

# EXPLANATORY NOTES

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## USING THE EXPLANATORY NOTES

The Explanatory Notes are intended to give 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 version.

The Explanatory Notes are not intended as legal advice and should be considered information only. You can contact Arts Law for 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, for example Producer or Client. 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 provide some background information about the Producer and the Client and state the parties' intention in entering into the agreement.

### Note:

If the Client is commissioning a producer's service company you need to add another party (the **Service Company**) and amend the recitals by deleting the current paragraph C and adding the following paragraphs:

- C. The Service Company is exclusively entitled to the services of the Producer.
- D. The Client wishes to commission the Producer to produce a video provisionally titled **★**"[TITLE]"**★** about **★**[DESCRIPTION]"**★** (**Program**) and the Service Company undertakes to provide the services of the Producer for this purpose, on the terms of this agreement.

## PRODUCER'S OBLIGATIONS (CLAUSE 1)

**Compliance with the Brief:** The Producer must comply with the Client's brief (**Brief**) set out in Schedule A. If the Producer substantially complies with the Client's requirements for the Program, the Client must accept (and pay for) the video produced (see clauses 4.2 and 5.1). Accordingly, the Producer should ensure that the Client's requirements for the Program are specified as fully as possible in the Brief.

**Production Schedule:** The parties need to agree to a production schedule that sets realistic completion dates for each major stage of production, such as scripting, commencement of principal photography, completion of principal photography, and off-line editing. The Producer must comply with these deadlines unless circumstances beyond the Producer's reasonable control delay production, or the

parties agree in writing to alter the deadlines. If the stages of production specified in Schedule B are inappropriate for your project, you need to replace them with other stages.

**Related Material:** The Producer might also have to create material other than the actual Program itself in relation to the agreement, such as artworks, set designs and soundtracks. The parties should list such material in Schedule C.

**Engagement of personnel:** Under the agreement, the Producer is required to hire all personnel necessary to produce the Program. The Producer is responsible for obtaining signed releases from all performers to cover all uses of their performance in the video, and to obtain an assignment of any copyright they may have in a sound recording. See Arts Law's information sheet [Performers' rights](#) and Arts Law's sample [Performer's Release](#) for more information on performer's releases. Contact the Media Entertainment and Arts Alliance for information on industry awards for performers (see **Useful Organisations**).

The agreement assumes that the Producer is also the director of the Program. If another person is to direct the Program, Arts Law's sample [Producer and Director Agreement](#) may be useful.

**Responsibility for loss or damage:** The Producer is responsible for all film production insurance. A good summary of insurance issues in film is set out in the chapter on insurance in *Film Business – A Handbook for Producers*, by Tom Jeffrey (see **Further Reading**).

**Other matters:** If the Client wants the Producer to report to the Client about the Program's production, the parties need to add another sub-clause to cover this.

## **CLIENT'S OBLIGATIONS (CLAUSE 2)**

In addition to providing the Brief and being available for consultation (see clause 3), the Client may provide other material, personnel and services to assist the Program's production. For example, the Client may have access to a celebrity sportsperson through sponsorship agreements, whom the Client wishes to use in the Program. In the case of a commission to produce a music video, the Client would have to supply a high quality copy of the recording to the Producer in a format suitable for incorporation into the video; Band members may also agree to make themselves available to appear in the video. Such contributions should be listed in Schedule C.

## **APPROVAL AND CONSULTATION (CLAUSE 3)**

The Producer is required to consult with the Client at the completion of each stage of the Production Schedule and, in particular, to draw the Client's attention to anything that could materially affect the Program, such as expenses that were not foreseen and were therefore not included in the Budget. The parties are also obliged to engage in good faith discussions over any of these issues (see clause 3.4). In addition, the Client must be available to the Producer whenever the Producer reasonably requests.

The parties should change clause 3 if they consider it too onerous.

## **DELIVERY AND ACCEPTANCE OF THE PROGRAM (CLAUSE 4)**

The parties must specify in which form the Producer must deliver the completed Program to the Client. If you are the Producer, think about the costs involved to meet your delivery obligations, and whether the Budget covers them. Often, production companies will provide duplication and packaging services as part of the production "package". The parties should specify in Schedule D in what format the master must

be delivered. Usually, it will be in some digital media storage device, such as DVD or external hard-drive, or by electronic transmission.

