



Performers Contractor Agreement 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.

It may be useful to separate the Explanatory Notes from the actual agreement when you are redrafting it to suit your particular situations.

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

WARNING

Before making a contractor agreement it is important that the parties consider whether the relationship between them will be legally classified as one of contractor and principal as opposed to one of employee and employer. The legal obligations in relation to things like tax, superannuation, workers compensation and other entitlements are different depending on this classification. Sometimes Principals try to establish that people they engage are contractors in order to avoid additional legal requirements and expenses. However, merely calling someone a "Contractor" does not, of itself, establish that relationship. Rather, a court looks at all the circumstances regarding the engagement of the person to determine if they are an employee or not.

If you are unsure whether the person is an employee or contractor, you should refer to the list of Useful Readings above. Some of these provide information about the factors that a court considers in determining if someone is an employee or contractor. If you are still unsure, you may be able to contact Arts Law for advice.

PARTIES

The agreement should clearly identify the name, address and preferably the telephone and fax numbers of the persons or entities who enter it (parties). Throughout the rest of the agreement, the parties are referred to or "defined" by shorthand terms for ease of reference,



for example, Contractor. Other terms could be used, or the parties could simply use their own names.

If a party has an ABN, ACN or ARBN the number must be included. The ABN is also important for GST purposes.

If an incorporated entity is being engaged as the Contractor and will then in turn engage an Artist, please see the note at the end of these Explanatory Notes as to how this agreement needs to be amended to provide for this.

SCOPE AND TERM (CLAUSE 1)

The parties must clearly set out what the Contractor is being paid to do. This should be as precise as possible. Contractors are usually engaged to complete certain tasks. For ease of reference we suggest that the list of duties and responsibilities of the Contractor be placed in an Annexure to the agreement and form the definition of “Services” throughout the agreement.

The parties must agree on a start and finish date for the Contractor. This could be a precise date or referred to by reference to certain events, eg. after 10 shows have been performed.

Be careful with this clause – it should reflect conditions which are consistent with the person engaged being a contractor. If the Contractor is working for the Principal for an extended period of time, on a wide range of tasks, and a long notice period must be given to end the relationship (see clause 8), these are factors that a court would consider in determining whether the person is genuinely a contractor or rather an employee.

BASIS OF ENGAGEMENT (CLAUSE 2)

Again, the provisions relating to other people performing the services and the provision of equipment are factors which indicate whether a person is engaged as a contractor or employee. The clauses are drafted so that the Contractor can engage other workers to assist in providing the services so long as the Principal first gives their written approval for this and the Contractor provides any equipment necessary for performing the services at their own cost unless the an alternative arrangement is made in writing. These positions are consistent with a contractor relationship. If you were to amend these clauses so that the Contractor can never engage others and the Principal had to provide the equipment this is more indicative of an employment relationship.

FEE (CLAUSE 3)

Sometimes Contractors are paid a lump sum for completing a task and sometimes they are paid an hourly rate for the hours actually worked. Make sure you specify which and clearly specify when payments are due.

It is important to understand that an indicative feature of a contractor relationship is the payment of remuneration based upon completion of the services that the Contractor has



promised to perform, rather than remuneration by way of periodic wage or salary. At no time should there be a reference in the agreement or any other documentation to the Contractor receiving a wage or salary.

Clause 3.2 contains a few options as the requirements for receiving payment are different depending on whether the Contractor supplies an Australian Business Number (**ABN**) or not.

The law says that an ABN must usually be quoted before any payment for goods or services is made where the contractor is carrying on a business enterprise. Generally, if an ABN is not quoted then the payer must withhold an amount of money that equals the highest personal tax rate (at January 2007 this is 46.5%). This means that if you are operating a business and provide services for a charge of \$1000 and do not quote an ABN, the payer must withhold \$460.50 from the payment made to you, so you will only receive \$530.50 and the payer remits the withheld money to the ATO on your behalf. You may receive some of this withheld money when you complete your annual tax return, depending on your income and the amount of tax you have paid. It is therefore, usually a good idea to apply for an ABN and provide one to anyone acquiring your goods or services.

However, if you are contracted in the course of carrying on an activity as a private recreational pursuit or hobby (and earn less than \$50,000 per annum) the withholding rules outlined above do not apply to you. As a result, payers do not have to withhold any tax from payments, so long as you first provide a written notification of such. There is a special form that you must use for doing this, called "Statement by Supplier – Reason for not quoting an Australian Business Number.", that is available on the Australian Taxation Office's website www.ato.gov.au.

