

# EXPLANATORY NOTES

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## USING THE EXPLANATORY NOTES

The Explanatory Notes are intended to provide more detailed explanations of certain clauses in this **sample agreement** or 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 must clearly identify the name, 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 member as “Cast Member”. 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 should be included. The ABN is also 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.

In this sample agreement, the Cast Member is assumed to be an individual. If, however, the individual’s services are to be provided by a service company, you will need to alter the sample document to reflect this fact.

## 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 Cast Member 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 Producer should describe in as much detail as possible what the Cast Member is engaged to do (**Services**) and the specifications or outcomes that the Producer wishes to achieve. For example, if a Cast Member is being engaged to edit the Film, and the editing has to be completed by a certain date, this should be stated. If a Cast Member will be fulfilling a number of roles, then all of the roles should be listed.

## **PAYMENT – FEE OR WAGES (CLAUSE 4)**

As stated above, when a Producer engages a Cast Member it is necessary to resolve whether the Cast Member is being engaged as an employee or an independent contractor. This agreement allows the Producer to choose whether to pay the Cast Member as an independent contractor or an employee. A Cast Member who provides services through a company will always be engaged as an independent contractor. A Cast Member who provides services as an individual may do so either as an employee or as an independent contractor.

As stated above deferred fees are **only** a legal option where the relationship between the Producer and the Cast Member is one of principal/independent contractor.

The Producer should be aware that the industry agreements negotiated by MEAA with SPA provide for minimum rates and conditions for the engagement of actors by producers who are SPA members. The industry agreements relevant to engaging Cast Members provide for a 'basic negotiated fee' with the total weekly/daily fee being calculated to include an amount of overtime, annual leave provision, with additional payments ('loadings') including a rights loading, which cover exploitation rights in specific territories or media.

For example, to engage actors to appear in feature films, the relevant agreement is the Actors Feature Film Collective Agreement (AFFA); or to engage actors to appear in "one-off" television productions such as telemovies, mini-series, scripted docu-drama productions and dramatised and scripted corporate video/training films of more than 20 minutes duration, as well as television series and serials, the relevant agreement is the Actors Television Program Agreement (ATPA) that sets the minimum rates and conditions and which operates with the Repeats and Residuals Agreement (ARRA) that sets fees payable in respect of Repeat, Residual and Ancillary Usage of the television productions. These additional rights loadings can be purchased up front; however, they may be purchased subsequently at the same rate. Even if the Producer is not a member of SPA these agreements set the standards expected by cast members and represents fair terms.

**Clause 4.1 Choose "Option 1 - Wages" if the Cast Member is engaged as an employee. Choose "Option 2 - Fee" if the Cast Member is engaged as an independent contractor.**

### Option 1 - Employees and tax ("Wage" option)

Insert the agreed wage payable to the Cast and Cast member in Schedule A. The employer (Producer) and employee (Cast Member) will have obligations in regards to taxation and other statutory fees and charges. Under the Australian tax system, the Producer must withhold PAYG tax from any wages paid to the employee and supply an employee with a group certificate. The Producer is also required to pay superannuation for 'workers' which includes all employees and some contractors (For more information about superannuation and workers' compensation refer to the Explanatory Notes under the heading "RELATIONSHIP OF THE PARTIES (CLAUSE 7)" or contact Arts Law).

The *Broadcasting and Recorded Entertainment Award 2010* is a consolidated modern award registered under the Fair Work Act that provides minimum wages and related matters for employed entertainment industry personnel including actors and film and television production personnel. The related matters covered by the Award are: hours of work; breaks between shifts; meal breaks and rest breaks; overtime; penalty rates; casual employment; allowances; and travel obligations. The Award can be viewed on the [Fair Work Commission website](#).

### Option 2 - Independent contractors and GST ("Fee" option)

Insert the agreed fee payable to the Cast Member in Schedule A. If any other additional benefits or forms of compensation are being provided to the Cast Member, the details should be added into this clause.

This sample agreement states that the fees are *exclusive* of the Goods and Services Tax (**GST**). This means that if the Cast Member is obliged to charge GST, it is in addition to the specified fee. GST is a general tax on goods and services supplied in Australia. Unless the Cast Member is providing their services as a hobby, most contracts for the supply of services in return for fees will be subject to GST.

Clause 4.1 contains a number of alternatives in relation to GST.

Alternative 1 - addresses the situation where the independent contractor is registered for GST. Legally, they are required to provide a tax invoice to the Producer prior to receiving any payment. Please note that an independent contractor with an annual turnover of \$75,000 or more must register for GST (if the Cast Member earns less than this, he or she has a choice whether or not to register).

