Liability and insurance

Accidents can happen when you operate a business or conduct your creative activity. It is important you understand your 'liability' or legal responsibility to compensate for damage or injury to people and property. This information sheet explains liability, risk management and insurance.

Introduction

It is important that you take care to avoid damage or injury to people and property when operating a business. Most creative activity occurs without incident. However, accidents do happen and sometimes you may be legally responsible for compensating someone for an injury he/she suffered. For example, a customer could slip and fall in your gallery, a volunteer may be injured while helping you cast a mould, an employee or contractor may be injured while using a piece of your equipment. A valuable artwork could be stolen from your studio. Accordingly, you should be prepared in the event of an accident by taking liability insurance.

What is liability?

Liability is your legal responsibility, duty, or obligation to compensate a person for the harm you have caused by breaching your legal duties to that person:

- **Duty of Care**: the law requires you to take reasonable care to avoid hurting or damaging a person or their property when your actions (or inaction) are likely to affect them.
- **Breach of duty**: if what you do (or fail to do) causes harm to a person whom you owed a duty of care, you may be legally responsible or liable.
- **Consequences**: if a court finds that you have done the wrong thing and are responsible for the harm caused, you may have to pay money to the injured person or for the damaged property. The court will look at what precautions you took to prevent harm to the person to whom you owed a duty of care.

Responsibility of tenants or licensees of property

The owner of a property is ultimately responsible for maintenance of the property. As a tenant or licensee occupying property, for example under a lease for an arts studio, you may still be responsible for injuries occurring on the rented or licensed premises, including those caused by defects in the property. This is called Occupier's Liability and the general duty of care applies whether you are the owner, a tenant or a licensee. The liability of an owner/occupier if a visitor is injured on the property is determined by considering whether there was a real risk of an injury occurring and what a reasonable owner/occupier would have done to prevent injury. That is to say there may be no liability where the risk of injury is obvious.

How to safeguard yourself

Identify risks

You need to identify the risks involved in your project. You should think about the possible situations where a person could be injured or property could be damaged, even if they seem unlikely to occur. Below are some questions to consider when identifying risks:

- Will members of the public visit your project space? If so, what are the risks of visitors getting injured (e.g. tripping over cabling, falling down a step)?

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· Is any valuable item stored in your project space(e.g. artwork, equipment)? Will any employee, volunteer or contractor be assisting you? Will their work involve any risk of getting hurt?

· Will you sell products? If so, do any of these products carry the risk of malfunctioning or hurting the purchaser?

Minimise or avoid risks

Once you have identified the risks involved in your project, you must plan how to avoid or minimise the risks. This could include:

· warning signs, for example by labelling dangerous equipment or poisonous substances with a clear warning;

· waivers or release forms. For example, if you run a workshop you could get the participants to sign a release form discharging you from liability in case of injury or accident. Waivers, however, cannot exonerate you from liability in all situations. For example, they are ineffective if the law imposes a strict liability on you in for certain damages. See Arts Law's Information Sheet Exclusion Clauses, Disclaimers and Risk Warnings;

· security measures (e.g. alarms, smoke detectors, sprinklers);

· training, including occupational, health and safety training for you and your employees, contractors, and/or volunteers; and

· insurance, such as public liability, property, workers compensation, to protect you against the risk.

Insurance basics

When you get insurance, you enter into an agreement (**insurance policy**) under which you pay a sum of money (**premium**) against the insurer's undertaking that the insurer will compensate a third party for harm or damage you might cause to that person or his/her property.

The following types of insurance might be relevant in relation to you:

- **Public liability insurance** covers damage caused to a person or his/her property, but does not usually cover employees or volunteers. For example, if a visitor slips and is injured in your gallery, public liability insurance would cover any resulting damage suffered by the visitor.

You should take out public liability insurance to cover any damage to people or property occurring in the space you occupy unless you are insured under someone else's public liability insurance. Accordingly, it is essential that you ascertain to which extent, if any, you are covered under your own or someone else's public liability insurance. For example if the organiser of an arts fair in which you participate, or the cooperative you have joined, has asked to hold meetings at your house, you should investigate whether the arts fair or the cooperative has public liability insurance that covers meetings at your house or whether you should take out your own public liability insurance to cover any gap in protection.

- **Product liability insurance** covers damage caused to people or property by faulty products. In Australia, there is strict liability for damages caused by defective products. This means that a person suffering injury or property damages from a defective product may recover damages from a manufacturer without having to prove intention or negligence on the part of the manufacturer. The term "manufacturer" is understood broadly, and includes importers of foreign products as well as people involved in the manufacturing process. Accordingly, product liability insurance is particularly important to obtain if your activity involves the selling of any merchandise that could cause injury to consumers. For example, crafts might contain dye or paint that could cause a person to become sick, or a lamp you manufacture could pose a fire hazard;
- **Workers compensation insurance** provides compensation to a 'worker' who suffers a work related injury. **Professional indemnity insurance** covers damage caused to a person as a result of the insured person's professional activity. For

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example, you may provide advice or instruction in a special technique in a publication or a workshop. If someone then relies on your professional opinion as expressed in that publication or workshop and is injured or suffer damage because the opinion was incorrect, they may seek to hold you responsible;

- **Property (building and contents) insurance** covers the replacement and repair of things in the insured property. You should obtain contents insurance to protect goods and equipment in your premises from damage or theft;
- **Transit insurance** covers the replacement and repair of the insured item, for example art equipment stolen, destroyed or damaged during delivery or on loan;

· **Volunteer insurance** covers damage suffered by a volunteer in the course of his/her activity for you;

· **Other insurance**: you may consider taking out other insurance policies (e.g. general business insurance), or you may otherwise be required to take out other insurance policies by law. Contact Arts Law or consult *The Arts Insurance Handbook* published by Arts Law or your solicitor or insurance broker for more information on what insurance you need.

