Auspice Agreements

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However, as an unincorporated association of individuals the Group may find it difficult to obtain funding such as grants, because funding bodies generally prefer to deal with an incorporated legal entity rather than a group of individuals. A way of managing this problem is for the Group to work under the umbrella of an incorporated organisation, which will involve that organisation receiving the funding on behalf of the Group. The incorporated organisation will administer the funding on behalf of the Funding Body; including by holding the money in a bank account; paying out the money to meet the costs of the project that the Group is undertaking; and reporting to the Funding Body and accounting for how the money is spent. Such an arrangement is called an Auspice Agreement.

Even if the Group has formed a legal entity, there are circumstances in which an auspicing relationship may still be appropriate. An example is where the Funding Body wants to see the Group establish a reputation of successful implementation of projects before providing direct funding to the legal entity formed by the Group. In that circumstance, the Auspice Agreement would reflect that the Group is operating through a legal entity.

Introduction

‘Auspice’ means to provide support, sponsorship or guidance. From this word we get the name ‘Auspice Agreement’ with the Group being known as the ‘auspicee’ and the incorporated organisation being known as the ‘auspicor’. When using an Auspice Agreement, the relationship can be described as one where the Group will be carrying out the project ‘under the auspices of’ the incorporated organisation (or Auspicing Body).

An Auspice Agreement must be drafted with care because the Auspicing Body is taking legal and financial responsibility for how the money provided by the Funding Body is spent. They also have responsibility for making sure that the project is completed on time.

Every auspicing relationship will be different and there may be additional issues that need to be included in each particular Auspice Agreement in order to take account of the specific circumstances of the Group and the project being implemented; the requirements of the Auspicing Body that is acting as the auspicor; and the requirements of the Funding Body and the terms and conditions of the funding agreement.

What is an Auspice Agreement?

Auspice Agreements govern a specific type of business relationship between an Auspicing Body (or auspicor) and an unincorporated group of individuals (or auspicee). It is possible for a solo artist to enter into an Auspice Agreement.

Certain funding schemes are only open to incorporated bodies or organisations with specific tax structures. In order for a Group to access these funding opportunities, which are typically project-based, it may enter into an auspicing relationship with an incorporated body – the Auspicing Body. The application of the Group for funding will be supported by the Auspicing Body with the funding agreement being between the Funding Body and the Auspicing Body. While the Group will be carrying out the project, the Auspicing Body will have the contractual relationship with the Funding Body and the legal responsibility for the financial and other commitments in the funding agreement. It is the Auspicing Body that must administer funds, and ensure compliance with the terms of the funding agreement with the Funding Body.

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The Auspice Agreement details the financial and administrative arrangements between the Auspicing Body and the Group. Because the Auspicing Body will spend time and other resources on managing the auspicing relationship it may expect to be paid a fee for its services. A common practice is for the Auspicing Body to deduct a percentage from the funding as a fee (typically 2-10%, depending on the Auspicing Body's role). The Auspicing Body's degree of involvement in the project can vary greatly, from mere financial oversight to active management. The Group's responsibilities also vary but mainly involve completing the project for which the funding was sought. The Auspice Agreement should describe the roles and responsibilities of the parties and also how the funds are to be managed, including any fees and payments for costs incurred that are to be paid to the Auspicing Body.

Arts Law publishes a sample Auspice Agreement which includes the most common terms that the Group and the Auspicing Body need to consider in reaching an agreement to implement an auspicing relationship.

What are the typical obligations involved in an Auspice Agreement?

The Auspice Agreement sets out each party's obligations. These may vary greatly from one auspicing relationship to another. Here are examples of typical obligations associated with each party.

For the Auspicing Body:

The Auspicing Body's primary obligations are to comply with the terms of the funding agreement with the Funding Body.

The Auspicing Body must monitor and record spending and provide the Funding Body with an acquittal of the funding. The term acquittal is used to describe the process of assessing and reconciling both the financial and performance/progress reports the Funding Body expects following the completion of the project. Most Funding Bodies that provide grants and other forms of financial assistance for arts project require an acquittal report to ensure that the Group has satisfied their obligations under the funding agreement.

The Auspicing Body also provides a level of project management assistance to the Group. This assistance may include financial advice, equipment, office space, marketing or accounting services, or taking Group members onto its payroll system. The Auspicing Body may also cover insurance matters.

