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Submission in response to:  
**Australian Writers' Guild Authorship Collecting Society Limited application to the  
ACCC for authorisation  
AA1000642 – interested party consultation**

**27 October 2023**

Screenrights is the trading name of Audio-Visual Copyright Society Limited ACN 003 912 310  
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## About Us

1. Audio-Visual Copyright Society Limited trading as "Screenrights" is a collecting society representing rightsholders in film, television and radio programs. Screenrights has over 5,000 members in 69 countries world-wide covering a wide spectrum of copyright owners and their agents including broadcasters, producers, writers, music copyright owners and creators of artistic works.
2. Screenrights is appointed by the Commonwealth and the Copyright Tribunal to administer several statutory licensing schemes under the *Copyright Act 1968 (Cth)* (the **Act**). This includes educational copying and communication of broadcasts under Part IVA Division 4 of the Act, retransmission of free to air broadcasts under Part VC of the Act and government copying in respect of television, radio and internet broadcasts under s183 of the Act.
3. The statutory licences operate as remunerated exceptions to copyright infringement. Screenrights collects fees for these uses and distributes those fees as royalties to its members, who are the owners of the copyright in the programs used (or their agents).
4. In the 2021/22 financial year, Screenrights made available a record \$49.7 million for distribution to Screenrights members payable to our members under all our statutory licenced and other services, with \$45.9 million in royalties distributed to 1,709 members.
5. Supporting its members' right to fair compensation for the usage of their work has always been and remains a fundamental objective for Screenrights.

## Overview

6. A version of the Australian Writers' Guild Authorship Collecting Society Limited (the **Applicant**) application to the ACCC for authorisation, submitted on 25 May 2023 AA1000642 (**Application**), including additional paragraph numbers in mark-up is attached as Annexure 1 to this submission. Where required, this submission refers to the paragraph numbers in the Application as shown in Annexure 1.
7. Screenrights welcomes the opportunity to participate in the interested party consultation process and appreciates the ACCC's contact on 11 August 2023 regarding the Application, prior to which Screenrights was not aware of the Application having been submitted.
8. Screenrights has conveyed to the Applicant its key observations, which are:
  - a. An authorisation in the terms sought would fail to achieve the outcome the Applicant intends. Therefore, in response to an authorisation in the terms sought, Screenrights' would have no basis to change its distribution practices, because:
    - i. Screenrights' obligation, as the collecting society declared by the Commonwealth Attorney-General to administer the scheme, is to pay the copyright owner or its agent;
    - ii. the Applicant is already the agent appointed by its members to receive royalties on behalf of its members;
    - iii. as a matter of law, a right to receive Secondary Royalties is not a right or interest in copyright. Therefore, an "assignment" of that right to the Applicant would have no bearing on how Screenrights would distribute statutory royalties or resolve Competing Claims; and
    - iv. for the reasons at (i)-(iii) above, Screenrights would continue to pay the Applicant, as the agent of its members where such members are the owners of the relevant copyright. The authorisation will not change this distribution practice as it will not make the Applicant the owner of the relevant copyright,

- b. The proposed conduct does not appear to be an unconditional irrevocable assignment and provides scope for a writer to “consciously decide(s) that they wish to assign their rights to receive secondary royalties to a third party”. In Screenrights’ view, an agreement between a writer and a producer which assigns the relevant copyright from the writer to the producer would be a conscious decision to assign the rights to a third party (the producer). The capacity to depart from the assignment to the Applicant is liable to lead to the following undesirable outcomes:
    - i. uncertainty and confusion as to who is the relevant copyright owner entitled to Secondary Royalties at any point in time;
    - ii. an increase in disputes in relation to competing claims; and
    - iii. an increase in the complexity of processes and administrative costs associated with collecting and distributing secondary royalties.
9. Screenrights makes the following additional observations:
- a. the representation of alleged deficiencies in Screenrights’ operations (and particularly its procedures for resolving Competing Claims) which are key grounds cited in support of the Application is problematic because it is inaccurate and therefore is not a proper basis on which an authorisation should be made; and
  - b. assuming that the proposed conduct provided for an assignment of the relevant copyright from the writer to the Applicant (which position Screenrights disputes, as above) the Application, if authorised, would effect a fundamental change in the rights position as between writers and producers, particularly in regard to certain genres of productions. Therefore, the contention in the Application that the proposed conduct “*does not seek to change, in substance, how the beneficial entitlement to these rights is held as between writers and third parties*” should be further interrogated.
10. These matters are discussed in more detail below.

