Agency agreements

Actors, musicians and bands often appoint agents or managers to act on their behalf. Visual artists often have a dealer who represents them. The manager or agent can enter into contracts that are binding on the person who appointed them (the principal). There are specific legal rules which apply to these agency relationships.

This information sheet explains what an agency is, how it is created, the authority granted to an agent, an agent's obligations, and the important terms of agency agreements. It also deals with any state legislation that applies to agents, managers and venue consultants in the entertainment industry. Bands and visual artists should also read the Music management checklist and Artist-gallery checklist.

Introduction

The appointment of someone as an agent creates an agency relationship, which means that the agent can enter into contracts on behalf of, and binding on, the person who appointed them.

Many creators struggle to find the time, resources and connections to effectively market and promote themselves and their work. In these circumstances, an agent can be invaluable. A good agent can be a key factor in assisting an artist to achieve their creative and commercial goals.

Any artist (whether a writer, visual artist, musician or actor) can get an agent to act for them at any stage of their career, and almost any person can be an agent – though not necessarily a good one!

The role of an agent tends to depend on the stage of an artist's career, their reputation and status. It is different from the roles played by a manager that are usually directed to the management of the artist's career rather than being limited to a specific activity such as selling artwork or obtaining commissions or other professional work.

When deciding whether to engage an agent it is important to consider the agent's reputation, personality and nature of their agency, and, exactly what you want them to do.

Typical agency agreements include the relationship between a visual artist represented by a particular gallery and between the members of a band and its booking agent.

In NSW, the *Entertainment Industry Act 2013 (NSW)* and the *Entertainment Industry Regulations 2014 (NSW)* regulate the relationship between performers (including any actor, singer, dancer, acrobat, model, musician or other performer of any kind) and their managers or agents. This legislation is discussed in this information sheet.

What is an agent?

Legally, an agent is someone who has authority to create legal relations between their 'principal' (in this case an artist) and others. Put simply, this means letting someone act for you. Just using the word 'agent' does not mean that the person using it is legally recognised as an agent.

The appointment of an agent results in three important legal relationships:

- Between the principal and the agent, which is discussed later in relation to **an agent's obligations**
- Between the agent and the third parties with whom they deal on behalf of their principal, which is discussed later in relation to **what can an agent do?**
- Between the principal and the third parties with whom the agent makes commitments on behalf of the principal, which is discussed later in relation to **what can an agent do?**

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When appointing an agent you should consider and define (preferably in writing) the scope of authority that you are giving to your agent. The agent can commit you to contractual obligations within the scope of their authority. The scope of authority of an agent is discussed later in relation to **what can an agent do?**

How do you create an agency relationship?

Generally an agency may be created by written or oral agreement, or may be implied by the conduct of the parties – both the agent and the principal. For an implied agency, the law will look at the actions of the parties to determine objectively if an agency exists – that is, have you acted in a way that reasonably implies your intention to have someone act as your agent. For example, if you entrust a gallery with the sale of your works over an extended period, your relationship with the gallery could be seen as an agency rather than one of consignment.

An agency relationship may exist for a limited purpose, such as asking a person to complete an online transaction, which will involve the person making the request (the principal) authorising the agent to complete the online transaction on behalf of the principal. Websites that provide transactional services can result in the transactional website being recognised as acting as the agent for the person that is using the services provided by the website.

In certain circumstances, an agency agreement must be in writing and in the form of a Power of Attorney – a special type of legal document –such as where the agent is authorised to sign a deed on behalf of the principal. Each state has specific legal requirements about Powers of Attorney including, in some circumstances, a requirement to register them.

If you are unsure whether your agency agreement must be in writing or in the form of a Power of Attorney you should seek independent legal advice on this issue. If you are an artist or arts organisation you may be able to seek assistance from Arts Law. In any event, it is always better to enter into any agreement in writing as a written document clarifies the terms of the agreement and can be used as evidence if things go wrong.

What can an agent do?

An agent can be appointed for a specific transaction, such as negotiating a commission of a new artwork with a particular buyer, or on an ongoing basis to represent the artist.

