



CAST AND CREW (DEFERRED FEES)

EXPLANATORY NOTES

USING THE EXPLANATORY NOTES

The Explanatory Notes are intended to provide more detailed explanations of certain clauses in this **sample agreement** or to give more detail about the law involved.

The Explanatory Notes DO NOT form part of the agreement and should not be included in your final redrafted agreement.

The Explanatory Notes are not intended as legal advice and should be considered information only. You should contact Arts Law for specific legal advice.

PARTIES

The agreement should clearly identify the name and address, and preferably the telephone and fax numbers, of the persons or organisations entering into the agreement (**parties**). Throughout the rest of the agreement, the parties are referred to or "defined" by shorthand terms for ease of reference. The film or video producer is identified as "Producer" and the cast or crew member as "Contractor". Other terms could be used, or the parties could simply use their own names.

If a party has an Australian Business Number (ABN), Australian Company Number (ACN) or Australian Registered Body Number (ARBN), the number must be included. The ABN is important for GST purposes.

If either party is a company, its Australian Company Number (ACN) and the address of its registered office must be stated.

RECITALS

The Recitals summarise the intentions of the parties. They include the title of the film or video (**Film**) that the Producer intends to make.

DEFINITIONS (CLAUSE 1)

Clause 1 gives the meaning of certain words or expressions that are regularly used throughout the agreement. Other words or expressions are defined in specific clauses of the agreement. Words or expressions that are defined begin with a capital letter.



OPERATION (CLAUSE 2)

The Contractor will commence providing the services on a certain date or from a certain event. The parties need to insert that date or event in Schedule A. The date or the event which will signify the completion date of the agreement also needs to be inserted in Schedule A.

SERVICES (CLAUSE 3)

In Schedule A, the parties should describe what the Contractor is engaged to do (**Services**) and the specifications or outcomes that the Producer wishes to achieve. For example, if the Contractor is acting a particular role, the role should be identified. If the Contractor is setting up the lighting for a film and the lighting has to be completed by a certain stage of the film production, this should be stated. If the Contractor is going to edit the Film, that function should be specified. If the Contractor will fulfil a number of roles, all of the roles should be listed.

NON COMPETITION AND CONFLICTS OF INTEREST (CLAUSE 4)

One of the features of an independent contractor relationship is the freedom of the Contractor to work for other people or on other projects. Clause 4 clarifies that the Contractor may provide services to other parties provided that:

- such activities do not prevent the Contractor from providing the Services to the Producer or from complying with the agreement;
- work for other people or on other projects does not put the Contractor in actual or potential conflict with the interests of the Producer.

FEE (CLAUSE 5)

Clause 5.2 states that the Contractor will be paid on a deferred basis out of the Producer's Net Profits. Net Profits are defined in Schedule B.

Clauses 5.3 and 5.4 require the Contractor to submit to the Producer a detailed record of the Services, accompanied by any supporting documentation required by the Producer and a tax invoice specifying the amount owing to the Contractor for a particular period.

New South Wales (Clause 5.5(b) and Annexure A)

In New South Wales, clause 5.5(b) and Annexure A must be included if the Contractor may be using employees or sub-contractors to provide any part of the Services. This will usually not be the case for actors. For example, if a particular person is contracted to act the lead role in a film, then only that person can provide the Services. In contrast, a set designer may not need to carry out every aspect of the services personally and may use employees or sub-contractors to do some aspects.

In most States, where the Contractor may use employees or sub-contractors to provide the Services, the Producer has a potential liability for any unpaid payroll tax or worker's compensation payments that the Contractor owes to his/her employees or sub-contractors. In New South Wales (but not in Queensland, Victoria, Western Australia or South Australia), there is legislation that has the effect of reducing that potential liability by requiring the Contractor to provide a statement in the form of Annexure A. Beware that while the statement in Annexure A will significantly reduce the Producer's risk of liability for such payroll tax and worker's compensation payments, it is not conclusive. If you are unsure, contact Arts Law for advice.

Is the Contractor registered for GST (clauses 5.6 to 5.8)



If the Contractor is registered for GST, use only clause 5.6 and delete clauses 5.7 and 5.8. If the Contractor has an ABN but is not registered for GST, use only clause 5.7 and delete clauses 5.6 and 5.8. If the Contractor doesn't have an ABN and isn't registered for GST, use clause 5.8 and delete clauses 5.6 and 5.7.

