

A COMPLETELY REVISED AND UPDATED EDITION
OF THE DEFINITIVE GUIDE TO 'MUSIC BUSINESS'

3RD
EDITION

MUSIC BUSINESS

A MUSICIAN'S GUIDE TO THE AUSTRALIAN MUSIC INDUSTRY
BY TOP AUSTRALIAN LAWYER AND DEALMAKER

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This chapter is taken from the book *Music Business* by Shane Simpson

More information can be found at
<http://www.simpsons.com.au/musicbusinessinfo.htm>

4

AGENTS

AGENTS PROVIDE A CENTRAL FUNCTION FOR PERFORMING ARTISTS. FOR MANY, THE AGENT IS THE PRINCIPAL SOURCE OF INCOME FROM LIVE WORK. THIS CHAPTER DISCUSSES THE FUNCTION AND POWERS OF AN AGENT, EXAMINES HOW THEY ARE REMUNERATED AND ALSO DISCUSSES THE VENUE CONSULTANT'S ROLE. SAMPLE AGENCY AND BOOKING AGREEMENTS ARE PROVIDED.

Agents play a central role in the industry. They are the conduit between the performer and the engagement; they source the work or the artist; negotiate performance terms and administer the fees.

The agency business in Australia is not as developed and sophisticated as it has become in the United States or the United Kingdom. Companies like the William Morris Agency or International Creative Management have hundreds of employees throughout the world and have billion-dollar turnovers. They are so large, they 'package' their own product; that is, they have the resources to put together whole movie or music ventures from beginning to end, using talent from within their own client base.

In Australia, agencies tend to be smaller and more specialised in their general industry focus (music, theatrical, film, publishing, modelling, etc). Even within those groups, there is a high degree of specialisation, so agents working in the music industry tend to specialise in particular categories of performers, such as rock/contemporary, country, classical, cabaret, jazz and so on.

Another feature of Australian agencies is that they have tended to represent both artists and 'employers', as they are called in Australian labour laws. That means that, as well as being the agent for the artist, some also act as 'venue consultants' to those who engage the artist to perform. There is an

inherent conflict of interest in this dual role. Being the agent for both sides of the transaction may have some attractions, but negotiating with yourself is rarely a rigorous process.

In 1989, in the Report Of The Ministerial Committee to Review Theatrical Agents and Employers Legislation in New South Wales, the Association of Theatrical Agents and Employers stated that 78% of its members conducted business in more than one role. The Association argued that this was necessary for their economic viability and that their links with employers benefited performers, by providing employment opportunities for the performers that they would not otherwise have had. The unions answered this by arguing that most of their problems with agencies were a result of agents having conflicts of interest. The unions recognised there can be work opportunity benefits in agents having a dual role, but asked that safeguards be built into the relationship by law.

In 1989 the *Entertainment Industry Act (NSW)* provided that an agent could not be paid by the venue and also take a commission from the performer; for more detail see Chapter 6, **Controlling Managers, Agents and Venue Consultants By Legislation.**

Why agencies demonstrate such a wide range of professional standards is no great puzzle: Agencies reflect the span of the industry. Many are highly skilled, professionally trained and of impeccable reputation, but some are somewhat lower on the evolutionary scale. The latter will always exist while there are more musicians seeking representation than there are agents looking for artists to represent, while aspiring musicians are willing to take any offer of employment on any terms, while artists do not properly look after their own business affairs and while legislation controlling agents (and managers) remains inadequate.

THE FUNCTION OF AGENTS

An agent's primary function is to find, negotiate and conclude contracts for the professional engagement of the artists on their books. (Remember that most management agreements specifically exclude the finding of live performance work from the manager's role.) Secondary functions include receiving fees and security deposits for engagements, arranging publicity, keeping proper records and accounting in relation to the work, forwarding payments to the artist and generally providing career advice.

These functions can be reduced or expanded by agreement between the agent and the artist, e.g. some of the more established acts insist that all final offers for performances must be submitted to them for approval before signing. Some insist that only they (or their manager) have the right to sign

agreements relating to their engagements, though this is not always convenient if they are touring or otherwise unavailable to sign documents.

