**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, read more on pages 4 – 6 of this document. 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 Australian Business Number (**ABN**), Australian Company Number (**ACN**) or Australian Registered Body Number (**ARBN**), the number must be included. The ABN is also important for GST purposes.

The *Corporations (Aboriginal and Torres Strait Islander) Act 2006* (CATSI Act) requires corporations registered under that Act to state the ICN that appears on the certificate of incorporation in all ‘public documents’, which includes contracts.

### Scope and term (clause [1](#bookmark0))

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 forms 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](#bookmark23)), 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](#bookmark1))

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 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](#bookmark6))

The notes as to the implementation of this sample agreement, discuss the application of the *Live Performance Award 2010*, which is a consolidated modern award registered under the *Fair Work Act 2009* (Cth), and the *Performer's Collective Agreement 2017*, which is the Enterprise Agreement negotiated between MEAA and LPA as to the engagement of **performers** as **employees**.

Clause [3.1](#bookmark30)(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.

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](#bookmark7) 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 (from July 2017, this is 47%). See the ATO information on [‘PAYG withholding’ in business transactions](https://www.ato.gov.au/business/payg-withholding/).

However, if you are contracted in the course of carrying on an activity as a private recreational pursuit or hobby 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 an ATO form that you must use for doing this, called [Statement by Supplier not quoting an ABN](https://www.ato.gov.au/Forms/Statement-by-a-supplier-not-quoting-an-ABN/).

There are three options in clause [3.2](#bookmark7):

* for the Contractor to quote an ABN and be paid in full (option 1, clause [3.2(a)](#bookmark8)); 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)](#bookmark8)); 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)](#bookmark9)).

You should include one of the options in clause [3.2(a)](#bookmark8) 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)](#bookmark9) ensures that the Contractor is paid after a certain time lapses even if they don’t comply with clause [3.2(a)](#bookmark8). 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 of at least $75,000 and all non-profit organisations with an annual turnover of at least $150,000 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, they must also provide a valid tax invoice to the Principal (see clause [4](#bookmark11)).

Clause [3.3](#bookmark10) deals with payments in the event that either party terminates the relationship early.

## Goods and Services Tax (GST) (clause [4](#bookmark11))

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 [ATO](https://www.ato.gov.au/) website.

## Duties and obligations (clause [5](#bookmark12))

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](#bookmark13))

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](#bookmark14), 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](#bookmark17) notes for information about moral rights).

In clause [6.2](#bookmark15), 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](#bookmark16), the parties promise to reimburse each other if their respective warranties in clause [6.1](#bookmark14) and [6.2](#bookmark15) are untrue.

## intellectual property rights (clause [7](#bookmark17))

Clause [7.1](#bookmark18) deals with copyright ownership and uses of copyright protected material. In the performance of a play, musical, dance or other stage performance, the performer has the benefit of the performers’ rights, but is not creating a work or other material that is protected by copyright.

However Contractor may create material that is protected by copyright if they have other creative skills that are applied in carrying out the Services. This could include creating dramatic works like plays or recorded choreography; literary works like funding applications or project proposals, and also artistic works or musical works.

Option 1 should be used if the intention is that the Principal will own the copyright in any dramatic, literary, artistic or musical works, cinematographic films and sound recordings (**Materials**) created by the Contractor, which is the full list of copyright works and materials other than works.

Option 1 includes dramatic works. However, it is not usual practice for a choreographer to assign the copyright in their original choreography; the normal practice is for a choreographer to retain copyright and licence the Principal to use the choreography in the production and (if appropriate) any touring or remounting of the production after the end of the first-run of the production. There could be some circumstances in which it is appropriate for the Principal to own the copyright in the choreography; such as, where a choreographer creates the dance for a welcome to country ceremony that is intended to be the exclusive dance for the organisation that is commissioning the choreography.

Option 2 should be used if the Contractor will retain copyright in the dramatic, literary, artistic or musical works, (**Works**) created by the Contractor, with those Works licensed to the Principal.

Note that Option 2 does not include sound recordings and cinematographic films (audio-visual recordings), as in clause 7.2 the Principal is authorised to make sound recordings and audio-visual recording of the performance of the Contractor.

In Option 2, 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.

**Performer’s Rights**

Clause [7.2](#bookmark18) deals with performers rights This agreement is drafted so that the Principal has copyright in any recordings of performances that are given as a result of the Contractor’s work.

The consent of a performer is generally needed to film or record a performance, and to broadcast or otherwise communicate a performance to the public. Under clause 7.2, the Contractor authorises the Principal to record and use his/her 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 8 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 Principal's authority to use the recording of the Contractor's performance in terms of territory (worldwide or certain countries), media (all or limited media), time and purpose. Clause 3 could provide for additional fees to be paid by the Principal to the Contractor for the commercial exploitation of recordings of the performance of the Contractor.

In some cases, the Principal 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. For example, clause 7.2 could be amended to limit the use of recordings of the performance as an “archival Recording” as defined in the *Performer's Collective Agreement 2017,* which includes use a reference for an understudy for a role or guide to recreate the production when it is restaged or remounted or as a marketing tool to on-sell the production.