An agent's main role is usually to find, negotiate and conclude contracts for its artists. Remember, though, that your agent only has the power to negotiate and enter into agreements on your behalf if, and to the extent, that you authorise them to do so. In other words, an agent's authority can be specifically created and limited by the terms of the agency agreement. This means, for instance, that:

- you can retain the final right of contract approval so that you know of any deals being arranged by the agent before a binding commitment is made;
- you can limit the scope of the agency to certain activities – for example, a musician could limit their agent to getting gigs, or to marketing or promotion tasks but specifically exclude signing record deals; or
- you can limit the amount of money the agent can spend on your behalf.

An agent may also have additional implied authority, which supplements any rights expressly granted. For example, by giving your agent the power to book interviews, it may reasonably be implied that they can make a commitment for you to turn up at a particular time and date. If there is any evidence, however, that you have expressly prohibited this, then the authority cannot be implied.

The really sticky area is where an agent acts with apparent (ostensible) authority. This is where an agent appears to others to be acting within the scope of the authority granted by you, but is in fact acting outside of it (or is no longer your agent at all). In this situation:

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- you may not be able to get out of an agreement made by your agent with third parties; and
- any third party that enters into an agreement with the agent, reasonably thinking that the agent has your authority to make the agreement, may be able to rely on and enforce that agreement against you. For example, you may find yourself bound to paint a commissioned work for an organisation you despise because your agent (acting under ostensible, but in fact not real, authority) signed you up for it.

Some of the activities associated with agents that work with writers, artists and performers include:

- seeking and securing work (commissions, gigs, film parts, etc);
- negotiating terms of an agreement for an artist's commissioned work or sale of artwork contract,
- negotiating arrangements relating to the attendance of the performer at a performance, arranging recording contracts or music publishing or other publishing agreements; and
- management of the reputation or career development of the writer, artist or performer and arranging publicity activities.

An agent's obligations

A legally recognised (correctly established) agent has legal obligations to their principal that impose a high level of trust and responsibility on the agent. In legal terms this is called a 'fiduciary relationship' and this places certain obligations on the agent regardless of any contractual obligations that may be imposed on them. The main obligations of an agent are to act in **the principal's best interests** and to **act honestly**. The duties of an agent include:

Duty to fulfil agency

An agent must carry out instructions. If an agent goes beyond or acts contrary to these instructions, and then causes loss, they are normally liable to cover that loss.

Duty to act in person

Unless otherwise agreed, or in an emergency situation, an agent must perform the agency in person, and not delegate their work to someone else. In other words, if the agent is allowed to appoint sub-agents, it should be made clear in the agency agreement.

Duty of care, skill and diligence

An agent that is paid for their work is required to exercise the degree of care, skill and diligence that is reasonably necessary for the proper performance of their obligations.

Duty to promote the principal's interests

The agent is not permitted to further their own interests, or those of any other person, in conflict with your interests. That is, an agent has to avoid any conflicts of interest, and fully disclose any conflicts to the principal. An agent must not, except where the principal consents, make seek to take financial advantage of their activities that are carried out on behalf of the principal; such as, by taking secret commissions in transactions. These duties are also known as the '**fiduciary duties**' of the agent, which exist where there is a relationship of trust and confidence.

Confidentiality

An agent must keep any information provided by the principal in confidence, completely confidential. Even after the end of the agency relationship, an agent is not permitted to use any confidential information acquired in the course of

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the agency in competition with the principal, or to the principal's detriment.

Duty not to profit secretly from the agency

For example, an agent isn't allowed to make their own, undisclosed commission (a secret profit) for sealing a deal (that is, apart from any usual and customary commission when the principal knows that the agent will receive something (but not necessarily the amount) from a third party).

An agent breaches their duty if they receive a bribe, and can be liable to the principal for the amount of the bribe and for any commission payable in relation to the transaction for which the bribe was given.

There is also legislation in all States and Territories of Australia dealing with secret commissions, much of it in *Crimes Acts*, or their equivalents.

Proper management

An agent must keep proper accounts of all agency transactions for you, including of money and property held on behalf of the principal, and provide the principal with a copy of accounting records and statements when requested.

