National Cultural Policy Submission

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Submitted: on behalf of a for-profit arts business

Introduction

Videogames can be beautiful works of art like the contemplative VR game *Lands End*, thrilling clever mysteries like *Hacknet*, muddy roaring rides like *Trucks Off Road*, and quirky laugh-out-loud mischief like *Untitled Goose Game*. Videogames help shape Australian culture.

While fine art, novels, and movies have traditionally received government support in the form of prizes, events and copyright protection, games have not. This has led to Australia falling far behind other countries in the game development industry.

This decade has seen the beginning of government support as a result of strong representation by game developer industry body IGEA. The number of game developers is growing and many of them are contractors rather than employees.

Games as a form of communication are here to stay and this revision of National Cultural Policy is a wonderful opportunity to analyse the opportunities and challenges ahead.

What challenges and opportunities do you see in the pillar or pillars most relevant to you? Feel free to respond to any or all pillars:

First Nations

Own story in videogames

A videogame featuring a First Nations main character would rightly be criticised if First Nations creators were not intimately involved in the creation of the story and the game. There are very few First Nations game developers. First Nations people have occasionally reached out to game developers to have a story told but so far, few such partnerships have resulted in a game or visual novel.

Sensitivity readings for video games

It costs money to obtain a sensitivity reading for including First Nations characters in games and it is easier to omit them altogether. If there was a government fund for sensitivity readings, this would encourage diversity in secondary game characters.

A Place for Every Story

Accessibility

Microsoft has done a magnificent job of listing ways to support a diverse audience of people with permanent, temporary, situational, or changing disabilities, and the Family Videogame Data Base has a comprehensive accessibility questionnaire. IGEA have lifted the status of accessibility in games by creating an AGDA for the most accessible Australian game.

Even as a very small studio, we have been able to make a game which has voice acting, sound effects, special instructions, screen reader capability, and action narration for players with vision impairment; subtitles and sound descriptions and separate volume controls for players who are deaf; high contrast text outlines for players with colour vision deficiency; button alternates for players with physical disabilities; and back button and contents button and how-to-play instructions for players with cognitive impairment.

Very few games are so accessible, but there is more we could have done, such as allowing button re-mapping and text resizing (a resource lack), and having a panel behind the text (a design choice).

We believe accessibility should be taught in game development classes.

Diversity

AAA games mirror movies in their slow and awkward shift to characters representing the community, such as unsexualised women, LGBTQIA+ characters and people of colour.

One might expect indie studios to be more nimble but characters in the asset store are still unrepresentative and game developers in Australia are still preponderately males.

We delayed our own game while our brilliant programmer devised a method for customising characters so players can choose the hair style and colour, skin tone, and

eye colour of the main characters. This demonstrated to us how very hard it is to create diverse characters in games.

Neurodiverse players - Photosensitive epilepsy

Games can trigger photosensitive epilepsy even in healthy adults who have never had a seizure before.
[https://www.sciencedirect.com/science/article/pii/S1059131105002219;
https://www.sciencedirect.com/science/article/pii/S1059131117302522]

The seizures are caused by flickering banner ads, bright flashes, patterns of white bars against a black background and irregular fonts.

The Harding Test measures the likelihood of a sequence causing a photoepileptic seizure. All film and TV in the UK must pass the Harding test.

Game designers are not trained to use this resource and even as recently as 2020, Poland's AAA studio released *Cyberpunk 2077* which caused grand mal seizures in vulnerable players.

Both the World Wide Web Consortium and the US Federal Government have rules governing screen flicker or flashing but these rules are not enforced. For example, a recently produced TV segment was prevented being shown because it did not pass the Harding test, and the producers will show it online where there is no effective online regulation. [https://tonedeaf.thebrag.com/aphex-twin-video-pulled-epilepsy/]

This problem could be tackled by

1. Education – require all videogame design, art and programming tertiary courses to have a session about photosensitive epilepsy.
2. Legislation – require all videogames published in Australia to pass the Harding test.
3. Funding – support studios by funding the Harding Test, either by paying for it (it starts at 35 Euros for 3 minutes of testing) or by providing a government testing facility.

The Centrality of the Artist

Studios

Picture a typical Australian video game developer working in a small studio making mobile games with live services, and often eking out a living by doing contract work for other game studios, or by working on serious games.