Basically there are three options in clause 3.2:

- for the Contractor to quote an ABN and be paid in full (option 1, clause 3.2(a)); or
- if the Contractor does not have an ABN to provide a form declaring that they are excluded from the ABN rule (option 2, clause 3.2(a)); or
- to let a certain amount of time pass, and then if the Contractor has not provided an ABN or a form declaring that they are exempt, to pay them but withhold an amount from the payment that the Principal must then remit to the tax office (clause 3.2(b)).

You should include one of the options in clause 3.2(a) depending on whether the Contractor has an ABN or not. If the Contractor has an ABN it is useful to include it at the start of the agreement where you set out who the parties to the agreement are.

The option in clause 3.2(b) ensures that the Contractor is paid after a certain time lapses even if they don't comply with clause 3.2(a). You could leave this provision out entirely, which would mean that the Contractor never receives payment until they either quote an ABN or provide the form declaring they are exempt.

Please be aware that it is not compulsory to have an ABN. However, if you are required to be registered for the Goods and services Tax (**GST**) you will need an ABN to do this. All businesses with an annual turnover at least \$50,000 and all non-profit organisations with an



annual turnover of at least \$100,000 must register for GST. You can choose to register if your turnover is less than this but it is not compulsory.

If a Contractor is registered for GST, s/he must also provide a valid tax invoice to the Principal (see clause 4).

For more detailed information about ABNs and GST contact that Australian Taxation Office on 13 28 66 or visit the website www.ato.gov.au.

Clause 3.3 deals with payments in the event that either party terminates the relationship early.

GOODS AND SERVICES TAX (GST) (CLAUSE 4)

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 4 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.

DUTIES AND OBLIGATIONS (CLAUSE 5)

The clause contains fairly standard provisions relating to the conduct of the Contractor. If the Principal has particular policies that the Contractor is expected to adhere to, the Contractor must be notified of these. It is always more straightforward if such policies are in writing and provided to the Contractor for review. It might also be useful to include the policies as an Annexure to the agreement, particularly where the Principal requires strict compliance with their policies.

WARRANTIES AND INDEMNITIES (CLAUSE 6)

A warranty is a promise. Where a party to a contract makes certain warranties (promises) they are for the benefit of the other party. In clause 6.1, the Contractor warrants that certain statements are true. These warranties relate to the qualifications, skill and capacity of the Contractor to enter the agreement and perform the services as well as to the content of the Contractor's work.



In clause 6.1(c), the Contractor promises that any material that s/he generates including any performances will not infringe the rights of any third party. This means that if the Contractor wants to use material created by someone else in a performance or any other material created when performing the services, the Contractor is responsible for getting any necessary licences (permissions) from these people. The Contractor needs to ensure they have cleared any third party rights, including copyright and moral rights (see clause 7 notes for information about moral rights).

In clause 6.2, the Principal warrants that s/he has acquired all necessary permissions, licences and releases for all materials other than those created by the Contractor. This ensures that the Principal must clear any rights in materials provided to the Contractor for use or development.

An indemnity is a promise to reimburse a person if they suffer loss or damage in the circumstances that are the subject of the indemnity. In clause 6.3, the parties promise to reimburse each other if their respective warranties in clause 6.1 and 6.2 are untrue.

CONFIDENTIALITY AND INTELLECTUAL PROPERTY RIGHTS (CLAUSE 7)

CONFIDENTIALITY

Clause 7.1 deals with copyright ownership, uses of copyright protected material, moral rights, performers' rights and the use of the Contractor's name and biography.

A Contractor may create material that is protected by copyright. This could include dramatic works like plays or recorded choreography, funding applications, project proposals, artworks or musical works. In this agreement, the Contractor retains copyright in these materials but grants the Principal permission to use them on certain conditions. You will need to think about the following:

- for how long the Principal can use the copyright work the territory in which the rights can be used; and
- whether the permission (licence) given over the works is exclusive or non-exclusive.

If a licence is exclusive, only the Principal can use the copyright works in the ways stated. If the licence is non-exclusive, the Contractor can still use the works and can allow other people to use them as well. Of course, a Contractor is usually paid more when they give exclusive rights for a period of time as these are more valuable to the Principal.

The position under the Australian copyright laws is that contractors usually retain their copyright, in contrast to employees, where the employer automatically gets copyright. Of course, you can vary these usual positions by a written agreement. However, a Contractor should think very carefully about giving away (assigning) all of their copyright in material, as this means the Contractor could never use them or a substantial part (an important, distinctive or essential part) of them without first obtaining the Principal's permission. If the Contractor is required to give away (assign) their copyright, the Fee should reflect this.



This agreement is drafted so that the Contractor retains copyright in the materials they create, and the Principal has copyright in any recordings of performances that are given as a result of the Contractor's work.

MORAL RIGHTS

Moral rights are personal rights of a copyright creator. They cannot be bought or sold (assigned). They belong to the creator regardless of whether s/he is still the copyright owner.