For the Group:

The Group's primary obligation is to complete the project in compliance with the Funding Body's requirements as well as those of the Auspicing Body. The Group is responsible for coordinating and ensuring the artistic quality of the project. It will usually liaise with artists, contract with them and arrange their pay. However the Auspicing Body may control the bank account in which the funds are held with payments from the bank account requiring the approval of the Auspicing Body. The Group can also be responsible for marketing and promotional material. Importantly, the Group must liaise with the Auspicing Body and provide any report required to acquit the funding.

The Arts Law sample Auspice Agreement operates with all members of the Group as parties to the agreement with the Auspicing Body and the agreement acknowledges that any intellectual property rights, including copyright, created or owned by the Group are the property of the Group.

Unwanted Obligations: Employment relationships and Partnerships

Sometimes the Group undertakes nearly all the work, but other times the Auspicing Body and the Group work closely together to complete the funded project. In these situations, it is important that the Auspicing Body and the Group don't inadvertently fall into a partnership or an employment relationship. Such relationships can arise de facto outside of formal agreements and may impose unwanted obligations on the parties. An Auspicing Agreement will usually confirm that the parties acknowledge that nothing in their agreement creates any relationship of partnership or employment between the

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parties.

Issues to consider before entering into an Auspicing Agreement

Before entering an Auspicing Agreement, both parties must carefully consider if the agreement complies with their organisation's legal status. For example, the Auspicing Body must consider its constitution and the requirements associated to its tax status.

Auspice Agreements often involve close working relationships. The parties should therefore be satisfied that they can enter into a successful working relationship with one another. Moreover, the Group must be aware that entering an Auspice Agreement implies losing some degree of independence to the Auspicing Body.

Issues to consider when drafting an Auspicing Agreement

When drafting an Auspice Agreement, both parties must be careful to include all of their intentions and expectations, and must plan for certain eventualities. For general information about contracts, see our information sheet Contracts: an Introduction.

Here are some essential issues to address in the Auspice Agreement:

- When – Delineate your agreement either with specific dates or in relation to events (e.g. the project's completion).
- What – Specify each party's obligations, in particular in relation to:
  - Financial administration: How will the Auspicing Body manage the funds and dispense them to the Group? How will the Group help the Auspice Body obtain these funds and record their expenditure? How will possible surpluses be distributed?
  - Fees: How much, if at all, will the Auspicing Body charge for its services?
  - Intellectual property: Acknowledge that the Group retains intellectual property rights in the material they create or own.
  - Recognition: how will the roles of the Group, Funding Body and Auspicing Body be recognised in promotional material?
  - The project: What is the nature of the project for which funding is sought? What is the Group's business plan and budget?

- Who – Specify in relation to each party, which individuals are:
  - The project managers: Who is responsible for the managing the implementation of the project? Including making the decisions as to how the project is to be carried out.
  - The financial controllers: Who is responsible for authorising payments? Including the process the project managers must follow to obtain approval for entering into financial commitments.
  - The managers responsible for responding to requests for information about the project or grant: As the Auspicing Body has the legal and financial responsibility to account to the Funding Body, it may expect to either control the process of responding to requests for information about the project or grant or be informed about, and involved in, communications between the Group and the Funding Body. The response processes could differentiate between project related communications (that deal with creative and other project issues such as changes to key creative personnel) and grant related issues (that deal with financial matters and issues related to compliance with the terms of the grant including changes in the budget; or changes to start or end dates of the project).
  - The managers responsible for responding media releases about the project or grant: the Group and the Auspicing Body may want to have a process of consultation related to the preparation of media releases.

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- Responsible for the preparation of progress reports and acquittal reports: As the Auspicing Body will have responsibility for providing progress reports and acquittal reports, it may expect to control the process of preparing progress reports and acquittal reports; although the input from the project managers and other members of the Group will be necessary to complete the reporting to the Funding Body.

- What if – However unlikely some events may be, it is crucial to plan for them:
  - Requirements not met: What kind of sanctions apply if a party does not meet its obligations?
  - Termination: What conditions apply if a party wishes to terminate the Agreement?
  - Dispute Resolution: Should a dispute arise, how will the parties deal with it?

Do the members of the Group need a separate agreement?

Quite separately to the agreement with the Auspicing Body, there is a benefit in having a formal agreement between the members of the Group, which clarifies the rights and responsibilities of the members.

Where a group of individuals are working together to carry out a project or some activity or enterprise without a formal corporate structure, the Group has the legal description of being 'unincorporated'. The legal status of an unincorporated entity is uncertain because people could join or leave the Group at any time so that there is always uncertainty as to who is a member of the Group. This has legal consequences as it creates doubt as to who can enter into contracts on behalf of the individuals. If there is uncertainty as to who is a member of an unincorporated entity there may be uncertainty as to who is the legal owner of any property of the unincorporated entity and uncertainty as to whether individual members of the unincorporated entity can pass legal title to any purchaser of property.