**Credits and consent to publicity**

Clause 7.3 deals with credits in programs or playbills for public performance and also other uses of the Contractor’s name, likeness and biography for publicity and marketing purposes. The crediting obligations may be expanded in relation to feature performers in relation to credits on posters and other publicity material.

## Moral rights (clause 8)

Clause 8 deals with moral rights, which are personal rights of a copyright creator, provided for under Part IX of the *Copyright Act 1968* (Cth). They cannot be assigned (i.e. sold or given away). They belong to the creator regardless of whether s/he is still the copyright owner.

Performers have moral rights in their live performances and sound recordings of their live performance. This means that a dancer has no moral rights in his or her live performance although a musician does have moral rights. Performers have no moral rights in audio-visual recordings of their live performances.

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:

* of a creator to be named as the author or creator of their work (*right of attribution*);
* of a creator not to have their work (falsely) attributed to another (*right against false attribution*); and
* 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 in writing to the infringement. 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.

Clause 8 provides for a general consent that the Principal may do anything that would otherwise amount to a derogatory treatment (the right of integrity) of the copyright material created by the Contractor or in relation to the Performance of the Contractor.

This consent could be limited when the Contractor is creating copyright work in which it is appropriate for the Contractor to retain their moral rights.

The moral rights as to attribution and right against false attribution are retained by the Contractor and are covered in the credit provisions in clause 7.3.

## Confidential Information and confidentiality (clause 9)

Clause 9.1 defines what is confidential information and clause 9.2 sets out 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 9.2). 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 10)

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).

The Principal should be aware that public liability insurance will not automatically cover the the Principal for the actions of volunteers or Contractors 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*](https://www.artslaw.com.au/product/the-arts-insurance-handbook-3rd-edition/) or Arts Law’s Information Sheet [*Liability & Insurance*](http://www.artslaw.com.au/info-sheets/info-sheet/liability-and-insurance/).

## Termination (clause [11](#bookmark23))

### Termination for convenience

Clauses [11.1 & 11.3](#bookmark23) 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

Clauses 11,2 & 11.4 sets out the 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 provisions may need to be added to the termination for cause clause in those cases.

Clause [11.5](#bookmark27) provides that the Contractor must return the Principal’s property on termination, including anything that contains the Principals’ confidential information.

### Payment in lieu

Clause [11.6](#bookmark28) 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 12)**

The cost of legal services means that going to court to resolve a dispute is expensive even if the litigation is successful, 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*](http://www.artslaw.com.au/info-sheets/info-sheet/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.

### Working with Children (clause 13)

All States and Territories have introduced laws which require people working with children to undertake a checking process. If this is a requirement in your State or Territory and the work involves working with children, then the Contractor will be required to have this check. You can check the requirements in your State or Territory by referring to the relevant government department e.g. the Department of Justice in Victoria, the NSW Commission for Children and Young People in NSW etc. A simple internet search for “Working with children in [insert your relevant State or Territory]” should help you locate the correct government department website.

For further information, see the Arts Law information sheet [*Children in the creative process (Australia)*](https://www.artslaw.com.au/info-sheets/info-sheet/children-in-the-creative-process-information-for-artists-and-arts-organisat/)

**GENERAL (CLAUSE 14)**

Clause [14.1](#bookmark30) 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 [14.2](#bookmark31) provides options as to whether consent is needed for the assignment of the rights under this agreement. The Contractor may want to ensure 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. Alternatively, the Contractor may permit the assignment of the rights under this agreement, provided that the Principal remains responsible for the obligations under this agreement, such as the payment of the fees. Remember clause [2.1](#bookmark3) provides that the Contractor can engage others with the prior written consent of the Principal.

Clause [14.3](#bookmark32) 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 [14.4](#bookmark33) 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](#bookmark34) 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 14.6](#bookmark35) 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 [14.7](#bookmark36) 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 [14.8](#bookmark37) 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 [14.9](#bookmark38) 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.

## 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 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 are 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.

A company can execute documents in accordance with s 127 of the *Corporations Act 2001* (Cth) as follows:

* Company without a common seal: by the signature of either: 2 directors; a director and secretary; or a company with a sole director who is also the secretary, by the sole director; or
* Company with a common seal: when the seal is placed on the document and the application of the seal is witnessed by the signature of either: 2 directors; a director and secretary; or a company with a sole director who is also the secretary, by the sole director.

However, s 127 does not prevent a corporation from following the rules for executing documents that are set out in the constitution of the company.

Section 99.5 of the *Corporations (Aboriginal and Torres Strait Islander) Act 2006* (Cth) applies the same requirements for executing documents as set out above, including the option of executing documents following the rules set out in the constitution of the corporation.

An incorporated association may execute a document in accordance with its constitution or as set out in legislation of the state or territory under which the association is established, which sets out how documents can be executed, such as the relevant incorporated associations legislation. If you are signing on behalf of an incorporated association, you must consult the organisation’s constitution and the relevant legislation to determine who is authorised to sign. It may also be necessary to stamp or “affix” the document with the association’s seal if this is required under its constitution.

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.