## Proposed Conduct

(Application paragraph 1.3.10)

11. The Application seeks authorisation to change the Applicant’s’ membership arrangements, specifically that members assign “*their rights to receive Secondary Royalties*” to the Applicant as a condition of membership.
12. There are a number of rights that a copyright owner has, including for example, the exclusive right to reproduce or copy the work or communicate it to the public. These are some of the rights or interests in a work which a copyright owner may choose to assign or license.
13. A right to receive royalties, however, is not a right or interest in copyright *per se*. This means that an “assignment” of that right to the Applicant would have no bearing on how Screenrights would distribute statutory royalties or resolve Competing Claims. At most, such an assignment might amount to a direction by the writer that any royalties to which they would be entitled should be paid to the Applicant. This, in effect, goes no further than the current appointment of the Applicant as agent under the existing Collection Agreement.
14. By comparison, in the Australian Screen Directors Authorship Collecting Society Ltd application for authorisation AA1000474 (**ASDACS Application**), ASDACS sought to alter its constitution to make its membership conditional upon directors assigning to it all of the copyrights directors have in relation to

the 'Retransmission Scheme', as set out in the *Copyright Act 1968* (Cth) (the **Copyright Act**).<sup>1</sup> The proposed assignment of rights from a director to ASDACS was the copyright ownership interest in a *cinematograph film* given to directors under section 98 of the Act and limited to "only so far as the copyright consists of the right to include the film in a retransmission of a free-to-air broadcast" (section 98(6)).<sup>2</sup>

15. It may be that the formulation of the proposed conduct stems from the Collection Agreement's description of the appointment of the Applicant as agent to collect royalties on behalf of a member as an exclusive licence arrangement, which is problematic for the same reasons outlined above. This issue is not dealt with in this submission, however Screenrights notes that these issues were specifically raised by Screenrights with the Applicant in April 2021.
16. For these reasons, the proposed conduct does not achieve the Applicant's intended purpose. Notwithstanding that, in order to properly address the submissions made in the Application, the next parts of Screenrights' submission assume that the proposed conduct comprises a proper assignment of a valid right or interest in the relevant copyright.

(Application paragraph 4.2)

17. The proposed conduct does not appear to be an unconditional irrevocable assignment and provides scope for a writer to "*consciously decide(s) that they wish to assign their rights to receive Secondary Royalties to a third party*". The capacity to depart from the assignment is liable to lead to the following undesirable outcomes:
  - a. uncertainty and confusion as to who is the relevant copyright owner entitled to Secondary Royalties at any point in time;
  - b. an increase in disputes in relation to Competing Claims; and
  - c. an increase in the complexity of processes and administrative costs associated with collecting and distributing Secondary Royalties.

(Application paragraph 1.3.13)

18. The Application states that legislative protections in overseas jurisdictions have the "*objective of ensuring that writers actually physically receive the equitable remuneration that is intended to be received by them*". By implication, there is a contention that writers are not receiving statutory royalties to which they are entitled in Australia. Screenrights does not agree and understands that the purpose of the statutory scheme is to provide remuneration to copyright owners. Screenrights agrees that the intention of some remuneration schemes in other jurisdictions (notably continental Europe) are structured differently and those schemes do reserve remuneration for authors, including writers. It is also correct that these schemes cover exercises of copyright similar to the statutory licences administered by Screenrights, particularly in regard to retransmission. However, in Australia, the Copyright Act does not preserve remuneration to authors, nor is it intended to reserve a specific percentage of royalties for authors (see below sub-heading "*Application paragraph 3.1.5*" regarding 22.1%). To the contrary, the provisions in the Copyright Act relating to collecting societies administering statutory licences specify that they collect for "eligible rights holders" meaning, for example at ss113V(9)(b)(i) "the owner of the copyright in a word, a sound recording or a cinematograph film...."