In NSW it is compulsory for an agent to keep any money handled on your behalf separate in a trust account and not mix it with the agency's funds. It is standard and best practice to abide by this in all States and Territories and your agency agreement should clearly specify this.

Termination of agency

If there is no written agency contract and the relationship is for a short time or a specific purpose, usually either the principal or the agent can terminate the agency at any time.

Where an agency agreement involves a continuing relationship between the parties usually:

- termination by one party must be in accordance with any express termination provision;
- if the agreement does not contain an express termination provision, either party can terminate by giving reasonable notice either orally, in writing or by conduct;
- the parties can agree with one another to terminate the agreement; and
- the agreement will end on the death of either the principal or agent.

If the principal terminates the agency relationship, it may be wise to make this known to third parties with whom the agent may have had dealings, to avoid the possibility that the former agent continues to hold themselves out to be the principal's agent and seeks to bind them to contracts with others.

The agency agreement

Arts Law strongly recommends that all agency arrangements are in writing, and that both parties get legal advice before signing an agency agreement.

It is important that an agency agreement, like other agreements, deals with each party's expectations and that it details the rights and obligations of each party. Typical, and important, terms in an agency agreement include:

Term

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The contract should specify how long the agreement lasts, and include any options to renew it.

Scope of agency

Is the agency exclusive or non-exclusive? In other words, can you appoint other similar agents? Many galleries, for example, require that an artist represented by them only exhibits and sells work through them. For this type of exclusive agency, it would be prudent to consider how long the agreement should last (term), and how and when the agency relationship will end (termination).

What are the agent's functions and powers? To negotiate offers? To sign agreements? Does the principal want to retain the right of final approval of any deals before they are signed off on?

Territory/fields of activity

Where can the agent act for the principal? Again, can a gallery only exhibit and sell an artist's work in a particular State or Territory? For performers, is the agent only to act in relation to particular kinds of performance?

Payment/Commission

Agents are usually paid by commission based on the gross income received for the principal. The agreement should give details of the way in which the commission is to be calculated and the timing and method of payment. Does the agent still receive commission if you obtain work without their help? What if a performance is cancelled?

Accounting requirements

The agent should be obliged to pay all money received for the principal into a trust account, and to keep good accounts that properly document the income and expenses associated with the agency. The principal should be given reasonable access to those accounts.

Insurance

For example, visual artists entering a gallery agency agreement should consider who is required to have and bear the cost of insurance to cover the risk that works are damaged or destroyed and the amount of appropriate insurance.

Termination

The contract should set out the circumstances in which the principal or the agent is able to end the agency relationship, including what happens if you want to leave the agent.

Disputes

Arts Law recommends that there is a mediation clause in the contract. When compared to litigation and arbitration, mediation is a less formal and less expensive dispute resolution process. In addition, instead of imposing a solution, in mediation an independent person helps the parties in conflict to formulate their own solution to a dispute. See the information sheet Alternative Dispute Resolution and the Arts Law Mediation Service for further information.

NSW legislation regulating managers, agents and venue representatives in their dealings with 'performers'

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In NSW, the *Entertainment Industry Act 2013 (NSW)* and the *Entertainment Industry Regulations 2014 (NSW)* regulate the relationship between performers (including any actor, singer, dancer, acrobat, model, musician or other performer of any kind) and their managers or agents.

The Act regulates the following:

- 'performers representatives' (such as agents and managers) defined as any person who, for financial benefit, carries out any one or more of the following entertainment industry activities on behalf of a performer:
  - seeking or finding work opportunities for the performer,
  - negotiating terms of an agreement for, and the conditions of, a performance,
  - finalising arrangements relating to the payment of the performer,
  - negotiating arrangements relating to the attendance of the performer at a performance,
  - administering the agreement between the performer and an entertainment industry hirer,
  - making arrangements for publicity attendances and related publicity responsibilities of the performer,

but does not include a person who does so solely as an employee of any such representative.