Contractor benefits (clause 5.9)

Clause 5.9 requires the Producer to provide a copy of the Film to the Contractor in addition to the deferred fees. If any additional benefits or alternative forms of compensation are being provided to the Contractor, the details should be added into this clause.

GOODS AND SERVICES TAX (CLAUSE 6)

The parties to the agreement must consider their obligations with respect to taxation and other statutory fees and charges.

GST is a general tax on goods and services supplied in Australia. Most supplies for arts businesses made for consideration (e.g. money or payment in kind) will be subject to GST. Clause 6 provides that payments are *exclusive* of GST. If this does not suit your situation, you will need to consider an alternative clause.

You should obtain specific professional advice on your GST and tax position and obligations under the agreement and generally.

For more information contact the Australian Taxation Office on 13 28 66 or visit the website www.ato.gov.au. In addition, the Australia Council for the Arts has published [*Artefacts: the Arts and Tax - a practical tax workbook for the arts sector*](#) which can be downloaded free from the Australia Council website.

Other taxation issues

The parties need to consider their other obligations in regards to taxation and other statutory fees and charges. Under the Australian tax system, the party paying for services under a contract has to determine whether any amounts must be deducted or withheld from the payments made to the other party (eg. withholding or PAYG tax).

ACCOUNTING (CLAUSE 7)

The Producer must always maintain accurate records of income and expenses. A Contractor receiving deferred payments based on Net Profits should have the right to inspect the financial records as to the calculation of those profits to ensure that the Contractor is in fact receiving his or her proper entitlements.

RELATIONSHIP OF THE PARTIES (CLAUSE 8)

Clause 8.1 expressly defines the relationship between the Producer and the Contractor as one of independent contractor as distinct from, among other things, one of employment.

Whether the relationship between Producer and Contractor is one of employee/employer or independent contractor/principal is a question of fact and law. Clause 8 specifies the parties' legal intention to enter a relationship of principal and independent contractor. Although an independent contractor relationship will not exist simply because the parties say so, their intention as expressed in the agreement will be a relevant consideration.



COPYRIGHT OWNERSHIP AND PERFORMER'S RELEASE (CLAUSE 9)

Clause 9 provides that the Contractor assigns copyright to the Producer in any material the Contractor creates as part of his/her engagement for the Film. For example, a Contractor may contribute to the script or create a set design in the course of production.

In order to exploit the Film, the Producer must have ownership of the necessary rights in all elements of the Film. If the Contractor is an independent contractor rather than an employee, a clear assignment of copyright in writing is necessary for the rights to be held by the Producer.

Clause 9 is worded broadly to cover a range of rights. However, it is not appropriate for the Producer to secure rights in material created independently of the Film. Contact Arts Law for further advice if you are unsure whether this clause covers your specific purpose.

Copyright in the sound recording of a live performance

Performers who contribute sounds to a live performance fixed in a sound recording own rights of copyright in that recording jointly with the person who owns or commissions the recording (with some exceptions). For example, if the Services provided by the Contractor involve performing music in a studio to be recorded for the film's soundtrack that is considered a live performance and the Contractor will be a joint owner of the copyright in the sound recording. Clause 9.1 has been drafted so that the Contractor assigns to the Producer any rights of copyright in any sound recording of any live performance by the Contractor provided as part of the Services.

This rule only applies to sound recordings not audiovisual recordings. For example, if the Services involve the Contractor performing music which is **filmed**, the Contractor does not have any copyright in the film or video of that live performance.

Performer's release (clause 9.2)

If the Services do not involve a live performance (such as acting, dancing, playing music or singing), sub-clause 9.2 can be deleted.

Under the *Copyright Act*, performers have limited (non-copyright) rights in the following performances (whether given in the presence of an audience or otherwise):

- a performance (including an improvisation) of a dramatic work, or part of such a work, including a performance given with the use of puppets;
- a performance (including an improvisation) of a musical work or part of a musical work;
- the reading, recitation or delivery of a literary work or part of a literary work, or the recitation or delivery of an improvised literary work;
- a performance of a dance;
- a performance of a circus act or a variety act or any similar presentation or show; and
- a performance of an expression of folklore.

Certain performances do not attract performers' rights, such as reading news and information, performing sporting activities, participation by members of an audience and certain performances by teachers and students in the course of educational instruction.