(Application paragraph 1.3.14)

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<sup>1</sup> [ACCC Final Determination on the application for authorisation lodged by Australian Screen Directors Authorship Collecting Society in respect of arrangements for the distribution of income arising from retransmission of audio-visual work AA1000474](#), 28 August 2020 at 1.1.

<sup>2</sup> [Australian Screen Directors Authorship Collecting Society Ltd Application for Authorisation](#), 13 March 2020 at 3.4 and 3.7.

19. The Application states:

*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.*

It is not correct to say that "anyone can make a claim to the "script" portion of Screenrights royalties" Screenrights' members making a claim for "script" royalties provide a warranty to Screenrights that they are the owner of the copyright in the script.

Where there is a competing claim, members are asked to provide evidence (for example, a contract) to support their warranty.

Some Competing Claims are never resolved, including for the following reasons:

- a. neither party attempts to contact the other party to resolve the dispute;
- b. neither party elects to participate in the Screenrights alternative dispute resolution process (including because the value of royalties in dispute is low);
- c. neither party provides evidence to verify their warranties;
- d. where a party provides proper supporting evidence and one does not, the royalties will be awarded to the party providing the evidence; and
- e. where Party A provides evidence that is more persuasive than Party B, the royalties will be awarded to Party A.

*(Application paragraph 3.1.5)*

20. The Application states:

*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.*

The assertion that, in theory, the author of the script should be paid those amounts is not correct. The owner of the copyright in the script should be paid those amounts. In practice, sometimes scriptwriters are paid (where they have retained the copyright in the script) and other times other copyright owners (who are not the scriptwriter) are paid where they have taken an assignment of the copyright.

Approximately 35% of the 22.1% pool of script royalties is paid by Screenrights to writer claimants. Screenrights understands that it is industry practice for writers to assign their rights in a script to a third party (often a producer) in order to facilitate the production of a film or television program.

*(Application paragraph 3.1.6)*

21. The Application states:

*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.*

This is not correct. Screenrights has an obligation to pay the copyright owner as specified in the Copyright Act. The contractual position of the parties has always been a relevant factor for over 30 years in making this determination.

*(Application paragraph 3.1.7)*

22. The Application states:

*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.*

Screenrights agrees that these agreements contain express reservations. Screenrights has introduced specific distribution processes to reflect this.

Screenrights also observes that it is common practice for market participants to use other forms of contracts containing obligations to pay Secondary Royalties to other beneficiaries and not the author of the script.

*(Application paragraph 3.1.8)*

23. The Application states:

*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.*

Screenrights does not agree that it follows that the practice of the assignment of rights by writers under individual agreements (apart from certain industry-agreed agreements) leads to a frequency of disputes between writers and producers.

It is open to the contracting parties to include a standard form departure provision to indicate retention by a writer of the copyright in the script giving rise to an entitlement to receive Secondary Royalties. It is also open to the parties to adopt an industry agreement like the SASA or MATA.

*(Application paragraph 3.1.9)*

24. The Application states:

*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.*

This is not correct and is an erroneous argument.

Screenrights distributes royalties using just under 3 million records for secondary use of content in Australia and New Zealand each year. Screenrights distributes more than \$40 million every year and achieves an average of 98% of royalties distributed within the statutory distribution period. We keep our Expenses to Collections ratio down to around 15-17%. Overall, the administration of the scheme is demonstrably efficient and accurate. Moreover, the proportion of royalties paid to copyright owners is, to Screenrights' knowledge, among the highest proportion of all audio-visual collecting societies globally.

Of the remaining 2% of undistributed royalties, approximately one third are not distributed due to unresolved Competing Claims. In the most recent financial year, unresolved competing claims

amounted to 0.48% of royalties. Competing claims represent an extremely small proportion of the total distribution.

Nevertheless, Screenrights has recently undertaken a review of its dispute resolution procedures which concluded that the cost of administering the Competing Claims process could be reduced and payment made with greater efficiency by simplifying the process. This has led to a decision by the Board to introduce a new process to assist members to resolve Competing Claims.

*(Application paragraph 3.1.10)*

25. The Application provides the following grounds for the proposed conduct:

- a) *ensure scriptwriters are, more often than not, equitably remunerated for secondary uses of their works as intended by the legislation and Screenrights' policy;*

The policy objective of the statutory licence scheme is to provide an exception to copyright infringement, a feature of which is the payment of equitable remuneration as compensation to copyright owners (eligible rights holders as defined in the Act). It is wholly permissible and common industry practice for scriptwriters to assign their rights to Secondary Royalties and this practice does not represent a derogation of the policy purpose of the statutory schemes.

