Modern Awards Review 2023-24
(AM2023/21)

Organisation:

Australian Writers' Guild
Australian Writers' Guild Authorship Collecting Society

Address:

4/70 Pitt Street
Sydney
NSW 2000

Contact details:

Name: Bryant Apolonio, Industrial and Policy Manager
Email: Bryant.apolonio@awg.com.au
Telephone: 02 9319 0339

Modern Award Review Stream:

Arts and Culture:	☒
Job Security:	☐
Work and Care:	☐
Usability of awards:	☐

The Australian Writers' Guild 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 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.

ISSUES

1. In its National Cultural Policy, *Revive*, the Government called artists the "original gig worker[s]".[1] Ensuring adequate remuneration is critical to allowing artists and creatives to have the enduring practice to create great work over a lifetime. In practical terms, this means that industry minima – including both minimum rates and contracts as negotiated by worker representatives – must be enforceable. Creative workers must be included in our national employment frameworks, and we should not be treated as a class outside those protections.

2. Performance writers such as playwrights, screenwriters for film and television, showrunners, podcasters, comedians, game narrative designers, dramaturgs, librettists and audio writers generally work on a freelance basis and rarely enjoy the minimum employment standards that other workers do. The absence of enforceable agreements or instruments such as awards exposes many of these creatives, particularly emerging writers or those without third party representation, to potential exploitation through subpar and unfair contracts. In its 'Impacts of COVID-19 on the Cultural and Creative Industries' Report, Creative Australia noted that even prior to the pandemic many creatives already earned below the workforce average and relied on multiple sources of income for work – the pandemic, of course, exacerbated this. [2]

3. The absence of enforceable agreements or minima for performance writers working in the screen sector hinders the equitable participation of Australian writers and other industry professionals in the success of the multinational media companies they provide services for and assign their intellectual property to.

Pre-existing negotiated agreements

4. There are four industrial agreements that the Australian Writers' Guild (**AWG**) negotiates on behalf of its members working within television and theatre and these agreements have in use, in various forms, for decades. These take the form of agreed industry template contracts. Three of these agreements govern television writing and are negotiated between AWG and Screen Producers Australia (**SPA**). These are the Series and Serials Agreement (**SASA**), first introduced in 1985, and later the Miniseries and Telemovies Agreement (**MATA**) and the Children's' Television Agreement (**CTA**). The terms of the MATA, SASA and CTA roll over each year and the writer's fees are indexed to inflation, increasing with the annual CPI on 1 January each year. AWG and SPA confer to ensure the rates are correct at the end of each year before publishing the following year

5. Minimum conditions for playwrights have also existed since 1979 when a committee led by AWG members spearheaded negotiations with Australian theatre companies. The result was the Minimum Basic Stage Agreement which over the years has been refined and renegotiated into the Theatre Industry Agreement (**TIA**). This agreement is negotiated by an organisation now known as the Confederation of Australian State Theatres (**CAST**)

[1] Australian Government, *Revive* (2023), 5.
[2] Australia Council, Impacts of Covid-19 on the Cultural and Creative Industries (2022). 3.

which represents the eight largest state theatres in the country and **voluntarily** negotiates the TIA with the AWG.

6. Negotiated agreements exist for performance writers and have been used in the screen and theatre sectors for decades. Yet there is currently no recourse for an Australian writer when a production company or theatre company undercuts an industry agreement. While the SASA, MATA and CTA are well-accepted standards, Australian producers do not have any **legal obligation** to use these agreements and writers have no recourse where they are underpaid, or the agreements are not used. SPA does not oblige its members to comply with its own agreements, and Australian producers are not obliged to become members of SPA. When there are breaches of contract or when those minima are undermined, workers are left with two options: either they take legal action against the production company (with assistance from the AWG) or the production company's conduct is reported to the funding agency (Screen Australia) which notionally has the power to withdraw funding from a producer in breach of industry minima. Legal action is costly and inefficient and may give rise to further complications for the average screen practitioner. In an industry as small as Australia's screen sector, a writer may be blacklisted and unable to find work if they enter into a legal dispute against a production company over their rights and entitlements. The costs of either action are also likely to exceed any underpayments retrieved.