In New South Wales, Clause 4.1(b) and Annexure A must be included if the independent contractor may use employees or sub-contractors to provide any part of the Services. For example, a set or special effects designer may not need to carry out every aspect of the Services personally and may use employees or sub-contractors to complete some aspects. If the independent contractor is a company then it will clearly need to use employees or sub-contractors to provide the Services.

In most States, where the independent contractor might 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 independent contractor owes to his/her employees or sub-contractors. In New South Wales (but not other States and Territories), there is legislation that has the effect of reducing that potential liability by requiring the independent 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.

Alternatives 2 or 3 can be selected where the Cast Member is NOT registered for GST.

Alternative 2 - should be selected where the Cast Member has an ABN. If the Cast Member has an ABN and does not provide it to the Producer, the Producer is legally required to withhold an amount equivalent to the highest personal income tax bracket (at Jan 2014 this is 46.5%) from the Fee and send it to the Australian Tax Office. This clause requires the Cast Member to provide that ABN to the Producer which is easily done by simply including the independent contractor's ABN at the beginning of the document where the parties to the agreement are named. If an independent contractor with an ABN does not provide that ABN, he or she (or the company) may receive some of this withheld tax when completing an annual tax return, however, this delay can be a frustrating experience.

Alternative 3 - choose this alternative if the Cast Member is not registered for GST and does not have an ABN. This clause satisfies the Cast Member's legal obligation to provide written notice to the Producer outlining the legal reason that they do not have to quote an ABN and ensures that the Producer is not required to withhold tax from the fee paid to them (see above). This written notice is sometimes called a "Hobbyist Statement".

***The parties should obtain specific professional advice on their GST and tax position.***

For more information contact the Australian Taxation Office on 13 28 61 or visit the ATO's website ([www.ato.gov.au](http://www.ato.gov.au)).

**Clauses 4.2 and 4.3** – both these clauses must be retained whether the cast member is an employee or an independent contractor.

#### **Clauses 4.4 and 4.5**

Either clause 4.4 or 4.5 should be inserted if the film project is a feature film or television series or serial and the Producer wishes to purchase rights up front for television, theatrical and ancillary rights. It sets out the percentages in the *Broadcasting and Recorded Entertainment Award 2010*. The Producer should remove rights that are not being purchased up front. Note that rights not purchased up front may be purchased at a later date. There are two alternatives – one for feature films and one for television series and serials. The Producer should contact the Media Entertainment & Arts Alliance (MEAA) to understand how to calculate the total negotiated fee to be paid to the Cast Member for performance in accordance with the terms of the *Actors Television Program Agreement (ATPA)* and the fees payable in respect of Repeat, Residual and Ancillary Usage of the Program are calculated in accordance with the *Repeats and Residuals Agreement (ARRA)* that is negotiated between the Screen Producers Australia and the Media Entertainment & Arts Alliance (MEAA).

If any other additional benefits or forms of compensation are being provided to the Cast Member, the details should be added into this clause.

#### **COPY OF FILM (CLAUSE 5)**

Whether the Cast Member is an employee or an independent contractor, this agreement requires the Producer to provide a copy of the Film to the Cast Member.

#### **ACCOUNTING (CLAUSE 6)**

A Producer must always maintain accurate records of income and expenses.

#### **RELATIONSHIP OF THE PARTIES (CLAUSE 7)**

Clause 7 allows the parties to make clear their legal intention as whether the relationship is one of employee/employer or independent contractor/principal. Make sure you delete the alternative that does not apply to the relationship. Clause 7.2 is retained in either version.

However, even so, as mentioned above (see the Explanatory Notes on Clause 4), whether the relationship between the Producer and Cast Member is actually one of employee/employer or independent contractor/principal is a question of fact and law. The statement in Clause 7 on its own is only one aspect to be considered. The [Australian Taxation Office website](#) has a useful tool to work out whether the relationship is likely to be viewed as an independent contractor relationship.

The Producer must comply with the terms of the Fair Work Act. The Producer is also required by law to obtain workers compensation insurance for, and to pay superannuation on behalf of Cast Members engaged as employees and in some circumstances, Cast Members engaged as independent contractors. For more information about these requirements refer to Arts Law's Information Sheet [Superannuation and Contract for Services](#) and the WorkCover Authority in your State or Territory. Workers compensation insurance is addressed in the Arts Law's Information Sheet [Liability and insurance](#).