By implication, it does not follow that scriptwriters are not being equitably remunerated for secondary uses of their works or that the proportion of royalties paid to copyright owners as administered by Screenrights is somehow contrary to the intention of the legislation and Screenrights' policy.

In relation to this argument in the Application, Screenrights is obliged to submit in response that it is acting in accordance with its obligations and in compliance with the various legislative and regulatory sources of those obligations.

The scheme allows for works to be used in certain contexts (education, government, retransmission), in exchange for the payment of equitable remuneration to the copyright owners in those works.

If what is being proposed is a change in the rights position of writers to make it impossible for them to assign their copyright in the script and their entitlement to secondary script royalties, it would be more correct to say that the proposed conduct is designed to ensure that there can be no assignment of the copyright in the script insofar as that copyright gives rise to an entitlement by a writer to receive to secondary script royalties; and to ensure that screenwriters, over time, become irrevocably entitled to 100% of the 22.1% script royalties.

- b) *reduce the number and complexity of Competing Claims and the associated administrative burden and costs of handling these claims; and*

Screenrights has introduced (from 1 July 2023) a new process designed to assist members to deal with Competing Claims. This will reduce the number and complexity of Competing Claims, as well as the associated administrative burden and costs.

- c) *streamline processes and reduce the administrative costs associated with collecting and distributing Secondary Royalties in Australia.*

If implemented, this proposal will not streamline processes for Screenrights, nor will it reduce Screenrights' administrative costs as:

- a. the proposed conduct does not affect the intended purpose as there is no express assignment of copyright;
- b. if this error was corrected by the Applicant, then the proposed conduct may form the basis of an Express Resolution Process Presumption under Screenrights' Competing Claim Resolution Procedures; and

- c. the (non-writer) party against whom the Presumption would be proposed to be applied would have the opportunity to overturn the Presumption. This is because it is not clear whether the proposed conduct would still allow writers to assign their right to Secondary Royalties to a third party (see page 8, para 4 “*unless a Writer Members (sic) consciously decides that they wish to assign their rights to receive Secondary Royalties to a third party...*”).

*(Application paragraph 3.2.2)*

26. The Application states that:

*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.*

For reasons discussed above, Screenrights submits that the effect of the proposed conduct is not similar to the ASDACS Application. Again, for the reasons discussed above, if the proposed conduct was authorised, Screenrights would not change its distribution practices to create a Presumption in favour of writers, contrary to the outcome of the ASDACS application.

*(Application paragraphs 3.2.3 and 3.2.4)*

27. The Application states that:

*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.*

Screenrights does not agree that the proposed conduct gives effect to the statutory framework underpinning payment of equitable remuneration by way of secondary royalties, nor does it affirm the prevailing status quo, or at least, to the extent that it does affirm the prevailing status quo, it does so because the assignment is ineffective.

As discussed above, it is Screenrights' experience that there are a number of approaches to the treatment of rights to statutory royalties which include the use of industry-agreed contracts as well other forms of contracts featuring different departures and rights reservations.

It is therefore not correct to represent that the express reservation of copyright in relation to Secondary Royalties is in fact the prevailing status quo.

Screenrights makes no observation on any impact or otherwise in relation to any potential or actual substantial lessening of competition.

*(Application paragraph 3.3.1)*

28. The Application states that:

*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.*

This is a key purpose in relation to copyright owners.

*(Application paragraph 3.3.2)*

29. The Application states that:

*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.*

The limited use of these agreements does not support the applicant's contention that the proposed conduct simply maintains the status quo. It is also entirely contrary to the applicant's proposition that the proposed conduct does not impact how the beneficial entitlement to these rights is held as between writers and third parties.

*(Application paragraph 3.3.3 and 3.3.4)*

30. The Application states that:

*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.*

It does not follow that the common departure from the MATA and the SASA and the assignment of Secondary Royalties by writers to producers leads to the Applicant being involved in Competing Claims.

The proposed conduct would clarify which party is entitled to Secondary Royalties by changing the rights position as between writers and producers.