7. Screen Australia's Terms of Trade oblige recipients of funding to comply with "award minimum rates or, where applicable, any minimum agreed between the relevant guilds" [3] but, in practice, it does not engage in enforcement action against non-compliant production companies. This should not be understood as a criticism of our agencies; rather, that they are not equipped or designed to perform an industrial inspection and arbitration service as the Fair Work Commission is.

Are performance writers employees within the meaning of the *Fair Work Act 2009*?

8. Many creative workers, including writers for screen and stage, are classified as independent contractors rather than employees and, as such, are not protected by the safety net of minimum conditions that apply to employees.

9. Following *CFMMEU v Personal Contracting* (2022) and *ZG Operations v Jamsek* (2022) , the question of whether an individual is engaged in an employment relationship must be determined by reference to the legal rights and obligations established in the contract, and it is possible to see this case as diminishing the importance of the traditional multifactor tests employed around the nature of the employment/contractor relationship.

[3] Screen Australia's Terms of Trade (4 December 2017) state that "recipients of funding support [must] act fairly and reasonably in relation to third parties involved in the funded project." The Terms of Trade define fairness and reasonableness to include "paying at least award minimum rates or, where applicable, any minimum agreed between the relevant guilds, for all work performed by third parties on their project, including key creatives, cast and crew".

10. In the main, AWG writers fall outside the protections afforded to employees and our members are afforded only the protection of our agreed template contractual minima.

11. The following employment indicia are likely to be present in standard screenwriting contracts where writers are commissioned to write a script:

    - The writer is furthering the business enterprise of the producer: Where a writer is commissioned to write a script, there is a strong argument that they are working in the business enterprise of the producer. This is particularly when the writer acknowledges from the date of commission that they will assign copyright in the work to the producer. The purpose of the commission is that the writer's work (the script) will further the producer's business enterprise.
    - The producer has control over the writer's services: Clause 3 of the SASA, for example, states that the writer "is commissioned to write the script/s for an episode" and will "attend such story consultations as may be reasonably required by the Producer". The writer is required to abide by set deadlines. They are required to "carry out adequate research as required and in all respects carry out his/her/its contractual duties in a properly skilled and capable manner" and they must "comply with all reasonable and lawful directions of the Producer". These combined obligations/rights demonstrate the Producer's substantial right to exercise control over the writer's services and how they carry them out.
    - The producer acts as paymaster and substantially has the power to fix remuneration.
    - The producer has the power to terminate the engagement if the writer fails to obey directions.
    - Writers expressly have no right to delegate their obligations under the contract to a third party.
    - Writers working in screen should be paid superannuation through the operation of section 12(8)(c) *Superannuation Guarantee (Administration) Act 1992* which classifies certain independent contractors as employees for the purposes of paying superannuation. However, we note that the routine non-payment of superannuation by production companies is a live issue for performance writers.

12. The following indica present in standard screenwriting contracts indicate that writers are independent contractors:

    - Writers provide their own equipment and undertake the expenses of maintaining it. That said, they do not need much in the way of equipment.
    - Remuneration corresponds to the output of the work script. Producers pay writers for the delivery of a script and the assignment of copyright in that script from the writer to the producer. Writers are not paid by the hour for those services.
    - Writers are responsible for the payment of their own income taxation.
    - Writers are able to work for others whilst they are engaged by a producer (noting this may not be determinative and holding two jobs in not uncommon).
    - Writers may take on some commercial risk from a defect in their work **if** they receive royalty or residual payments, though it is increasingly rare for television writers to

successfully negotiate such payments and they may not necessarily receive them, even if the right is successfully included in their contracts.

Do performance writers perform work which resembles the kind of work that has traditionally been subject to award regulation?

13. There is no modern award or pre-modern award that specifically covers the work of performance writers. The screen and live performance sectors are covered by awards but, of course, only employees of the screen and theatre producers in those industries are covered by those awards.

14. The *Broadcasting, Recorded Entertainment and Cinemas Award 2020* covers many creative and technical roles related to the film, television and other broadcasting industries, but these roles are expressly confined to the "production" phase of "feature films" and "television programs" rather than the development and writing of the scripts those films and programs are based on.

15. Finally, the *Live Performance Award 2020* applies to employees involved in "producing, including pre-production and postproduction" of live theatre, not the commissioning and development stage, when playwrights are actually writing the play scripts that are to be produced and performed.