The Producer must deliver the materials specified in Schedule D by the Delivery Date specified in Schedule B. If the Producer fails to deliver the materials by the Delivery Date, the Client may terminate the agreement under clause 12.2.

Although the Client may choose not to use the Program (see clause 8.3), the Client must accept and pay for the Program if it has been produced in accordance with the Brief.

### **PAYMENT (CLAUSE 5)**

Under the agreement, the Client pays the Producer in three instalments. The final instalment is conditional on the Producer delivering the materials specified in Schedule D.

Failure by the Client to pay the Producer within a certain period from the time specified in clause 5.1 entitles the Producer to terminate the agreement (clause 12.1).

The parties should establish a detailed budget to include into Schedule E. The budget should outline all foreseeable costs of production of the Program, and should include any fee payable to the Producer. Refer to Screen Australia's budgeting manual, *The Satchel - Production Budgeting & Film Management*, for some guidance regarding production budgets (see **Further Reading**).

As it is difficult to predict accurately all costs of video production, the Budget should include a contingency. Usually, the contingency is expressed as a percentage of the total budget. Clause 5.2 requires the Producer to seek the Client's approval before incurring any expense not covered by the Budget.

Sometimes production agreements require a producer to repay any money not spent producing the Program. You need to insert a clause into this section of the agreement if this is to occur. Conversely, the parties may want to deal with the possibility of a shortfall in money needed to produce the Program differently from the current clause 5.2. In this case, that clause should be changed.

### **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](http://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.

### **TITLE TO AND COPYRIGHT IN THE PROGRAM AND RELATED MATERIAL (CLAUSE 7)**

The parties need to decide how to distribute ownership of physical objects protected by copyright, such as sets, excess footage, copies of scripts and artwork, after the Program is completed. Physical ownership of these objects is different from

ownership of any copyright in them, and it is possible for copyright and title to the physical objects to be held by different people. The holder of title to the physical objects cannot reproduce, perform in public or communicate them to the public unless the holder also owns the copyright, or has a licence (i.e. the permission) of the copyright owner (or another licensee allowed to give this permission) to do so.

Under clauses 7.1 the Client has title to all tangible materials produced under the agreement.

Under the Copyright Act, the person who commissions the making of a film against payment of some remuneration to the producer owns the copyright in the film unless there is an agreement to the contrary. Clause 7.2 confirms the statutory position as to the Client's ownership of the copyright in relation to the Program and Related Material. The Client therefore has the right to: make copies of the Program; communicate the Program to the public (broadcast or make available on the internet); allow the Program to be seen in public (eg. as part of a store window display); and allow the Program to be transmitted on a private distribution service (eg. in-house hotel cable TV).

The parties may modify the agreement so that copyright in the Program (including excess footage) or Related Material is vested in the Producer, who grants the Client an exclusive licence to use the Program (and other materials) in accordance with their intentions. Such a clause should be drafted by a lawyer with expertise in film contracts.

Under clause 7.3, the Producer is responsible for paying the fees or royalties for the use of third parties' copyright material in the Program. For example, the Producer is responsible for payment of all fees, royalties and other sums which may need to be paid for the use of:

- artwork;
- songs (including music and lyrics);
- sound recordings; and
- literary works

reproduced or used in the Program. Arts Law recommends including in the Budget an amount to cover the licensing expenses for the use of this material. Arts Law has a number of sample licence agreements for the use of literary, dramatic or musical works in a film or video (see the other sample agreements in the Low Budget Film and Video Pack).

The Producer is, however, not responsible for paying any royalties for the public performance or communication of copyright material and performances of any copyright material included in the Program to collecting societies such as the Australasian Performing Rights Association (**APRA**) or the Phonographic Performance Company of Australia (**PPCA**) because these fees relate to the exploitation of the Program by the Client rather than to the Program's production.

#### **CLIENT'S USE OF PRODUCER'S NAME AND LIKENESS, CHANGES TO THE PROGRAM (CLAUSE 8)**

Under clause 8.2 the Client may change the Program and any Related Material provided the Client informs the Producer of the proposed change. The Producer may not oppose the changes but may elect to have his/her name removed from the credits.

## **CREDITS (CLAUSE 9)**

Under clause 9 the Producer must be credited in the Program and on all copies of the Program, as well as in all promotional material associated with the Program.

Clause 9.4 requires the Client to ensure that distributors are obliged to conform to the credit provisions of the agreement. Clause 9.6, however, protects the Client by limiting the circumstances in which the Client will be liable for breach of the credit provisions.