Funding sources for studios

- Sweat equity
- Founder investment
- Friends, Family, Fools
- Government grants
- Tax incentives/credits
- Platform grants
- Grants (other)
- Angel investors
- Crowdfunding
- Equity crowdfunding
- Venture Capital (VC)
- Publisher advance
- Platform exclusivity advance
- Platform sales advance
- Subscription service buyout
- Project investment
- Loans
- Credit cards

Who supports the studios? The wonderfully smart, efficient, hard-working, helpful industry body IGEA supports videogame developers from tiny studios like ours to Playside Studios with more than 200 employees.

Workers

Unpaid overtime known as 'crunch' is expected from game workers, and US contractors have been known to drive around the car parks on a Saturday to check that they are full. Standouts such as the award winning South Australian indie studio Mighty Kingdom have proved that productivity does not drop if hours are reduced but in general, game development employees can expect long hours.

Pay Award for game developers

Sorry, there isn't one.

- **Programmers** are covered by the Professional Employees Award which covers scientific work.
- Game Workers Australia says that **artists** and **designers** are also covered by the Professional Employees Award because they are involved in the creation and design of software.
- **2D artists** are covered by the Graphic Arts, Printing and Publishing Award.
- MEAA – Media Entertainment and Arts Alliance – sets out pay rates for **writers, actors** and **musicians**.
- **Market researchers** are covered by the Market and Social Research Award.
- **Office assistants** are covered by the Clerks Private Sector Award.
- The Miscellaneous Award (MA000104) sets the minimum wage for everyone else, such as **quality assurers** and **playtesters**.

Who supports the workers? The nascent Game Workers Australia union merged with Professionals Australia as it didn't have enough members to form a union on its own. This is because unions are for employees, and most workers in the game development industry are contractors.

Contractors

There is no Fair Work Act for contractors, who frequently work far below the minimum wage, at the same time maintaining expensive equipment.

Vendors

Some developers make assets for other developers to use and sell them on the game stores. Some developers make tutorials and market these through game dev educational publishers or through YouTube or Patreon.

Careers in game development

Firstly, who are the artists? Here is a list of game developers.

Careers in the studio

- Programming – frequently coding on game engines; system design
- 2D art –characters, props and backgrounds, UI art, concept art, vector graphics, animation, marketing material
- 3D art – 3D characters, props and environments, textures, rigging, animations
- Technical art – visual effects, lighting
- Sound – music, sound effects, recording dialogue
- Writing – game narrative, dialogue; marketing copy; technical writing such as Game Design Document (GDD)
- Design – game design, level design, UI design
- Quality Assurance – testing with players, checking for bugs
- Producer
- Marketing – game stores, social media, campaigns
- Business development – pitching for funds, applying for grants and rebates
- HR

Careers outside the studio

- Voice actor
- Musician – composing and recording game music
- SFX provider – a lot of game sound effects are bought from sound libraries
- Translators – writing store copy for other countries
- Video editor – making game trailers
- Accounting
- Lawyers for contracts, game terms of use and privacy policies, non-disclosure agreements
- Game reviewers
- Twitch streamers
- eSports players
- Cosplay suppliers

Career choice for game developers

Saying, 'I like games, I think I'll be a game developer' is a bit like saying, 'I like reading, I think I'll be a novelist.'

By the time a student is considering their tertiary opportunities, they should have already shown their interest. Musicians should have been making music, artists should have been making pictures, and designers and programmers should have been making games.

The best way to give potential game developers experience in making games is at school and in the community.

Teaching game development in primary schools

One of the reasons Australia is behind other countries when it comes to game development in schools is our high standards for privacy. Minecraft and Roblox have wonderful educational programs but require full student information and enable uncontrolled interaction with adults. Kodu Game Lab is safe but allows limited creativity. Gamemaker Studio and Godot Engine and Ren'Py (for visual novels) are representative of the next level of difficulty, which require teacher expertise. These all lead to industry behemoths like Unity and Unreal Engine which require industry expertise. Some suggestions are:

1. Ensure teachers warn students not to enable multiplayer permissions in Minecraft Education (Victorian teachers have been recognised internationally for their use of Minecraft Education from Year 2 onwards https://education.minecraft.net/en-us/blog/victoria-celebrates-remote-learning).
2. Ensure teachers use Parental Controls in Roblox - despite Roblox advertisements, Roblox users frequently encounter adult games and ill-intentioned adults to whom they can send images. Also ensure teachers toggle on the Monthly Spend Restrictions - note that after the age of 13, spending cannot be restricted.
3. Consider making or funding a government game engine which is a fun, practical programming course which is safe for young students.
4. The Digital Technologies section of the Australian Curriculum seems too simple to me. I am a game designer and I have taught in primary schools. Consider review of this section by teachers who are experienced game developers. https://www.australiancurriculum.edu.au/f-10-curriculum/technologies/digital-technologies/?strand=Digital+Technologies+Knowledge+and+Understanding&strand=Digital+Technologies+Processes+and+Production+Skills&capability=ignore&priority=ignore&year=12985&elaborations=true&searchNodeId=12985&searchTerm=games#dimension-content

Work experience

Several small game studios in Adelaide have punched above their weight in accepting work experience students. These students gain invaluable experience.

Most studios say they are too busy making games to spend time with high school students that way, but the studios involved were busy as well.

Some of the problem is the paperwork. Having government-provided template contracts for non-disclosure and IP would make it easier for studios to provide work experience to students.

Tertiary game schools
Course availability

My Advanced Diploma in Professional Game Design and Production cost me $40,000. If I had studied at a university, those 2 years would have cost me $18,000 but there was no university offering game design.

Course curricula

There is no requirement for tertiary institutions to employ teachers who are industry veterans. This has led to ridiculous waste, such as a university teaching on Gamemaker instead of Unity or Unreal Engine, so students graduate with little ability, knowledge or experience. This could be prevented with better curricula.

Community jams

Games are made by teams and game jams are the best way to practise making games in a team. Jammers not only are highly incentivised to learn new skills in game jams, but they also learn how to work with others, and the practical requirements of other disciplines.

Game jams foster the formation of new teams and the creation of original works. Hit indie success Hollow Knight began in a game jam in Adelaide. [https://www.youtube.com/watch?v=rB9-8Df16MQ]. Thanks to Jamalaide, Adelaide had more than 6 game jams a year from 2011 to 2016 and this could explain why South Australia is the only state apart from Victoria where the percentage of full time game dev employees exceed the percentage of the population. Alternatively it could be a result of being the first state to offer a tax rebate to game developers (2020). Victoria has a thriving game development industry due to 25 years of strong government support.

The difficulty with organising game jams in physical meetups is the venue, security, insurance, and computer availability. If game jams were supported by government for example by insuring game jams at universities during holidays, this would kickstart game jams, and game development, again.

Networking

In an industry with a large number of contractors, networking is crucial. It can help keep contracts local rather than going overseas, and give contractors experience enabling them to eventually make their own IP.

Industry bodies could be given government support for networking events. Perhaps groups could gain recognition with IGEA so their state government doesn't have to do the checks required to ensure they genuinely support the industry.

Strong Institutions

While the Australian gaming industry is worth billions, most of the money goes to overseas game developers. For example, less than 1% of publishers on Android phones are Australian. [https://42matters.com/australia-mobile-gaming-statistics]

However this is starting to change, with a strong industry body who has tirelessly lobbied Australian governments for industry support.

Game development bodies in Australia

Proper game development bodies only have A, D, E, G or I in their names.

GDAA - Games Development Association of Australia

merged with

IEAA - Interactive Entertainment Association of Australia

to form

IGEA - Interactive Games and Entertainment Association [Australia]

which runs the

AGDA - Australian Game Developer Awards.

IGEA has a working group called **IDEA** – the Inclusion, Diversity, Equality and Accessibility working group of IGEA.

IGEA must not be confused with

IGDA - International Game Developers Association – the US body with chapters in every country including (wait for it) Australia.

South Australia has been careful to keep within the naming restrictions and it has

AGD – Adelaide Game Developers – who have a discord server (800 members), Facebook page (1,800 members), and website page supporting active game developers in the state.

Even remotely associated bodies keep to the rule.

AEDA - Adelaide Economic Development Agency is a subsidiary of the Adelaide City Council which is providing desks for game devs to work in the city.

State government support for game development

State screen bodies are supposed to be supporting games. Here is a test: How many states have a game development officer?

Answer: 2.
1. SA –Game Development Executive position in the South Australian Film Corporation was filled in July 2022.
2. Vic - VicScreen has been supporting games for 25 years.