A Producer should also be aware of Federal legislation, the *Independent Contractors Act 2006* (Cth), which regulates independent contractor relationships and which

provides remedies for contractors where the contractual arrangements are deemed to be unfair in certain circumstances.

For further information on award provisions, contact the Fair Work Ombudsman or MEAA in your State or Territory. For further information on the difference between an employee and independent contractor and the legal consequences that flow from those relationships contact Arts Law or see Arts Law's Information Sheet [Employment issues \(for NSW employees\)](#).

## **PERFORMER'S RELEASE AND COPYRIGHT OWNERSHIP (CLAUSE 8)**

### **Performer's release**

The Cast Member must give authority for their performance to be recorded for the purposes of the Film. Since October 1989, performers have had limited rights in their performances. For more information see Arts Law's Information Sheet [Performers' Rights](#).

Performers' rights apply to any of the live performances listed below:

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

Such live performances attract performers' rights whether given in the presence of an audience or otherwise with the result that any such performance which occurs for the purpose of making the Film will give rise to the issue of performers' rights. In other words, the Producer must obtain permission from all Cast Members to:

- i. record such performances by sound recording or film;
- ii. broadcast or rebroadcast such performances; and
- iii. use that recording in a soundtrack.

Under Clause 7.1, the Cast Member authorises the Producer to record and use the performance. Note that this release can be as wide or as narrow as the parties agree and you should alter the clause accordingly. This is a matter for negotiation.

In some cases the Producer will want an unlimited right to use the performance and in other cases the performance will be for a clearly limited use (for example, as part of a soundtrack). The Producer should ensure that Clause 7.1 covers all of the purposes which the Producer requires. On the other hand, if the Cast Member only wants the Producer to have the right to use the recording of his or her performance for limited purposes that limitation should be clearly set out in Clause 7.1. For example, a performance which is to be included in a documentary film could be limited by the words "for use in connection with the documentary film *Botany Bay*, including exploitation of the Film in all media throughout the world, and advertising of the Film." If the parties wish to agree on the widest possible rights for the Producer then the first alternative in each of Clauses 7.1(a)-(d) should be selected.

### **Copyright**

The copyright clause in this agreement provides that the Cast Member assigns any copyright they may have in any material they create in connection with the Film as part of the Services they provide to the Producer. In order to exploit the Film, the Producer needs to be able to show that they have the necessary rights in all elements of the Film. Therefore, if a Cast Member contributes to the script, or if a Cast Member designs a set, it is important that the Producer obtains a grant of rights in that material from the Cast or Crew Member. Without that grant of rights, the Producer may not be in a position to establish a clear chain of title.

If a Cast Member is engaged as an employee, the copyright in anything they create in the course of their employment is owned by the Producer. This is not the case for independent contractors where a clear assignment from the independent contractor to the Producer is essential. In either case it is better to deal with copyright ownership in writing as it avoids misunderstandings and disputes in the future.

Clause 7 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.

### **MORAL RIGHTS (CLAUSE 9)**

With some exceptions, moral rights apply to most creative materials (artistic, literary, dramatic, musical works and films, but not sound recordings) and to certain performances. Moral rights are personal rights of the creator or performer and cannot be bought or sold (assigned).

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

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

Part IX of the Copyright Act grants moral rights to the "author", which in relation to a cinematograph film, means the maker of the film. The individuals involved in film production who are likely to be viewed as the author are the director(s), producer(s) and screenwriter(s). A "performer" in a "live performance"; including a recording of such a performance, also has moral rights in their performance.

Clause 8 is intended to give the Producer the ability to make the Film without risking any moral rights claims by Cast Members. The director, producer, screenwriter and cast members (performers) have moral rights. Cast Members may also hold moral rights, for example, if they contribute artistic works (set design, costumes, graphics). In order to exploit the Film, the Producer needs to be able to show that it can do certain things which might otherwise arguably amount to an infringement of moral rights (such as editing a recorded performance to satisfy a television time-slot or an in-flight entertainment program). Therefore, it is important that the Producer obtains a moral rights consent from each Cast Member.

The moral rights clause in this agreement is suitable for Cast members who may have moral rights as "performers" and is consistent with the 'Industry Accord' - a standard moral rights consent clause which has been drafted, and agreed to, by the Australian Screen Directors' Association, Australian Writers' Guild and Screen Producers Australia. It lists certain limited "acts or omissions" (treatment) which the Cast Member permits the Producer to do in relation to any performance or any creative material generated as part of the Services. The Cast Member gives up any

right to complain later that these particular acts or omissions infringe their moral right of integrity.