THE POWERS AND AUTHORITIES OF AGENTS

As we have seen above, the word ‘agent’ is used in two senses in the music industry. It also has another, legal, meaning. Before examining the power of agents in the music industry it is worth briefly explaining the ‘legal’ meaning of the word because it turns up in so many industry agreements.

At law, an agent may perform any function or exercise any power delegated to it by the principal. This delegation can be in writing, oral or implied by the way the parties behave. By doing so, the principal (the person appointing the agent) is authorising the other party to stand in their shoes and to make commitments on their behalf. What the agent does on the principal’s behalf is just as binding as if the principal had done it personally.

The delegation of such trust is sometimes essential in the industry; there are times that record companies, managers and agents all need such delegated powers. In contrast to the Australian practice, in California and New York an agent must be appointed by written contract and there is very strict controlling legislation and labour agreements. The American cases are not of much relevance in Australia because of this difference.

It is unwise to grant any third party, powers of that extend beyond the immediate requirements of that person’s function. The essential thing is to limit that power to that which is absolutely necessary or desirable, e.g. with a booking agency, why should your agent have an unrestricted power to negotiate and execute contracts on your behalf? Shouldn’t you have the right to be consulted, to approve the terms of the booking and authorise its acceptance? Isn’t it wise to require these limitations to be specified in the contract of appointment? Answer ‘no’ to either question and you are either being naïve or are independently wealthy.

When you appoint an agent, the agreement can be written or oral. That agreement should specify the powers that are being conferred. Those powers should be restricted to those that are needed to perform the appointed function.

THE AUTHORITY TO REPRESENT

The most basic power of the music industry agent is to ‘represent’. It is from this basic authority that its other powers are derived or may be inferred.

Major booking agencies require their acts to sign exclusive contracts, meaning that they become the artist’s exclusive representative for contracting live work. Other, smaller agents represent less established artists and are prepared to work on a non-exclusive basis.

THE AUTHORITY TO RECEIVE AND NEGOTIATE OFFERS OF EMPLOYMENT

The agent's authority to receive offers of employment is inherent in the agency function. It may be limited to particular areas of the entertainment or music industry, or to particular territories or periods.

The agent is usually authorised to negotiate the terms of employment, including the performance fee, approval for and selection of support acts, order of appearance, performance time, publicity, method of payment, use of other artists' equipment such as public address ("PA"), lights and mixing desk.

As the agent's commission is based on the artist's fee, it is in the agent's interest (unless there is a conflict of interest) to negotiate a fee that reflects the artist's market value. Judging that value is one of the core skills of a good agent. Moreover, it is often the case that, because of the agent's connections and reputation, he or she may be able to secure a better package than the artist would have been able to negotiate.

However, musicians should not leave negotiation of the deal points entirely to the discretion of the agent. The musician will eventually have to perform the contract as it is negotiated and will have to accept all its benefits and drawbacks. Accordingly, performers should liaise with their agent and set the extent of the agent's authority so both parties are clear as to what the agent can and cannot do.

THE AUTHORITY TO SIGN BOOKING AGREEMENTS ON THE MUSICIAN'S BEHALF

Once both the agent and the employer have accepted the terms of a booking agreement, a written agreement between them should be signed as soon as possible.

It is the agent's responsibility to prepare the booking agreement and to submit it to the employer before the performance date. Although some major acts reserve strict control over the agent's right to negotiate or sign contracts on their behalf, in most cases the agent will have the artist's authority to negotiate and sign booking agreements which conform to the usual business practices of the industry.

THE AUTHORITY TO COLLECT DEPOSITS AND PERFORMANCE FEES

The payment of performance fees can be made by several methods, e. g.:

- (a) Part-payment of the deposit (in advance) to the agent pending performance, with the balance paid to the agent or musician once the performance is over.
- (b) Payment in full to the agent or musician immediately before the performance.

- (c) Payment in full to the agent or musician immediately after the performance.

The entertainment industry is notorious for being a cash business and payments for regular bookings are usually made immediately before or after the performance. In the case of new venues or promoters, agents will often ask for a substantial deposit (or even payment in full) to be made at the time the agreement is signed by the employer. Deposits are virtually always paid when booking major artists or booking artists to appear in a large promotion.

