fee waiver request – Australian Writers' Guild Authorship Collecting Society (AWG Authorship Collecting Society)

I refer to your letter of 27 February 2023 to the Australian Competition and Consumer Commission (ACCC) in respect of a proposed application for authorisation. In your letter you have requested that the ACCC grant a fee waiver in respect of the proposed arrangements.

You have requested that the fee to be paid in relation to an application for authorisation to be lodged by the AWG Authorship Collecting Society be waived in whole.

In support of your request, among other things, you submitted that:

- (a) AWG Authorship Collecting Society is a not for profit organisation and has minimal cash assets on hand and
- (b) it would not be financially practical to request a financial contribution towards the application fee from your members, as the annual average income of members is estimated to be below the national average wage.

Having regard to the above, as a person authorised to assess fee waiver requests for and on behalf of the ACCC, I wish to advise that no application fee will apply with respect to the anticipated application for authorisation from the AWG Authorship Collecting Society.

This decision will remain in force for a period of three months. The three-month period will expire on 8 June 2023.

A copy of this letter should accompany the application for authorisation to be lodged by the AWG Authorship Collecting Society. The cover letter to the application should mention that a letter from the ACCC regarding a fee waiver is enclosed with the application. The application together with this letter will be placed on the public register at that time.

If the application for authorisation is lodged by the AWG Authorship Collecting Society after 8 June 2023, a full application fee of \$7500 will apply, unless you make, and the ACCC approves, another fee waiver.

Should you have any queries in relation to this matter, please do not hesitate to contact Jaime Martin on (03) 9290 1477 (or jaime.martin@acc.gov.au).

Yours sincerely

A handwritten signature in black ink, appearing to read 'Lyn Camilleri', written in a cursive style.

Lyn Camilleri
General Manager
Exemptions