

Our Ref: 04.007

8 March 2004

Mr Vernon Joice
Post-implementation review NCL
The Board of Taxation
c/- The Treasury
Langton Crescent
PARKES ACT 2600

Dear Vernon Joice

Re: Post-implementation Review of Non-commercial Losses (Division 35)

I attach the submission by the Australian Society of Authors relating to the Board of Taxation's post-implementation review of the non-commercial losses provisions of Division 35 of the Income Tax Assessment Act 1997.

The ASA makes this submission to ensure that the specific interests and concerns of Australian writers and picture book illustrators are adequately addressed by the review. The ASA also supports and endorses the general submission compiled by the Australia Council which covers 'the special circumstances of artists'.

The ASA is prepared to make further submissions, to answer particular questions or to discuss our concerns directly with the Board.

Yours sincerely

José Borghino

Executive Director

Australian Society of Authors

ASA Submission to the Board of Taxation's Post-implementation Review of Non-commercial Losses (Division 35)

The Australian Society of Authors welcomes this opportunity to make a submission to the Board of Taxation. The ASA directly represents 3,100 members across Australia who write and illustrate in all genres; and we speak on behalf of the more than 10,000 writers and picture book illustrators (according to Public Lending Right/Educational Lending Right figures) working in Australia at the moment.

The ASA understands that the Government's overall intention at the time it introduced the non-commercial losses provisions in Division 35 of the Income Tax Assessment Act 1997 was to close off tax loopholes for so-called 'Pitt Street farmers'. The ASA supported this intention in 2000 and continues to do so. We argue, however, that these provisions have seriously affected a substantial number of Australian authors and book illustrators by denying them the opportunity to off-set their legitimate arts-related expenses against income earned from other jobs.

The latest ABS figures show that, in 2001-02, a total of 238 publishers in Australia published 129.5 million books valued at a total of \$1.341 billion.¹ That this entire business edifice is founded upon the hard work of Australian authors, who nonetheless remain the worst remunerated sector of the industry is shown by the fact that the total amount paid out in 'royalties and fees' in 2001-02 was a mere \$91.9 million,² about 7 per cent of the value of the books sold that year. And the latest research by the Australia Council confirms that the median income derived by writers directly from their writing is only \$4,800 per annum.³ Writers and book illustrators are usually paid last and the least in a chain of transmission that stretches from initial idea to published text, to distributor, to bookseller or librarian, and finally to the reader.

¹ ABS, Book Publishers 2001-02 (1363.0). Other pertinent figures include the following: 9,078 new Australian titles published in the 2001-02 financial year, 89 per cent of which were Australian originated titles, and 52 per cent of the total being for the educational market; export sales of Australian titles reached \$186 million (a 23 per cent increase on 1999-2000 figures); in June 2002, Australian publishers directly employed 5,138 people, and 1,600 businesses (bookshops, department stores and others) sold those books to Australian consumers; figures for those employed by Australian printers were unavailable, but the increase in the number of Australian-originated titles points to a clear benefit in that area.

² ABS, Book Publishers 2001-02 (1363.0), p 9.

³ *Don't Give Up Your Day Job*, David Throsby Virginia Hollister, Australia Council, 2004, p 45).

Other industries such as the film, television and advertising industries often rely on the ideas and creativity of Australian writers for their inspiration. Such classic Australian movies as *Don's Party*, *Monkey Grip*, *The Year of Living Dangerously*, *Picnic at Hanging Rock*, *Looking for Alibrandi*, *The Monkey's Mask*, *Praise*, *The Well*, *Bliss* and (soon) *Hating Alison Ashley* had their genesis in Australian fiction, as have *What I Have Written*, *Swimming Upstream*, *Australian Rules* and *Lantana*. And a strong connection between the two fields continues with internationally produced films like *Schindler's List*, and *Oscar and Lucinda*, being based on Australian writing.

But writing a novel takes a long time – usually between two and three years. Substantial non-fiction can take longer – from five to ten years. And there is no way to learn to write this kind of work except by doing it. This requires long and sustained effort. Prize-winning author (and barrister) Elliot Perlman, puts it this way:

I wrote my first short story at the age of 20. Over the next 10 years I continued to write and submit short stories while studying at university, and then while working in various capacities as a lawyer. I was completely unable to get published until, at the age of 30, a story of mine won the *Age* short story competition. The prize money was approximately \$3,000. It led to more letters of rejection and, finally, to a few other short stories getting published.

In late 1995, based on one short story in particular, I was offered and signed, a 3-book deal with Picador. Armed with a number of short stories and the first part of a novel, the following year I went to London to secure an agent and the British publisher (Faber and Faber) who would go on to publish all my books thus far. Between March 1998 and August 2003 I have had 3 books published in Australia: a novel of some 100,000 words (*Three Dollars*); a short story collection also of approximately 100,000 words (*The Reasons I Won't Be Coming*); and a novel of 250,000 words (*Seven Types Of Ambiguity*).