However, the proposed conduct would not help to clarify which party is the copyright owner entitled to Secondary Royalties because it is not clear whether:

- a. the proposed conduct is limited to Secondary Royalties arising from future events, or whether it is also retrospective in its operation; and
- b. it would still be possible for a writer to "consciously" assign their rights to a third party.

*(Application paragraph 4.1, 4.2 and 4.3)*

31. The Application states that:

*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.*

Screenrights reiterates its observation that that the proposed conduct provides scope for a Writer Member to consciously decides that they wish to assign their rights to receive Secondary Royalties to a third party and that this capacity is liable to lead to:

- a. uncertainty and confusion as to who is the relevant copyright owner entitled to Secondary Royalties at any point in time;
- b. increase disputes in relation to Competing Claims; and
- c. cause complexity in processes and increase the administrative costs associated with collecting and distributing Secondary Royalties.

## Conclusion

32. Screenrights would not object to an authorisation in terms which would achieve the outcome intended by the Applicant. While such an authorisation may change industry practice in regard to the retention of copyright by scriptwriters, that is not a matter on which Screenrights has a view. As with the ASDACS authorisation which made such a change for directors, Screenrights would consider the proposed conduct merely in terms of its potential impact on the administration of the statutory licence.
33. However, for the reasons set out above it is concerned that an authorisation in the terms proposed would not in fact achieve this and may instead lead to an erroneous, problematic, and ineffective outcome.

**ANNEXURE 1**  
**(PLEASE SEE NEXT PAGE)**

# 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*

1.3.1 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.

1.3.2 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**").

1.3.3 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**).

- 1.3.4 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*

- 1.3.5 AWGACS currently acts on behalf of more than 2100 members (2156 as at 20 June 2022).
- 1.3.6 Writer Members are not required to pay any registration fee or periodic membership fees to be an AWGACS member.

*Collection Agreement*

- 1.3.7 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.

- 1.3.8 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.

- 1.3.9 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.

- 1.3.10 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*

- 1.3.11 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.
- 1.3.12 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.
- 1.3.13 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.
- 1.3.14 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](mailto: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**

- 2.1 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*

- 3.1.1 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.
- 3.1.2 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).

3.1.3 In the screen sector, these payments are collectively referred to as "secondary royalties" because they relate to a "secondary use"<sup>11</sup> that flows on from the primary use - being the broadcast itself.

3.1.4 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%

3.1.5 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*

3.1.6 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.

3.1.7 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.

- 3.1.8 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.
- 3.1.9 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.
- 3.1.10 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.
- 3.1.11 *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**).
- 3.1.12 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*
- 3.1.13 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)*
- 3.1.14 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)*

- 3.1.15 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*

- 3.1.16 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*

- 3.1.17 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)**

- 3.2.1 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).

- 3.2.2 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.

3.2.3 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.

3.2.4 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**

3.3.1 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.

3.3.2 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.

3.3.3 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.

3.3.4 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.

3.3.5 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**

3.4.1 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**

4.1 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.

4.2 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.

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

## 5 PRODUCTS AND/OR SERVICES

5.1 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>.

5.2 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.

5.3 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

6.1 As above.

## 7 MARKET SHARE

7.1 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

- 8.1 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

- 9.1 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.).
- 9.2 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.
- 9.3 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.
- 9.4 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.
- 9.5 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.
- 9.6 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**

10.1 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](mailto: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](mailto: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](mailto:info@screenrights.org)

Phone: +61 2 8038 1300

PO Box 853, Broadway NSW 2007

**12.5 APRA AMCOS**

Email: [info@apra.com.au](mailto: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**

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**12 DECLARATION BY APPLICANT**

- 12.1 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.
- 12.2 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).



Signature of Claire Pullen  
Executive Director, AWGACS

25/05/23

Date signed



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

23 Marcus Clarke Street  
Canberra ACT 2601  
GPO Box 3131  
Canberra ACT 2601  
tel: (02) 6243 1111

8 March 2023

exemptions@accc.gov.au  
www.accc.gov.au

Molly Ulm  
Manager  
Australian Writers' Guild Authorship Collecting Society

**Via email:** [molly.ulm@awgacs.com.au](mailto: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](mailto: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