The Cast Member should always carefully consider the scope of any consent and seek advice if he/she is uncertain about the terms of the consent.

### **CREDIT AND USE OF NAME AND LIKENESS (CLAUSE 10)**

The credit that the Cast Member will receive should be set out in Schedule A, including the wording, size and positioning of such credit. Giving a screen credit satisfies the right of a performer or creator to his or her moral right of attribution.

The Producer may want to use the name and image of a particular Cast Member 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 the footage in “making of” programs and for DVD use.

### **CAST MEMBER’S REPRESENTATIONS AND WARRANTIES (CLAUSE 11)**

It is important that the parties think about the representations and warranties 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 Cast Member’s representations under Clause 10 are for the benefit of the Producer. The Cast Member should be given the opportunity to obtain independent legal advice before making any representation.

### **EXPENSES (CLAUSE 12)**

Clause 12 confirms that the Cast Member can only incur expenses on behalf of the Producer with the Producer’s express written consent. If the Producer intends to give someone the authority to incur costs on the Producer’s behalf, the Producer should agree in writing with that person what the expenses are and the maximum amount which he/she is authorised to spend.

### **INSURANCE (CLAUSE 13)**

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 14)**

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 14 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 Cast Member is critical to the Film. If so, it may be necessary to amend the agreement to limit the Cast Member'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 15)**

Clause 15 provides that the confidential information defined in the agreement remains the property of the Producer.

## **NOTICES (CLAUSE 16)**

It is a good idea for the parties to specify where they require notices to be sent under the agreement. This avoids any misunderstandings as to where any notices ought to be sent. This clause also specifies when a notice is taken to be given, which will be important if there are time restrictions imposed upon the giving of any notices, such as a notice for any breach of the agreement.

## **DISPUTES (CLAUSE 17)**

Clause 16 provides that the parties must engage in alternative dispute resolution (ADR) to resolve any disputes. If the parties are unable to agree on an ADR process, the dispute must be referred to Arts Law's mediation service for subscribers. 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. If mediation is not successful, the parties can start court proceedings. It is almost never worth going to court to resolve a dispute, but not every problem can be solved easily.

See the information sheet on [Arts Law's Mediation Service](#) or contact Arts Law for further details.

## **GENERAL PROVISIONS (CLAUSE 18)**

Clause 18.1 provides that the Producer may assign its rights under the agreement to another party (a new producer). However, the Cast Member may not.

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 18.2 seeks to ensure that the written agreement contains *all* relevant terms. Anything that might have been discussed 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 legally be excluded as stated by statute and where one party has made deliberate or negligent misrepresentations on which the other party relied in entering the agreement.



Clause 18.3 clarifies that the engagement of the Cast Member, the payment of their fee/wages and any relevant insurance cover will only occur if the Producer raises the requisite finance to cash flow the making of the Film. If the Producer cannot do so, they have no obligation to the Cast Member under Clauses 3, 4 and 13 of this agreement.

Clause 18.4 addresses possible future changes to the law in favour of Indigenous rights. It provides that parties will comply with the law as enacted.

Clause 18.5 is important for the Producer, as the Producer will not want the Cast Member to be able to stop the Producer doing those things necessary to complete production of, and exploit the Film. This clause means that the Cast Member is only entitled to monetary compensation if the Producer breaches the agreement.

Clause 18.6 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 from arguing that the agreement was varied orally.

Clause 18.7 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.

Clause 18.8 specifies the governing law and that the courts of that State will be competent for any litigation in relation to the agreement if the parties fail to resolve any conflict under Clause 17.

If your Film has investors and those investors require a completion guarantor then a clause will need to be added to this 'General Provisions' section of the agreement to deal with the rights and obligations of the completion guarantor. A completion guarantor is a form of insurance provided to investors, guaranteeing that the film will be completed. The completion guarantor guarantees to the financial backers of a film that the film will be completed and delivered by a given date to its principal investors in accordance with the relevant distribution agreements. For more information please contact Arts Law.

## **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. Insert your Australian Business Number, if you have one. 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 a sole director, 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 or association's seal if this is required under its constitution or articles of association. In that situation, replace the existing wording "Signed for an on behalf of ..." with:

*"The Common Seal of the [party] was fixed to this 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 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 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 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 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 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. Contracts for services and assignments of copyright (such as this agreement) do not usually attract stamp duty in any State or Territory. However, if the agreement is amended substantially or if in doubt 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.