Where money is paid to an agent on the artist's behalf, the agent should bank it in a trust account immediately and not mix it with the agency's own funds. This is compulsory in New South Wales, but should be standard practice everywhere. After all, the artist is not a bank, so the artist's money should not be used to fund the agency's operations. Both the agency agreement and the booking agreement should clearly specify that the agent is to maintain a separate account for all deposits or fees paid to the agent and also specify the purposes for which the agent may withdraw money from the account.

AGENTS' FEES AND COMMISSIONS

The standard agency commission for booking live work is 10% of the gross fee paid by employers. Some agents say this is uneconomic and provide (or, if the artist is unlucky, merely purport to provide) management functions as well, to justify charging a larger percentage. In New South Wales the Entertainment Industry Act sets down specific rules which must be complied with if this percentage is to be exceeded: see Chapter 6, **Controlling Managers, Agents And Venue Consultants By Legislation**.

WRITTEN AGENCY AGREEMENTS

Agencies should all have written agreements with the musicians they represent. The agreements are usually brief but some are not paragons of drafting skill. To make them work in practice, it may be necessary to imply further powers and obligations into the agency relationship. It's not hard to imagine the difficulties that can arise if an agency agreement is not written down, or where the terms are vague, contradictory or incomplete.

It benefits both the musician and the agent when a well-drafted agency agreement is used. The contract should include the following:

- (a) The agent's authority to represent the artist and whether the relationship is exclusive or non-exclusive.
- (b) The fields of activity in which the agent is authorised to represent the artist (e.g. live work, motion pictures, television, composition).

- (c) The functions of the agent (e.g. to obtain and negotiate offers).
- (d) The agent's powers (e.g. the authority to execute agreements).
- (e) The period of the agency agreement.
- (f) The amount of commission to be paid to the agent (and also to any sub-agent), including a definition of when the commission is deemed to be earned by the agent.
- (g) An obligation to pay all money received on behalf of the musician, into a trust account.
- (h) Any restrictions on the agent's powers.
- (i) A description of the artist's obligations.
- (j) A mechanism specifying what happens if engagements are cancelled.

The following sample may be downloaded from simpsons.com.au/documents/music:

SAMPLE EXCLUSIVE AGENCY-ARTIST AGREEMENT

To:

From:

Agent Appointment

Further to our discussions we confirm that we agree to represent you. The following sets out the conditions of representation.

1. We will be your exclusive agent for the purpose of booking your live performances in Australia.
2. In representing you, we undertake to:
 - (a) Seek, throughout Australia, engagements and other contracts related to your musical activities.
 - (b) In consultation with you, obtain offers, negotiate engagements and terms of contracts, and execute agreements.
 - (c) Maintain, update and revise as necessary all your publicity material, including brochures, media releases and photographs.
 - (d) Keep a record of press notices and interviews.
 - (e) Liaise with all relevant organisations to ensure they have up-to-date material about you and pursue media promotion in cases where it is clearly not the prerogative of an entrepreneur or commissioning body to do so.
 - (f) Ensure that you receive adequate and appropriate advice from lawyers, accountants or others, if and when this becomes necessary.
 - (g) Make travel and accommodation arrangements as necessary and provide detailed schedules and itineraries ('worksheets').

BOOKING AGREEMENTS AND ENGAGEMENT CONFIRMATIONS

Some agencies use written booking agreements with venues but many, presumably because the industry has traditionally been so scared of anything as concrete as a written contract, use a so-called 'confirmation' which they send to the employer, setting out the terms of the deal.

A confirmation is not in itself a booking agreement. However, it is legally correct to refer to it as a 'confirmation' if you argue that the booking contract was really entered orally (e.g. on the phone) and that the written material is just a confirmation and record of the terms of that oral agreement.

All agents use written booking agreements or confirmations. An agent who does not confirm a booking in writing is probably acting negligently in failing to fulfil one of an agent's fundamental functions.