- 'venue representatives' who are defined as any person who, for financial benefit, acts on behalf of an entertainment industry hirer to arrange a performance by a performer at a particular venue; and
- 'entertainment industry hirers' defined as any person who engages or contracts any performer for the purpose of a performance.

NSW is currently the only state or territory in Australia to have this kind of legislation. It applies to all agents, managers and venue representatives carrying on business within NSW (even if usually resident in another state or territory).

The Act seeks to apply certain standards and controls to minimise unfair practices and exploitation. For example, it requires performers to be paid immediately, or the amount due must be paid into a trust account and paid as directed by the performer within 14 days after the performer representative receives the money; venue representatives must pay any money due to the performer within 14 days of its receipt or as otherwise directed by the performer; and an entertainment industry hirer must pay the performer within one calendar month after the date of the performance or any other period as agreed in writing with the performer. The performer representative must also provide the performer with financial statements.

An 'Information for Performers' fact sheet must be provided before a performer enters into entertainment industry agreement. Child performers must be given a copy the Office of the Children's Guardian 'Parents Fact Sheet explaining the Code of Practice'.

The Act also introduces a code of conduct, which is published by NSW Industrial Relations, to provide performer representatives with guidance on the standards of service required to ensure professional and ethical conduct in the provision of services to performers. The Act also prohibits performers being charged a fee merely for joining or auditioning to join or entering into a contract with a performer representative.

The Act also prescribes the maximum fees and percentages performer representative may charge a performer in different situations:

- in relation to work in the film, television or electronic media the cap is 10% of the total amount payable to the performer for the performance;
- in relation to work in live theatre, or a live musical or variety performance, the cap is 10% for any period up to 5 weeks and 5% for any period after 5 weeks.

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However the Act permits a performers representative to charge fees in excess of the caps where the performer signs an agreement that describes the 'additional services' provided by a performer representative regarding the management of the performer's reputation, career or career development. The Act describes this document as an 'Entertainment Industry Managerial Agreement'. This agreement must set out the fees payable by the performer for the services specified in the agreement. This agreement can provide for fees in excess of the fee caps, provided that the performer receives the ' Information for Performers' fact sheet and acknowledges that they understand that a cooling-off period applies, which allows the performer to get out of the agreement with three (3) days of signing the agreement. However the agreement can provide that the performer waivers the right to the cooling-off period.

Visual artists and the Personal Property Securities Act

When visual artists consign their artworks to a gallery or appoint galleries as their agents, the *Personal Property Securities Act 2009* (Cth) **(PPSA)** means it is essential for them to register their ownership of their artwork or risk losing both the artwork and the ability to recover the full value of the artwork if the gallery goes under.

If the gallery purchases artworks directly from you to sell to its clients, you may still get some protection from the PPSA in the event of the gallery's insolvency IF your agreement with the gallery includes a condition that ownership is retained by you until full payment is made AND you have registered your security interest. You may wish to seek legal advice on the operation and requirements of new personal property securities regime. You can contact Arts Law for more information as to the type of gallery agreement that will provide you with the best protection.

For further information see the Arts Law information on Personal Properties Securities Act (PPSA) and Register or perish: the Personal Property Securities Act and its impact on art dealings.

The PPSA Register also publishes the information sheets: Commercial consignment of craftwork by individual artist to gallery (sole trader); and Indigenous artists and art centres.

Further information

Other Arts Law publications for those considering an agency relationship include:

- Artist-Gallery checklist
- Music Management checklist
- Artist-Gallery (Long Term) Agency sample agreement
- Gallery and Touring Agency sample agreement

Arts Law publishes '*Visual Artists and the Law*' by Shane Simpson. 3rd Edition by Annabel Clemens (2013); which provides a commentary on: contracts (Ch 5); and securities, sales and galleries (Ch 9).

Other publications that may be useful are:

- *Music Business* (2012) 4th edition, by Shane Simpson & Jules Munro, Omnibus Press, Chapters 4-6

Disclaimer

The information in this information sheet is general. It does not constitute, and should be not relied on as, legal advice. The Arts Law Centre of Australia (Arts Law) recommends seeking advice from a qualified lawyer on the legal issues affecting you before acting on any legal matter.

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