Three Dollars won the *Age* Book of the Year Award, the Fellowship of Australian Writers' Book of the Year Award, the Betty Trask Award (UK) and was short-listed for the Miles Franklin award. *The Reasons I Won't Be Coming* won the Steele Rudd award for the best Australian short story collection.

I was working full-time during the writing of the first 2 books, firstly as an Associate to a Supreme Court judge and then as a barrister. Following a change of agent, I was fortunate to get an advance from an American publisher sufficient for me to take a break from legal practice to write my third book full-time. This book (*Seven Types Of Ambiguity*) took approximately 4 years to write. It will be published in the UK this coming August and in September in the US. The new agent has managed to sell the translation rights to my books to French, Italian, Dutch and Spanish-language publishers. A screenplay I co-wrote based on my first book is currently being shot in Melbourne. It stars David Wenham, Frances O'Connor and Sarah Wynter and

has a budget of \$6 million to cover the cost of the cast, crew and production office staff.

By most objective measures I have had a very fortunate writing career thus far. But so small are the economic rewards, so slow is the writing process, and so uncertain is the commercial and critical response to any particular book, that at no time throughout the last 7 years of writing did I allow my Bar subscriptions, my professional indemnity insurance or my chambers' rent to lapse. This was all at a considerable cost. Despite my good fortune as a writer, when contemplating a future in which I try to support a family, I do wonder if it is not imprudent for me to continue writing. I write this today aware that I am one of the lucky ones.

Writing is not a lucrative occupation for the majority of Australian practitioners. Most Australian authors have to support themselves while they write/illustrate through a succession of part-time and casual jobs. You will find authors driving taxis, teaching, and being waiters. They do not regard these occupations as their chosen 'careers' – they don't aspire to become the world's greatest waiter or taxi-driver, for instance – but as necessary ways of supporting or subsidizing their primary business activity: their writing or illustrating.

Especially when they embark on their careers, authors will not earn anywhere near \$20,000 from their work, they will rarely make sustained profits and they will never be able to invest \$100,000, or own property relating to their writing or illustrating valued at \$500,000 or more. In other words, they will not satisfy the current 'commerciality tests' of Division 35. But they will be undertaking a serious and important business activity – one that sustains a whole range of other Australian industries and which, more importantly, will delineate a unique and vibrant Australian identity into the future.

In making this submission, the ASA spoke to a number of individual authors, copyright lawyers and a number of tax accountants who have authors as clients. Their experience is as follows:

- There are a substantial number of Australian authors who work in non-arts related professions and earn incomes above the \$40,000 threshold, who nonetheless continue to write/illustrate, continue to earn royalties, CAL monies and ELR/PLR payments, and who continue to have ongoing general arts-related expenses which cannot be claimed because they do not satisfy the four 'commerciality tests' – mainly because they do not earn \$20,000 from their writing.

An extreme example of this type of author is a self-publisher who incurs all the expenses of publishing without being able to claim those expenses back because they earn over \$40,000 from their non-arts related job.

- There are also many authors who work in much more basic non-arts related jobs — as shop assistants, part-time teachers, waiters, etc. — who, do not earn above the \$40,000 threshold, but like itinerant farmers are forced to patch together income and employment in an ad hoc fashion. Many of these are middle-aged or in mid-career, but only one in fifteen would earn more than \$20,000 a year from their primary arts-related work and therefore be able to claim their legitimate arts-related expenses. This is reportedly the most common type of taxpayer unfairly caught by the non-commercial losses provisions.
- There are also those writers who may work across a number of different genres or industries. For instance, a writer may earn large amounts as a TV script writer, but may also write novels or poetry and earn very little from these. They would then have clearly separate income streams — a group certificate from one source, and freelance income or even royalties from another — but a real difficulty in differentiating a commonality of expenses, often incurred at a home office.

Another good example is journalists who work at lucrative day-jobs (such as subeditors), but who also consider themselves to be serious authors and would, in fact, prefer to live off their non-journalistic writing, but again are unable to claim their legitimate arts-related expenses because they do not earn \$20,000.

- A ludicrous example of the unintended, Kafkaesque consequences of the current provisions is the case of those writers who are employed as creative writing teachers by TAFE. A condition of employment is that they are expected to be practising artists, but the reality is that very few of them will have primary arts-related income of more than \$20,000. However, because they usually earn more than \$40,000 as TAFE teachers, they are then excluded from claiming arts-related expenses for the work that, ironically, qualified them to work as a TAFE creative writing teacher in the first place. Tax accountants have reported that this is fairly common and that there are regular problems incurred when expenses have to be pro-rataed across teaching and arts-related incomes.
- A number of individual authors have reported that, because of the uncertain nature of work in the industry, even when they have had relatively successful years where the non-commercial losses provisions have not had to kick in, they are still apprehensive and anxious about the future, believing that their past compliance will have little or no bearing on their future acceptance by the ATO as bona fide writers, working in a particularly difficult and volatile industry (see Elliot Perlman, above as an example).
- This lack of security is compounded by the complexity of the legislation which results in many authors being given misleading or wrong advice by tax

accountants who themselves, clearly, either do not understand the implications of the legislation or cannot be bothered working through situations for clients whose income is so unstable and/or meagre. (This is how the situation was reported to me by two tax accountants who have many author clients.)