Workers compensation insurance in Australia

If you are engaging people to work on a creative project you should check the workers compensation legislation of your state or territory to understand your obligations as an 'employer' to have workers compensation for your 'workers'. Note that the definition of 'worker' in each state or territory may extend to:

· people who are engaged under a "contract of service" (employees) and who work on a full-time, part-time or casual basis;

· people engaged under a "contract for service", who perform work as an independent contractor or who are sub-contractors (working for a principal contractor);

· company directors engaged under a "contract for service"; and

· volunteers or interns that do not receive payment for the work (apart from any payment for expenses).

There are also differences between the workers compensation legislation of each state or territory regarding the obligation of an employer to obtain workers compensation insurance (different thresholds apply) and in relation to licensed insurers and whether employers can self-insure:

· NSW: Under the Workers Compensation Act 1987 (NSW), workers compensation insurance is compulsory to protect against compensation claims for workplace injuries where you pay more than $7,500 in total wages (i.e. cumulatively among all employees, not per employee, including overtime, leave payments, super etc.) in a financial year, employ an apprentice or trainee or in other specific circumstances. Visit SafeWork NSW.

· Australian Capital Territory: Under the Workers Compensation Act 1951 (ACT), an employer must either take out a workers compensation insurance policy with a licensed insurer to cover workers compensation claims made by its 'workers', or apply to WorkSafe ACT to be granted a permit to self-insure against workers compensation claims. Visit WorkSafe ACT.

· Queensland: There is no threshold that you must reach before insuring people defined as 'workers' in Queensland. Unless you are a licensed self-insurer the Workers' Compensation and Rehabilitation Act 2003 (Qld) requires employers to insure their workers with WorkCover Queensland. Visit WorkCover Queensland.

· Victoria: Under the Workplace Injury Rehabilitation and Compensation Act 2013 (Vic) workers compensation insurance is compulsory to protect against compensation claims for workplace injuries where you pay more than $7,500 in total wages (i.e. cumulatively among all employees, not per employee, including overtime, leave payments, super etc.) in a financial year, employ an apprentice or trainee or in other specific circumstances. From 1 July 2014, employers will no longer be required to take out a WorkCover Insurance Policy. Instead they will be required to register with the Victorian WorkCover Authority

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(VWA) to be covered by WorkCover insurance. Visit Victorian WorkCover Authority.

· Tasmania: Under the Workers Rehabilitation and Compensation Act 1988 (Tas) an employer must either take out a workers compensation insurance policy with a licensed insurer to cover workers compensation claims made by its 'workers', or apply to the WorkCover Tasmania Board to be granted a permit to self-insure against workers compensation claims. Visit WorkCover Tasmania.

· South Australia: Under the Workers Rehabilitation and Compensation Act 1986 (SA) if you employ one or more workers and the total remuneration payable to your workers exceeds $12,031 (indexed figure for 2014-15 financial year), you must register as an employer with WorkCover SA. You register and pay a premium to WorkCover SA where you exceed the payment threshold or when a workplace injury claim is lodged by a worker. Visit WorkCover SA.

· Northern Territory: Under the Workers Rehabilitation and Compensation Act (NT) employers must arrange a workers compensation policy if they employ a 'worker'. Visit NT WorkSafe.

· Western Australia: There is no threshold that you must reach before insuring people defined as 'workers' in Western Australia. The Workers' Compensation and Injury Management Act 1981 (WA) requires employers to insure their workers with WorkCover WA. Visit WorkCover WA.

Safe Work Australia is a federal government agency that leads the development of national policy to improve work health and safety and workers' compensation arrangements across Australia. Workplace Safety is a company that is an occupational health and safety (OH&S) advisory and information provider to Australian companies.

Tips for buying insurance

In some cases, group insurance may be available and a cheaper option for you. For example:

- **National Association for the Visual Arts** (NAVA) provides a members-only public and product liability and professional indemnity insurance package for visual artists and craftspeople (www.visualarts.net.au);
- **Ausdance** provides a members-only public and product liability and professional indemnity insurance package for dance teachers, dancers and dance companies (www.ausdance.org.au);
- **Duck for Cover** provides members-only public liability insurance for performance based artists (www.duckforcover.com.au);
- **Flying Arts** provides a members-only public and product liability and professional indemnity insurance package for artists, artworkers, writers and musicians and extends to limited cover for teaching and training students (www.flyingarts.org.au);
- **Local Community Insurance** provides insurance to clubs and community groups (www.localcommunityinsurance.com.au);
- **Regional Arts NSW** provides public liability insurance and volunteer insurance cover for incorporated entities in New South Wales, provided the entity is an affiliate of Regional Arts NSW (www.regionalartsnsw.com.au);
- **Regional Arts Victoria** provides public liability insurance and volunteer insurance cover for arts groups and individual artists. Although the organisation focuses on Victorian artists, its insurance policy is available to artists throughout Australia (www.rav.net.au).

Further information

The following publication on insurance issues is available from Arts Law:

- Catherine Fargher and Seth Richardson, *The Arts Insurance Handbook: A Practical Guide for Artists and Arts Organisations*, 3rd ed, Arts Law Centre of Australia, 2005

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