- While ScreenQueensland says it supports games there is no mention of a games officer.
- ScreenNSW's NSW Digital Games Rebate is run by their Post Digital & Visual Effects officer.
- ScreenWest supports 'interactive projects' and helped with the latest Unreal Engine Short Film Challenge but again, no games officer.
- Screen Tasmania is doing more for games and actually has a Game Development funding program, but these are handled by Screen Tasmania's Development Manager or their Business and Production Investment Manager.
- Screen Territory also has no game dev officer.

Copyright protection

Unauthorised use

It happens! Who steals art and music and video from games? NFT providers, advertisers, YouTube content creators, TikTok influencers, Redbubble merchandisers, Etsy suppliers; basically everybody if your game is beautiful.

Then there are the game developers themselves. Some steal assets from other games and from the web, or use unauthorised likenesses of people. There are entire companies that make their money by copying ('cloning') other people's games and reselling them under similar names.

Some unauthorised 'homages' such as cosplay and fan art and even mods (modified versions of the game) can be great for marketing. But some are disastrous and the question whether a Twitch streamer has the right to benefit commercially from playing a videogame publicly is a very important one. Walkthroughs, playthroughs, and LetsPlays are particularly damaging to visual novels and puzzle games as the audience does not then pay for the game.

Copyright law in Australia is set out in the *Copyright Act 1968* (Cth) and in court decisions. The Act lists categories of material which are protected by copyright, including:

- "literary works" (such as stories, poems, song lyrics and compilations);
- "dramatic works" (such as plays, film scripts, mime and choreography);
- "musical works" (such as notated music);
- "artistic works" (such as cartoons, drawings, photographs, models and sculptures);
- "sound recordings" (in addition to copyright in the works that are recorded);
- "cinematograph films" (the recording of moving images and accompanying sounds);
- "broadcasts" (a broadcast is protected separately from the content of the broadcast); and
- "published editions" (a typographical arrangement is protected separately from copyright in the works in the edition, such as anthologies of poems, illustrations, or music).

The Act needs to protect videogames as well. The marketing of clones is rife in the industry but current copyright laws will not protect a videogame as a whole.

There are other questions which need to be settled in law. Is a visual novel protected? What about a mocap (motion capture) recording? Who owns the likeness rights for the volcap (volumetric capture) 3D image of a person's body? When is a game mechanic an original work of authorship and when is it an uncopyrightable function that merely enhances gameplay? When is an animation copyrightable? If we are allowed to test whether games are substantially similar, should we use both intrinsic and extrinsic tests?

Copyright of software

While we are on the topic, the Act also needs to protect software in general as there is so much debate about how far protection goes. In his comprehensive Sydney Law Review paper in 2016, legal academic Dr Benjamin Hayward explains "[I]n the UK, Australia and NZ, the question of whether software constitutes 'goods' under sales law and consumer law is determined by the common law, subject to statutory intervention. Five key cases develop the position that software constitutes goods when it is embodied in a physical medium, but not when it is software simpliciter; that is, software in and of itself." That means software can only be protected as a literary work. [Dr. *Benjamin Hayward, W*hat's in a Name? Software, Digital Products, and the Sale of Goods (Dec 2016) Sydney Law Review - Volume 38, Number 4, p.448 <http://sydney.edu.au/law/slr/slr_38/slr38_4.shtml>.]

Other intellectual property legislation

Patents, not copyrights, protect game mechanics, but patents are not practical to protect indie video games because they are expensive and time-consuming to obtain.

Trademark protection can cover game names, trade dress and even the company name, but trademark law does not protect functional features.

Designs of works of artistic craftsmanship can be registered but it is a lengthy, complex and costly process.

Take down notices

Take down notices are made under the Digital Millennium Copyright Act (DMCA). This is a US law but Australia has adopted DMCA-compatible rules through trade agreements with the US.

The problems with the take-down notice system are firstly, it is being abused by large rightsholders, secondly, it is being ignored by large scale offshore infringers, and thirdly, it is too easy for unscrupulous rivals to file a fraudulent counter-notice. An Australian government interested in supporting its creative industries could improve the take down notice system.

Site blocking

Site blocking has been adopted in Australia, unlike in the US, and internet service providers must take reasonable steps to stop customers accessing file-sharing websites such as The Pirate Bay. Websites can circumvent this by changing their addresses, and consumers can circumvent this by using proxies, but if multiple sites are blocked at once, it can be an effective tool. It is beyond the scope of an indie studio to undertake such a project.