Do parties agree that the Miscellaneous Award may not cover certain workers, such as artistic directors or media producers?

16. It has been suggested that the *Miscellaneous Award 2020* (***Miscellaneous Award***) is the only existing modern award which may cover many arts and culture sector employees where not required to be diploma or degree qualified.[4] The *Miscellaneous Award* is held out to be a "catch-all" award which covers employees who are not covered by any other modern award.[5] The purpose of the *Miscellaneous Award* was to provide interim coverage whilst awaiting the introduction or extension of modern awards.[6]

17. For an employee to be covered by the *Miscellaneous Award* they must:

    - Be a national system employee.[7]
    - Perform work similar to the kind of work traditionally subject to award regulation.[8]
    - Not traditionally have been excluded from award coverage due to the nature or seniority of their role.[9]
    - Not be a managerial or professional employee.[10]

[4] *Modern Awards Review 2023–4 Discussion Paper – Arts and Culture Sector* ('*Discussion Paper*').
[5] *Four yearly review of modern awards* 2020 FWCB 754 [75].
[6] *AIRC Full Bench,* 4 December 2009 Decision.
[7] *Fair Work Act 2009* (Cth) ('*FWA*') s 42.
[8] *FWA* s 143(7)(b).
[9] *FWA* s 143(7)(a)
[10] *Miscellaneous Award* cl 4.2.

- Not be covered by any other modern award[11] or enterprise agreement[12]; and
- Fall within one of the four listed classifications.[13]

18. Again, performance writers are generally independent contractors that are not employed by production companies or theatre companies.

19. Even if they were employees, they may be excluded from the Miscellaneous Award since they may be considered "professional employees". Tertiary study for performance writing is widely available and generally necessary for employment.

Do the parties have a view about the potential impact of the Closing Loopholes Bill on the arts and culture sector? Is digital platform work common within the arts and culture sector?

20. The *Fair Work Legislation Amendment (Closing Loopholes) Bill 2023* (**the Closing the Loopholes Bill**) proposes to amend the *Fair Work Act* and introduce a new section 15AA "as a response to the decisions of the High Court of Australia in *Personnel Contracting* and *Jamsek*."

21. The Closing the Loopholes Bill also proposes to give the FWC the power to set minimum standards for "employee-like" workers. In its current form, however, it is inapplicable to entertainment and performance writers, as it is restricted to digital platform work. Digital platforms are not used in the performance writing context, or by workers within the screen and theatre sectors more generally.

22. If the restriction to digital platform work **were removed**, then writers who are not considered employees would likely come within the meaning of "employee-like" workers.

PROPOSALS

Protection for 'employee-like' workers must not be confined to those workers who find work through digital apps

23. Gig work predates the digital apps. In Australia, writers, musicians, actors, directors, and cinematographers generally work on a freelance basis, gig to gig, without minimum employment standards for their work. Creative workers in Australia have "portfolio careers", referring to a mixture of different jobs usually without any minimum employment standards[14]. Patterns of work across the cultural and creative sector vary, with a large number of creative practitioners undertaking short-term contracts as employees or independent contractors or performing ad hoc and seasonal work. The intermittent working arrangements are insecure, and creatives rarely have access to

[11] *Miscellaneous Award* cl 4.1.
[12] *FWA* s 57.
[13] *Miscellaneous Award* cl 4.1.
[14] Power, Katherine 'The Crisis of a Career in Culture: Why Sustaining a Livelihood in the Arts is so Hard' (2021).

minimum employment standards. As noted by Salvo et al, there is no one definitive characteristic of gig work[15]. Our preference is to not define in the negative, but one definition, following Abrahams in Salvo, is: "someone not paid a wage or salary, does not have an implicit or explicit contract for a continuing work relationship, does not have a predictable work schedule over time, and has a high degree of dependency on the engaging entity for their livelihood."

24. The 'Employee-like forms of work' consultation paper (**Consultation Paper**) rightly pointed out that:

    "The degree of autonomy contractors can exercise in relation to their work can…vary. Some may possess a high degree of bargaining power, putting them in a strong position to negotiate pay and conditions, and when, how and with whom they perform work. Others may, for example, be largely dependent on a single business for ongoing work or engaged under standard form contracts over which there is little scope for negotiation."