Accordingly, all cast members (actors, dancers and musicians and other performers) in the Film are likely to have performers' rights and the Producer must obtain permission from each of them to:

- i. record their performance by sound recording or film (whether directly from a live performance or indirectly from a communication of it); and
- ii. communicate their performance to the public (this includes broadcasting and communicating on the internet).

Under clause 9.2, the Contractor authorises the Producer to record and use his/her live performance.

Generally, once a performer has given permission for the recording and communication of his/her performance on film (audio visual recording), the performer has no further rights in relation to how the film footage is used (other than the moral rights discussed in relation to clause 10 below). This is, however, subject to any agreement to the contrary or the terms of any award.

The sample agreement provides that the parties must agree, as a matter for negotiation between them, on the extent of the Producer's authority to use the recording of the Contractor's live performance in terms of territory (worldwide or certain countries), media (all or limited media), time and purpose.

In some cases the Producer will want an unlimited right to use the performances of the Contractor and in other cases, may only require rights to use recordings of the performance for a clearly specified use (such as the promotion of the Film). For example, a performance which is to be included in a documentary film could be limited by the words "for use in connection with documentary film *Botany Bay*, including exploitation of the Film in all media throughout the world, and advertising of the Film." This would prevent use of that film footage in other projects without the Contractor's permission.

The position is different for sound recordings of live performances. Even if the performer agrees to the making of a sound recording of his/her live performance, the Producer cannot use that sound recording as a soundtrack for a film (which includes a video and would include any soundtrack with moving visual images) unless the Contractor expressly consents. If the Producer wants to use a sound recording of a cast member's performance as a soundtrack for the Film, the Producer must obtain the performer's express consent to this specific use by including clause 9.2(d).

MORAL RIGHTS (CLAUSE 10)

In clause 9, the Contractor assigns copyright in any copyright work or other subject matter (**Materials**) created in the course of providing the Services to the Producer and authorises the Producer to make and use sound and audio visual recordings of the Contractor's live performances. The Contractor may, however, still have moral rights in relation to those Materials and performances.

Moral rights are personal rights of an artist, provided for under Part IX of the *Copyright Act 1968* (Cth). They cannot be bought or assigned (i.e. sold). They belong to an artist regardless of whether the artist is still the copyright owner. Moral rights apply to artistic, literary, dramatic and musical works and films. Since 26 July 2007 moral rights have also existed for performers in live performances (so far as the performance consists of sounds) and sound recordings of those live performances.

In Australia there are three moral rights, namely the right of a creator:

1. to be named as the work's author or creator (*the right of attribution*);
2. not to have his/her work (falsely) attributed to another (*the right against false attribution*); and
3. to protect his/her work from unauthorised alteration, distortion or other derogatory treatment that prejudices his/her honour and reputation (*the right of integrity*).

"Derogatory treatment" in relation to an artistic work is defined in the Copyright Act as:

- (a) *the doing, in relation to the work, of anything that results in a material distortion of, the destruction or mutilation of, or a material alteration to, the work that is prejudicial to the author's honour or reputation; or*
- (b) *an exhibition in public of the work that is prejudicial to the author's honour or reputation because of the manner or place in which the exhibition occurs; or*
- (c) *the doing of anything else in relation to the work that is prejudicial to the author's honour or reputation."*

Accordingly, the Producer needs to ensure that the making and communication of the Film does not infringe any moral rights of the Contractor. In clause 10 (and clause 11), the Contractor permits the Producer to do various acts necessary for the Film which might otherwise be considered infringements of the Contractor's moral rights.

Generally, Arts Law recommends that artists resist any contractual term whereby they consent to the future infringement of their moral rights. Arts Law advises against contracts containing general consents or purported waivers of moral rights in relation to all copyright works. Such terms could potentially breach the Australian Consumer Law and similar State legislation. A moral rights consent that is unfair may also be open to attack under various State legislation regulating contracts and industrial relations.

It is, however, usually necessary for the Producers to obtain an appropriate consent in respect of moral rights from any Contractor whose copyright or live performance is used in the Film. Clause 10 lists a number of activities which could theoretically give rise to moral rights infringement. The parties should delete any activities which are not relevant and add others as appropriate. The Contractor should always carefully consider the scope of any consent and seek advice if he/she is uncertain about the terms of the consent.