## **MORAL RIGHTS (CLAUSE 10)**

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. They also exist for performers in live performances (so far as the performance consists of sounds) and sound recordings of those live performances.

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, 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."*

Arts Law recommends to artists not to agree to any term whereby they give up ("waive") their moral rights. The Copyright Act does not specifically allow for the "waiver" of moral rights. However, it does contemplate that artists can give consent in writing to the future infringement of their moral rights. Arts Law considers that general consents or purported waivers of moral rights in relation to all copyright works could potentially breach the Australian Consumer Law. A moral rights consent that is unfair may also be open to attack under various State legislation regulating contracts and industrial relations.

In some circumstances it may be necessary or appropriate for an artist to consent to certain acts or omissions in respect to his/her moral rights. For example, the Producer may consent to the Client altering the Film in some way. You should always

consider any consent carefully and seek advice if you are uncertain of the terms of the consent.

Clause 10 deals with the Director's moral rights generally. Clause 10.3 incorporates the terms of the "Industry Accord on provisions which by consent may be incorporated in contracts" (**Industry Accord on Moral Rights**). The Industry Accord on Moral Rights is a voluntary film industry standard (available for download from the Screen Australia website at [www.afcarchive.screenaustralia.gov.au/downloads/moralrights\\_industryaccord.pdf](http://www.afcarchive.screenaustralia.gov.au/downloads/moralrights_industryaccord.pdf)) which acknowledges an author's moral rights, but provides for the author's consent to certain acts which would, in the absence of consent, infringe those moral rights.

### **REPRESENTATIONS, WARRANTIES AND INDEMNITIES (CLAUSE 11)**

The effect of clause 11 is to make the Producer liable to the Client if the content of the Program breaks some laws, for example through infringement of someone else's copyright or by incorporating defamatory, obscene or otherwise unlawful material. Similarly, the Client is liable to the Producer if the Brief or other material the Client provides to the Producer contains information or materials to be incorporated in the Program that infringe someone else's rights, such as copyright or are defamatory, obscene or otherwise unlawful.

An indemnity is a promise to reimburse a person if the person suffers loss or damage in the circumstances that are the subject of the indemnity. Clause 11.3 imposes on each party an obligation to indemnify the other party for any loss or damage of that party resulting from a breach of the representations or warranties under clause 11.1 or 11.2 respectively.

### **TERMINATION (CLAUSE 12)**

The Producer may terminate the agreement if the Client is late in making a payment under clause 5 for more than amount of days specified in clause 12.1.a. Termination as a result of late payment entitles the Producer to retain or claim payment for work done until the date of termination, and reimbursement of reasonable expenses incurred up to that date.

The Client may terminate the agreement if the Producer fails to deliver the materials specified in Schedule D by the Delivery Date specified in Schedule B. However, the right to terminate does not arise immediately. The Client must give written notice of the breach to the Producer, who then has a certain period in which to remedy (i.e. fix) the breach.

The parties need to consider what happens once the agreement expires or terminates and state this towards the end of this clause. The parties must amend clauses 12.4 and 12.5 if different consequences are to apply than those specified in the agreement.

### **DISPUTES (CLAUSE 13)**

It is almost never worth going to court to resolve a dispute, but not every problem can be solved easily. Clause 13 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 Australia. Only after the parties have attempted mediation, can the dispute be the subject of court proceedings.

#### **GENERAL PROVISIONS (CLAUSE 14)**

Clause 14.1 defines the relationship between the Producer and the Client as one of independent contractor as distinct from, among other things, one of employment. It indicates the intention of the parties but may not be legally effective if the Producer is in reality an employee or partner of the Client.

Clause 14.2 specifies how notices under the agreement can be given, and when they are considered to be served (i.e. given).

Clause 14.3 is included to ensure that the parties entering the agreement will solely be responsible for their obligations. If any responsibilities are to be delegated or subcontracted, the subcontractors and their obligations should be first agreed to.

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 14.4 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 14.5 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 as enacted.

Clause 14.6 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 14.7 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.

Amend clause 14.8 to state the appropriate governing law for the agreement and the place where possible litigation should be conducted if the parties fail to resolve any conflict under clause 13. This is particularly important if the agreement is between people in different States or different countries where laws may vary.

#### **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 needs 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" (i.e. 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.