25. Screenwriters tend to fall in the latter category. They are rarely able to negotiate pay and conditions above industry agreed minima and they satisfy a number of indicia for employment as discussed at [11].

26. They may be "largely dependent on a single business for ongoing work or engaged": for example, writers on *Home and Away* and *Neighbours* and writers working for the few Australian producers that make children's television may stay with the same employer for many years.

27. In our submission in response to the Consultation Paper, we joined calls from the rest of the creative industry – and many others – that the regulation on 'employee-like' forms of work must be wider in scope and include workers who do not predominately find work through digital apps. Limiting access to the minimum standards for independent contractors to workers engaged through a 'platform' (i.e. gig economy workers) is not meritorious and it is also ambiguous. The use of an app/platform is not a reliable measure of worker exploitation. Our members are usually offered agreement terms on a 'take it or leave it' basis with no scope for negotiation, in some cases after they have begun work on a project. Such a narrow definition would mean exploited contractors working in industries like cleaning, construction, security, writing and the arts are excluded just because they are not engaged through an app.

Pre-existing industry negotiated agreements enforceable at law

28. As stated in *Revive*:

    "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

[15] Salvo, J., Shipp, S., Zhang, S. (2022). Defining the Role of Gig Employment in the Post-Pandemic World of Work.

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."*

29. By making pre-existing industry negotiated agreements enforceable at law, a safety net is immediately created for an entire category of workers. The organisations that have negotiated the industry agreements will be incentivised to ensure that the agreements are up to date and appropriate in the modern industry environment. It is also no additional impost for the industry, as these are agreed between parties and in regular use- not just by Guilds but also by agents who represent performance writers.

30. Access to dispute resolution in the event of breaches of, or disputes about, the minimum standards and our agreements is key. The Fair Work Commission should be empowered to deal with such disputes, including by arbitration, and to make orders requiring compliance. This should include interim orders and orders requiring the payment of financial compensation. A breach of an order should be a civil remedy provision and injunctions should be able to be sought in the federal courts. Orders should also be enforceable against individual directors per section 550 of the *Fair Work Act*.

31. We support a new Fair Work Commission jurisdiction to challenge unfair contractual terms for contractors. The Commission should be empowered to deal with such matters and needs to have the power to arbitrate and also to make binding and enforceable orders (including for financial compensation).

Enforcement by government funding agencies

32. Unlike many other industries, the majority of businesses employing Australian screenwriters are partially reliant on state and federal government funding and tax concessions. It is our understanding that the majority of screen and content works made in Australia receive some form of government subsidy or support, which may be direct grants, or through taxation exemptions and rebates. This unique dependency necessitates additional measures to safeguard the rights and livelihoods of creative professionals.

33. Screen Australia's Terms of Trade oblige recipients of funding to comply with "award minimum rates or, where applicable, any minimum agreed between the relevant guilds"[16]. However, we have no experience of the agency ever undertaking this, and we are unsure how this work might proceed from the agency's point of view.

[16] Screen Australia's Terms of Trade (4 December 2017) state that "recipients of funding support [must] act fairly and reasonably in relation to third parties involved in the funded project." The Terms of Trade define fairness and reasonableness to include "paying at least award minimum rates or, where applicable, any minimum agreed between the relevant guilds, for all work performed by third parties on their project, including key creatives, cast and crew".

34. Theatre companies receive their funding through the Australia Council and the CAST companies are specifically funded through the National Performing Arts Partnership Framework which provides guaranteed funding over a number of years. Unlike the screen agencies, the recipients of National Performing Arts Partnership Framework funding are not obliged to comply with industry-negotiated agreements or treat the creatives with whom they collaborate “fairly and reasonably”.

35. Federal funding agencies for screen and theatre amend their terms of trade so as to require funding recipients to recognise industry minima as a condition of funding.

36. In addition to enforcement mechanisms establishing creative workers as part of the Fair Work jurisdiction, we propose that government funding bodies should recognise our industry-agreed minima and funding arrangements should be contingent on compliance with these minima: a key enforcement tool not available in many workplaces.

37. We note also that government may choose to outsource enforcement duties to relevant industry organisations, or to consider what the most appropriate mechanism is to facilitate enforcement across the Commission, the relevant funding agencies and industry Guilds. The Guild welcomes the opportunity to discuss enforcement work further, should the protections of minimum conditions be extended to Australia’s performance writers.