CREDITS AND USE OF NAME AND LIKENESS (CLAUSE 11)

The credit that the Contractor will receive should be set out in this clause, including the wording, size and positioning of such credit.

The Producer will often want to use the name and image of a particular Contractor to promote the Film, particularly if that person has a reputation which may assist in the promotion of the Film. This clause grants the Producer permission to do so, including using footage in "making of" programs and for DVD use.

CONTRACTOR'S REPRESENTATIONS (CLAUSE 12)

It is important that the parties think about the representations that they are asked to make in any document. Representations are statements or promises made by one party to the other party as a fact, often to entice the party to whom the representation is made to enter the agreement. Warranties are assurances where one party promises that certain facts are



true. Warranties are often coupled with indemnities. An indemnity is a legally enforceable obligation by the party giving the warranty or making the representation that if the warranty or representation is not correct, that party will fully compensate the other party.

The Contractor's representations under clause 12 are for the benefit of the Producer. The Contractor should be given the opportunity to obtain legal advice independent from the Producer's legal advisors before making any representation. Arts Law considers that in circumstances where the Contractor is accepting a deferred fee arrangement and thus taking the risk that he/she may never be paid for work on the Film, it is not fair to require the Contractor to provide any warranty or indemnity. This sample agreement does not provide for any warranty or indemnity from the Contractor to the Producer.

EXPENSES (CLAUSE 13)

Clause 13 provides that the Contractor is responsible for any expense incurred in providing the Services. In certain circumstances the Producer may reimburse the Contractor, provided that the expense has been authorised in writing and the Contractor has produced satisfactory evidence.

ENTITLEMENTS, TAXES AND OTHER CHARGES IN RESPECT OF THE CONTRACTOR (CLAUSE 14)

Clause 14 specifies that the Producer is not responsible for the Contractor's leave entitlements, statutory income tax instalment deductions, superannuation and other entitlements normally associated with an employment relationship. For more information on superannuation for contractors see the MEAA's Fact Sheet on Super for Free-Lancers and the Self Employed (<http://www.alliance.org.au/information-centre/super-tax-information/view-category>)

In New South Wales, clause 14.5 should be included if the Contractor will provide the Services through a corporate structure, or through employees or sub-contractors.

INSURANCE (CLAUSE 15)

The Contractor is responsible for taking out and maintaining any relevant insurance, including insurance covering damage or destruction of the Contractor's property, and personal accident, illness, income protection, death and disability insurance for the Contractor and his/her employees. If the Contractor has employees or is sub-contracting any of the Services, such insurances would also include workers compensation insurance.

If the Producer were to provide these types of insurance covering the Contractor, this factor may be considered as indicating an employment relationship. As indicated above, a deferred fee arrangement is not possible in that case.

If the relationship between the Producer and the Contractor is subsequently determined to be an employment relationship, the Producer may be liable for any injuries and losses to the Contractor (and his/her employees) which occur in the course of providing the Services. In that case, if the Contractor does not have insurance, this could result in a significant personal liability for the Producer. Clause 15.2 is designed to protect the Producer by requiring the Contractor to demonstrate that he/she has the necessary insurance.

Arts Law recommends that all Producers obtain public liability insurance. For more information see Arts Law's information sheet on [Insurance](#).



OH&S COMPLIANCE (CLAUSE 16)

Both the Contractor and Producer have obligations under State and Commonwealth health and safety legislation. Both parties should review their obligations under the relevant legislation. Generally, the party in control of a site where work is undertaken is responsible for ensuring its safety.

TERMINATION (CLAUSE 17)

The agreement automatically terminates at the close of business on the completion date provided for in the agreement unless the completion date is extended under the terms of the agreement.

Clause 17 sets out the circumstances in which the parties can terminate their relationship. Either party can terminate for a breach which is not remedied or if the production schedule is delayed. The Producer has additional rights of termination, including the right to terminate for any reason provided the Producer gives sufficient notice.

If the Film has investors which have required a completion guarantee, the Producer needs to consider whether the contribution of a particular Contractor is critical to the Film. If so, it may be necessary to amend the agreement to limit the Contractor's rights of termination and impose additional obligations such as deadlines for the completion of the Services. Contact Arts Law for more information.

CONFIDENTIALITY (CLAUSE 18)

Clause 18 provides that the confidential information defined in clause 1 remains the property of the Producer.