- Finally, the ASA wants to stress that we represent many Australian book illustrators, whose experience of these provisions of the tax laws is closer to that of visual artists in terms of the cost of materials, but whose income is often even lower than that of writers.

None of these tax-payers consider themselves hobbyists or having made a 'lifestyle choice'. All of them are deadly serious about their writing and illustrating, regard themselves primarily and essentially as authors and in most cases are recognized and accepted as such by the literary community. They sometimes produce work which is of low immediate commercial interest because of questions of fashion in content or form, but many would argue that their contribution to Australian culture in the long term is higher and more lasting than the contributions of more immediately successful or commercial authors.

The upshot is that they are not corrupting the system or trying to avoid paying their legitimate tax contributions. They are not 'Pitt Street farmers' by any stretch of the imagination, but they have been caught up in the Pitt Street farmer net. They are not making a 'lifestyle choice' in the pejorative or dismissive sense included in the Second Reading Speech which introduced this legislation into Parliament in 2000. They are seeking to legitimately subsidize their own writing or illustrating by working second or other jobs — a level of enterprise and industriousness that, we submit, should be encouraged not penalized.

Australia at the moment is a net importer of copyright content — approximately three out of every four dollars spent on copyrighted material goes straight to overseas copyright owners. Only by encouraging more Australian authors to write more can we as a society create the basis for a truly independent and flourishing indigenous culture into the future — a culture based on the creation of wealth through information rather than an impoverished, derivative culture based on the exchange of other people's information and creativity. Writers and other cultural workers are at the creative forefront of the innovative, knowledge-based information society of the future. To ignore their needs is to condemn us in this new century to the status of cultural importers, consuming the excess produce of overseas cultures.

There are very good macro-economic reasons for encouraging the rise of what Richard Florida, in a recent book, has dubbed the 'creative class'. Florida maintains that the prime driver of the American economy is now (and will be into the foreseeable future) the creative class which comprises more than a third of the US

workforce.⁴ But there are equally good bureaucratic reasons for the Board of Taxation to simplify and adjust its rules in this area – the ‘creative economy’ is set to grow extremely quickly globally, and an increasing number of taxpayers will be caught up in these unfair provisions.

What authors need especially early in their careers is the opportunity to develop as writers and illustrators and to produce a critical mass of high quality work that will sustain them. They, like most artists, are not looking for handouts but encouragement in their struggle to make a go of their chosen business. In this they are very like primary producers. Poet and farmer Les Murray once said that authors and farmers are very similar in that both occupations patch together income from various sources, seasonally and opportunistically, in order to survive. We submit that cultural producers are of equal if not higher strategic importance as primary producers are to the long term economic and cultural well-being of Australia.

In 1972, there were only 19 first edition Australian novels published in this country; in 2002, according to the Australia Council, there were over 1,000. This flowering of Australian culture over the past thirty years should not be taken for granted. Artists in Australia remain in a precarious position. The present non-commercial losses provisions harken back to the bad old days when only the rich and the desperate would contemplate a life in the arts. Many authors baulk at the bureaucratic hurdles and disincentives associated with eking out a living as an artist. And it seems many tax accountants also baulk at the complexities of the current provisions when advising authors.

The ASA strongly urges the Board of Taxation to recommend that the current non-commercial losses provisions of the Income Tax Assessment Act 1997 be amended to take into account the adverse affect it is having on authors and other artists in Australia trying to carry on legitimate arts-related businesses.

The Australian Tax Office, we understand, is currently working on a binding public ruling that would help define what it means to carry on a ‘business as a professional artist’. We submit that such a public ruling will be more useful than the anachronistic ‘commerciality tests’ in determining whether a taxpayer is conducting a business as an artist, especially given the clear indication from recent Australia Council research that the \$20,000 income test is woefully inadequate.

We would welcome the opportunity to have further input in the debate and to discuss our concerns directly with the Committee.

Yours sincerely

⁴ Richard Florida, *The Rise of the Creative Class* (Pluto Press Australia), 2003. The creative class includes writers and other artists as well as film-makers and ‘people in science and engineering, architecture and design, education, arts, music and entertainment, whose economic function is to create new ideas, new technology and/or new creative content.’

José Borghino
Executive Director