Operating as an unincorporated entity may also have the unintended consequence that the members are considered to be a partnership. A partnership is a relationship between persons who carry on a joint enterprise or business in common for profit, which usually has an element of continuity or repetition of activities. Although 'one-off' project might not be sufficient to create a partnership, a partnership can arise through conduct as well as the result of an oral or written agreement to form a partnership. A possible consequence of being determined to be in a partnership is that partners are jointly liable for debts that any partner incurs in carrying out the joint enterprise.

Arts Law publishes a sample One-off Performance Partnership Deed, which can be used when a group of performers want to form a partnership for the purpose of putting on a one-off show/project/performance.

When might an auspicing relationship not be appropriate?

There are different circumstances in which entering an auspicing relationship may be the appropriate solution for the Group to carry out a project. However where the members of the Group propose to have a long term working relationship, the Group should consider whether to incorporate; that is, form a legal entity. If that occurs then it may not be necessary to enter into an auspicing relationship and the legal entity formed by the Group may be able to contract directly with the Funding Body.

Incorporated legal entities

The incorporation of a legal entity provides legal structure in which to carry out some activity or enterprise. There are a number of different forms of legal entity so that the selection as to what is an appropriate legal entity to form will be influenced by different factors including whether the entity is going to be a not-for-profit organisation or a for-profit organisation.

Arts Law publishes the Artists in the Black Information Sheet, Business Structures, which explains the difference between incorporated and unincorporated groups. The Arts Law Centre of Australia Information Sheet, Business Structures for Filmmakers, describes the benefits and disadvantages of various forms of legal entities used by filmmakers, including a

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company limited by shares, which is a common legal entity used for a for-profit enterprise. The Arts Law publication, Business Structures and Governance: A Practical Guide for the Arts (2008), has a more extensive discussion of the benefits and disadvantages of various forms of legal entities including a co-operative, incorporated association, partnership and a company limited by shares.

The Australian Securities and Investment Commission (ASIC), is the regulator of a company limited by shares or a company limited by guarantee; so that when those entities are formed the company is registered with the ASIC under the *Corporations Act 2001* (Cth).

Co-operatives and incorporated associations are formed under state or territory legislation, so that the relevant regulator and associations incorporation statute needs to be identified.

Indigenous organisations may be eligible to incorporate under the *Corporations (Aboriginal and Torres Strait Islander) Act 2006* (Cth). That Act is administered by the Office of the Register of Aboriginal and Torres Strait Islander Corporations (**ORATSIC**).

Useful Readings

- Arts Law Centre of Australia (Artists in the Black) Information Sheet, *Business Structures*
- Arts Law Centre of Australia, Information Sheet *Business Structures for Filmmakers*
- Arts Law Centre of Australia, Information Sheet *Contracts: an Introduction*
- Arts Law Centre of Australia, Information Sheet *Contracts: a glossary of jargon*
- Arts Law Centre of Australia, Information Sheet *Exclusion clauses, disclaimers and risk warnings*
- Arts Law Centre of Australia, Information Sheet *Liability and insurance*
- Arts Law Centre of Australia, Information Sheet *Organising a festival*
- Naomi Messenger with Seth Richardson, *Business Structures and Governance: A Practical Guide for the Arts*, Arts Law Centre of Australia, 2008
- Catherine Fargher and Seth Richardson, *The Arts Insurance Handbook, A Practical Guide for the Arts*, 3rd ed, Arts Law Centre of Australia, 2005
- Arts Law publishes *'Visual Artists and the Law'* by Shane Simpson. 3rd Edition by Annabel Clemens (2013); which provides a commentary on: the basics of copyright (Ch 1); trading copyright (Ch, 2); protecting your copyright (Ch 3); moral rights (Ch 4); contracts (ch 5); resale royalties (Ch 8); art and the internet (Ch 10); Aboriginal and Torres Strait Islander artists (Ch 11) design (Ch 14); insurance and liability (Ch 16); debt (Ch 17); and tax (Ch 18).
- The Justice Connect Information Hub provides a guide to auspicing arrangements relevant to not-for-profit community organisations.

Need more help?

Contact Arts Law if you have questions about any of the topics discussed above

Telephone: (02) 9356 2566 or toll-free outside Sydney 1800 221 457

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