DISPUTES (CLAUSE 19)

It is almost never worth going to court to resolve a dispute, but not every problem can be solved easily. Clause 19 provides that a party which wants to access the dispute resolution procedure in the contract must first send a written notice of the dispute to each other party. This starts a timetable for resolving the dispute. The parties must make a good faith effort to sort out their dispute themselves, but if that isn't successful must then attend a mediation arranged through the Arts Law mediation service (at least one party must subscribe to access this service). Compared to litigation and arbitration, mediation is an informal and less expensive dispute resolution process, in which an independent person helps the parties in conflict to formulate their own solution. For more information see Arts Law's information sheet: [Mediation and the Arts Law Mediation Service](#).

The Arts Law mediation service expects that the parties will be able to agree on the person to be appointed as the mediator. If however that is not possible, the contract provides that the Arts Law Centre will appoint a mediator. Instead of the Arts Law Centre, the parties may wish to nominate another independent body within their industry such as Screen Producers Association of Australia. Only after the parties have attempted mediation, can the dispute be the subject of court proceedings.

GENERAL PROVISIONS (CLAUSE 20)

Clause 20.1 specifies how notices under the agreement can be given, and when they are considered to be served (i.e. given)

Clause 20.2 is included to ensure that the parties entering the agreement are solely responsible for their obligations. The consent of either party is required to transfer any right or responsibility under the agreement.



A legally enforceable agreement can comprise both written and verbal (oral) terms. Oral terms can be expressly stated or implied from the circumstances. In the interests of certainty, clause 20.3 seeks to ensure that the written agreement contains all relevant terms. Anything that might have been canvassed during negotiations which is not actually set out in the agreement will generally be excluded by this clause. However, there are exceptions, for example, where terms cannot be excluded by statute and where one party has made deliberate or negligent misrepresentations on which the other party relied in entering the agreement.

Clause 20.4 addresses possible future changes to the law in favour of Indigenous rights. It provides that the parties will comply with the law as enacted.

Clause 20.5 requires any changes to this agreement to be in writing signed by both parties. This avoids confusion over the terms of the agreement and prevents a party arguing that an agreement was varied orally.

Clause 20.6 specifies that the validity of the agreement as a whole and of its individual clauses is not affected by the invalidity of any clause, unless that invalidity has an impact on any other clause.

Clause 20.7 specifies the governing law and that the courts of that State will be competent for any litigation in relation with the agreement if the parties fail to resolve any conflict under clause.

SIGNING THE AGREEMENT

If you are an individual, sign your name and write in the date of signing where indicated at the bottom of the agreement. This is sometimes called “executing” the agreement.

If a company or association rather than an individual is a party to the agreement, the organisation’s rules and relevant laws determine who is authorised (for example a director, a secretary), and how many authorised signatories (for example two directors, or a director and a secretary) are required, to sign the agreement. It may also be necessary to stamp or “affix” the document with the company’s or association’s seal if this is required under its constitution or articles of association. In that situation, replace the existing wording “Signed for and on behalf of ...” as follows:

“The Common Seal of the [party] was fixed to this agreement ...”

If someone else is signing on behalf of either party as that party’s agent, you should insert the following sentence into the signature section:

“I am the authorised agent for ...”

If any of the parties is under the age of 18, that party’s parent or legal guardian will need to sign the agreement “on behalf” of the child. This does not mean that the parent or legal guardian becomes a party to the agreement in the parent’s or legal guardian’s own right.

If there is a change to the agreement at the last minute before signing, you can either type up a new agreement, or make the change in handwriting and have each party initial next to the change before signing at the bottom of the agreement. You may also wish to initial each page in order to make sure no new pages can be inserted after you have signed, but this is not strictly necessary.

KEEP RECORDS OF YOUR AGREEMENT

Signing the agreement is evidence that you agreed to its written terms. You will usually be bound to perform the agreement as it is written. For this reason it is a good idea to get the



same number of identical originals of the agreement as there are parties to it and have all originals signed by all parties. Each party then keeps a fully signed copy. At the very least, however, make sure you have a copy of the original agreement so that you can remember what you have signed.

STAMP DUTY

Stamp duty is a tax which is enforced and collected by State and Territory governments on certain “instruments” (that is, documents) and transactions relating to property such as partnership interests or shares, or in some cases, intellectual property such as copyright. You should check with the Office of State Revenue in your State or Territory as to what stamp duty, if any, may be payable on your document or transaction.