Moral rights apply to artistic, literary, dramatic and musical works and films, with some exceptions, in relation to acts or omissions that occur on or after 21 December 2000. There are no moral rights in sound recordings.

In Australia, there is no need to "assert" your moral rights. However, this is required in some other countries, including the United Kingdom and New Zealand. You should include a clause dealing with this if your work is likely to be sold or distributed in these countries.

In Australia, there are 3 moral rights, the right:

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

"Derogatory treatment" in relation to a literary work like song lyrics and a musical work like the music is defined in the Act as:

"(a) the doing, in relation to the work, of anything that results in a material distortion of, the mutilation of, or a material alteration to, the work that is prejudicial to the author's honour or reputation; or

(b) the doing of anything else in relation to the work that is prejudicial to the author's honour or reputation."

There are some circumstances where it is permissible to infringe moral rights. These are where it is reasonable in the circumstances or when the creator has given their consent writing to the infringement. This clause provides that the Contractors' moral rights will be respected except in the circumstances where a consent is provided (clause 7.1(f)).

CONFIDENTIAL INFORMATION AND CONFIDENTIALITY

Clauses 7.2 -7.3 deal with confidential information and outlines what types of information might be considered as confidential, as well as the duty of the Contractor in keeping that information confidential. These clauses benefit the Principal and ensure that a Contractor is bound to keep certain material secret, even after the period of engagement ends (see clause 7.5). Contractors are likely to deal with material that is confidential to the Principal in



planning a performance, and it would be detrimental to the Principal if the Contractor could end the agreement and take advantage of that confidential material.

INSURANCE (CLAUSE 8)

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: (a) people who are engaged under a "contract of service" (employees) and who work on a full-time, part-time or casual basis; (b) people engaged under a "contract for service", who perform work as an independent contractor or who are sub-contractors (working for a principal contractor); (c) company directors engaged under a "contract for service"; and (d) volunteers or interns that do not receive payment for the work (apart from any payment for expenses).

Producers should be aware that public liability insurance will not automatically cover the Producer for the actions of volunteers or Cast Members working as independent contractors. Additional insurance, such as Personal Accident Insurance, should be obtained to provide coverage for these individuals. For more information contact Arts Law or refer to the Arts Law [Arts Insurance Handbook](#) or Arts Law's Information Sheet [Liability & Insurance](#).

TERMINATION (CLAUSE 9)

TERMINATION FOR CONVENIENCE

Clause 8 provides for termination of the agreement by either party for convenience, provided the terminating party gives notice to the other party. You need to include the amount of notice that a Contractor or Principal must give the other party to terminate the relationship.

TERMINATION FOR CAUSE

This clause contains circumstances in which the Contractor and Principal can end the agreement (termination for cause).

The parties should consider if there are some things that are so important to them that they want to be able to end the agreement if they occur where they shouldn't occur or do not occur where they should occur. Additional provision may need to be added to the termination for cause clause in those cases.

Clause 8.3 provides that the Contractor must return the Principal's property on termination, including anything that contains the Principals' confidential information.

PAYMENT IN LIEU

Clause 8.4 provides that if a party terminates the agreement for convenience, the Principal can terminate the agreement with immediate effect provided the Principal pays any amount which would be due to the Contractor if the notice period were maintained. Disputes (clause 10)

It is almost never worth going to court to resolve a dispute, but not every problem can be solved easily. Clause 9 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 Ausdance. Only after the parties have attempted mediation, can the dispute be the subject of court proceedings.

General (clause 11)

Clause 10.1(a) defines the relationship between the Contractor and Principal as one of independent contractor as distinct from, among other things, one of employment. It indicates the intention of the parties but remember, it may not be legally effective if in reality the artist is an employee or partner.

Clause 10.1(b) alerts the parties to the fact that there are some circumstances where a Principal must hold a workers compensation policy in favour of a contractor even though they are not referred to as an "employee". This is because the workers compensation legislation defines some people who are usually labelled "contractors" as employees for the purposes of workers compensation. Similarly the definition of "employee" in the superannuation legislation also includes some people that are usually referred to as "contractors," so sometimes a Principal will have to make superannuation contributions for the Contractor. For more information, please refer to the "Useful Readings" above on superannuation, workers compensation and the Arts Law Information Sheet on Employees and Contractors.

Clause 10.2 ensures that the Principal remains responsible for their obligations under the agreement, unless the Contractor consents to them transferring the rights to someone else. This is usually important to the Contractor, as they may have chosen to deal with the Principal because of the people involved. Remember clause 2.1 provides that the Contractor can engage others with the prior written consent of the Principal.

Clause 10.3 deals with the way that written notice is to be provided to the other party, when it is required.