Platform prosecution

When video game developer Dong Nguyen released his new game, 30 clones were immediately available on Google Play with more on the Apple App Store and the Windows Phone Store. All three distributors deleted clones, although some remain available. Platform owners have no legal obligation to police cloning on their platforms, but US intellectual property attorney Sam Castree III argues that distributors may be legally liable for distributing clones. For small games which are the livelihood of small studios, this sort of action could only be instigated in practice if supported by a government body.

Government support

Copyright protection - nope

As a producer of videogames which can be subject to modding, plagiarism and piracy I approached Screenrights Australia, the Copyright Council and the Copyright Agency and asked where I could seek copyright protection. Each agency assured me they did not protect videogames.

Copyright bodies in Australia have traditionally not provided support to videogame developers on the basis that videogames cannot be protected by copyright. There is no government agency in Australia to protect videogame developers, which command a larger market than books, movies or TV shows.

Legal support - nope

Indie developers need help managing their copyright affairs, particularly assignments of rights during development. Videogame developers are excluded from receiving Arts Law Centre of Australia sample licensing agreements and legal advice.

Collection system – triple nope

The Australian Copyright Council has licensing agreements and collection systems in place for the licensing of artwork, sounds and text. Collection bodies include Screenrights, PPCA, and APRA. There is no collection system for video games as whole products rather than component parts. This means that when a video game developer markets an educational video game, that developer needs to organise payments separately with every school.

Arts funding – the tide is turning

In 2015, when then-Arts Minister George Brandis proposed the National Program for Artistic Excellence (since rebranded as the Catalyst Fund) to replace existing Arts Council funding, "interactive games" were explicitly excluded.

In 2017 there was no possible funding for a game being made in South Australia.

In 2018 I was told that the Copyright Agency Cultural Fund and the Screenrights Cultural Fund did not extend to videogames.

Since then, South Australia has ran funding programs in 2018, 2019 and 2020. Thanks to IGEA lobbying, South Australia and other states and the Commonwealth government have introduced tax rebates for game development, and the Commonwealth government has directly funded game development.

Business codes

The Catch-22 of business codes. The Census, banks, the ATO and the ABR use codes for people to describe their businesses. There is no code for game development so they don't know game developers exist. Since they don't exist, they don't need codes!

Tax

The main game distributors (Google, Apple, Steam, XBox, Playstation, Nintendo) have very different ways of collecting GST, one leaving it up to the individual game developer.

Privacy

The US has strong laws protecting children's privacy online and in videogames. US platforms like Apple and Google are very proactive in ensuring privacy is maintained. I am not aware of any major Australian game distribution platform for which laws need to be made but laws could be made pro-actively.

Reaching the Audience

Lists of Australian games

List of games published in Australia are at https://www.sifter.com.au/post/the-definitive-list-of-australian-made-games-released-in-2021. One would expect a government body supporting games would compile such a list.

Classification of video games

In my 2021 submission for the Review of Australian classification regulation I argued for the following:

- classification categories: C classification
- classifiable elements : societal aggression, self harm, societal ills, speeding as part of the violence category
- requirement to list:
  - in-game monetary transactions
  - in-game links to other sites
  - capacity for stalking, insulting, harassing, stealing from and groping other players in-game
  - whether their servers are fully monitored
- the amount of interactivity should be a factor in classification.

I also noted that classification can be a positive force and games could be classified for their suitability for players with different disabilities.

There needs to be a system for making a complaint, having a timely review, guidelines about what to do during the review process, fair payment for the review, the review and reasoning made public, and guidelines changed as a result of the review. The reviewee should not have to pay for judges to fly to meet as they can meet online. The judges should be appointed and paid publicly. Review decisions should feed back into the Australian IARC formula, which should be publicly available.

Please tell us how each of the 5 pillars are important to you and your practice and why. Feel free to respond to any or all that are applicable to you:

The Centrality of the Artist

Australian assets

I still remember how thrilled I was to see a gum tree in a game last year. Until then I hadn't realised how most game assets reflect the northern hemisphere.

There is no prize or award for making a game Australian.

Strong Institutions

Parental controls

Parental controls are voluntary industry controls and publishers vary widely in their application. Even when they take steps to make games safe for children, in practice these do not work. Ask any parent about the advertisements their children see on mobile devices while playing children's games and you will be surprised at the gaming ads and scams. This is despite very strict controls on developers. These controls are clearly not applied to the marketers who buy ad space.

https://igea.net/useful-links/parental-controls/