A legally enforceable agreement can comprise both written and verbal (oral) terms and oral terms can be expressly stated or implied from the circumstances.

In the interests of certainty, clause 10.4 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 10.5 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 from arguing that the agreement was varied orally.

Clause 10.6 addresses possible future changes to the law in favour of Indigenous rights. It provides that the parties to the agreement will comply with the law should these laws be enacted.

Clause 10.7 states that if part of this agreement is held in a court to be legally unenforceable, the parties intend the rest of the agreement to remain on foot to the extent possible. It is relevant if a matter goes to court and the court finds that part of the agreement is invalid.

Clause 10.8 means that if a party does not act on a breach of the agreement by the other quickly, they are not later stopped from taking action in relation to that or a similar breach.

Amend clause 10.9 to state the appropriate governing law for the agreement. This is particularly important if the agreement is between people in different states or different countries where laws may vary.

NOTE: THE FOLLOWING COMMENTS ARE ONLY RELEVANT WHEN A PRINCIPAL ENGAGES A CONTRACTOR THAT IS AN INCORPORATED ENTITY

Sometimes a Principal may engage a Contractor that is not an individual such as a production company, which will then procure the performance of the services under the agreement from a suitably qualified person (**Artist**).

If this is the case, be aware that several of the provisions in this agreement will need to be changed.

For example some obligations have to be put on the Contractor to require, in the Contractor and Artist agreement, that the Artist will agree to some of the provisions in this agreement.

Several of the clauses have to be amended to refer to the Artist. The following are the minimum changes that would need to be made to the agreement to accommodate an incorporated contractor that engages Artists to provide the services:

- Clause 2
 - change clause 2.1 to read *“The Contractor must procure the performance of the Services by a suitably qualified person who is capable of performing those Services (**Artist**).”* [or you could specify the name of the person to be engaged by the Contractor]
 - insert the words *“In addition to the Artist”* to the start of clause 2.2
 - amend clause 2.3 to commence with *“The Contractor will ensure the Artist is provided with all equipment...”*



- amend clause 2.4 to commence with *“The Contractor will ensure the Artist is only authorised to incur expenses...”*
- Amend clause 6 to reflect the promises that are made by the Contractor about the Contractor's capacity and those that are made by the Contractor about the Artist. Remember that the Artist is not a party to this agreement so you can not make the Artist make any promises in this agreement but the Contractor can promise certain things about the Artist and is then responsible if they are not true. You should also add a provision that requires the Contractor to deliver a form signed by the Artist which contains an acknowledgement that the Contractor engages the Artist not the Principal, and indemnifying the Principal against any claims made by the Artist against the Contractor. The Principal could even include this form as an Annexure to the agreement and require it to be signed in the form in the annexure in this provision.
- Clause 7
 - Amend the beginning of clause 7.1(c) to read *“the Contractor authorises the Principal and procures written authorisation from the Artist to make...”*
 - Amend the beginning of clause 7.1(h) to read *“the Contractor authorises the Principal, and procures written authorisation from the Artist, to use the Artist's name...”*
 - Amend 7.2 to refer information disclosed to or acquired by the Contractor *“or the Artist”*.
- Clause 8
 - Delete the words *“the Contractor”* from the end of the first line in clause 8.1 and then add the words *“the Artist”* to the start of 8.1(a)-(f). At the start of clause 8.1(g) insert the words *“the Contractor”*.
 - Add a clause 8.1(h) which reads *“or the Contractor is or becomes or is considered to be insolvent (including if under external administration or where a provisional liquidator, liquidator, administrator, controller, receiver, or receiver and manager is appointed) or the Contractor ceases to carry on business or threatens to do so.”*
 - Amend clause 8.3 to commence *“Immediately upon termination of the Agreement, the Contractor must, and must cause the Artist to, deliver to the Principal”...*
- Clause 10
 - Amend clause 10.2 to read *“The Contractor is responsible for any superannuation payable to the Artist and will maintain a workers compensation policy in favour of the Artist where required to do so by law and indemnifies the*



Principal against any liability in respect of payment of superannuation or workers compensation for the Artist.”

SIGNING THE AGREEMENT

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

If you are signing on behalf of a company or association, you must consult the organisation’s rules and relevant laws to determine who is authorised to sign. It may also be necessary to stamp or “affix” the document with the company or association’s seal if this is required under its constitution or articles of association.

If someone else is signing on behalf of either party as their 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 eighteen, their 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 his or her own right.

If there is a change to the agreement at the last minute before signing, you can either retype the agreement, or make the change in handwriting and have each party initial next to the change before signing at the end. You may also wish to initial each page to make sure no new pages are 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 what is written there. 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, which are 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, or 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 duty, if any, may be payable on your document or transaction.