There is no standard form booking agreement. Each agency has different ways of operating and each deal may have different issues of importance, depending on the type of music, the employer, the artist and the event.

Following is a skeleton agreement that provides at least the minimum deal points and the basic information needed if both the employer and the artist are to be sure of each other's basic needs. Established acts are likely have their own, much more developed, agreements and will insist that these are used in place of their agent's basic form.

SAMPLE BOOKING CONTRACT

(short form)

BETWEEN:

Artist:

(a) name.....

(b) address

AND:

Employer:

(a) name.....

(b) address

PERFORMANCE DETAILS:

- (a) **Venue:**
- (b) **Date(s):**
- (c) **Fee (or basis of calculation):**
 - (i) Deposit:
 - (ii) Time of payment:
 - (iii) Payment shall be by cash immediately after each performance.
- (d) **Times:**
 - (i) Equipment access:.....
 - (ii) Sound check:.....
 - (iii) Doors open:.....
 - (iv) Performance:.....
 - (v) Equipment removal:.....
- (e) **Cover charge:** \$
- (f) **Stage requirements:**
.....
- (g) **Power requirements:**.....
- (h) **Order of billing:**.....
- (i) **Transport arrangements:**
- (j) **Accommodation:**.....
- (k) **Special provisions:**
.....
.....
- (l) **Cancellation:** Payment will be in full unless cancellation is made at least 14 days from the date of the contracted performance.
- (m) **GST:** If you are registered for GST and you supply us with both a Tax Invoice and your ABN, we will pay the Fee plus GST. If you aren't or you don't, we won't - and you will be liable for any GST payable.

READ UNDERSTOOD AND AGREED :

.....
Signed for and on behalf of Employer date

.....
Signed for and on behalf of Artist date

VENUE CONSULTANTS

As mentioned earlier, many booking agents represent performers and also act as consultants to venues, who retain their services to liaise with agencies and to select, contract with and supervise the live entertainment provided by that venue. The degree of responsibility undertaken by these consultants varies considerably. Some just select and contract the talent. Others do that and also supervise all non-financial administration of the engagement. Still others undertake all of the functions already mentioned, as well as payroll administration.

Many venue consultants have written agreements with the venue (more often than not, drawn up by the venue) but many of these agreements do not sufficiently protect either the venue or the agent. They often do not delineate the parties' respective functional obligations nor adequately define their legal liabilities.

A venue consultancy agreement should specify the sort of entertainment the venue wishes to present; the general performance conditions such as sound check and rehearsal time availability, starting times, compulsory finishing times, requirements as to sound levels, performance restrictions (e.g. swearing or fireworks or other pyrotechnics); maximum ticket prices; approved methods and timetables for payment of the acts; promotion responsibilities or restrictions; load in and load out procedures; staging and production limitations; and any other matters that the venue consultant will have to observe when selecting, contracting and administering the venue's artists. Getting down to this sort of detail minimises the opportunity for misunderstanding and conflict between venues and the booking consultant. Misunderstandings are not good for anyone's business.

PAYROLL SERVICES

Venue consultants who provide a payroll service for their venues face particular problems with respect to taxation, unless they are very careful.

To show this, let's assume that you are an agent who is operating as venue consultant for a number of hotels. Put simply, you supply the entertainment needs of your hotel clients, i.e. you act as the agent of the hotel in the selection of the talent, liaise with agencies, attend to administration relating to the employment and attend to payment of the artists. For these services you receive (say) a monthly cheque from the hotel for the entertainment. The amount is all-inclusive ('global') and it is your responsibility to ensure that the financial arrangements relating to the employment are properly concluded.

In brief, you supply a service which provides entertainment for the hotels and which allows them to be free of obligations, except for payment of your regular global cheque.

In this position you are in very real danger of being classified as the employer for the purposes of the income tax laws and thus liable for the deduction of PAYG tax from the payments made to your artists. It also

exposes you to burdensome GST obligations. This means that even though the hotel is the real employer you will be liable as the deemed employer.

If the artist wants you to pay the whole of their fee without you first deducting PAYG tax, the artist has to provide you with the following details:

- (a) If the artists say they are a registered company, they must supply you with the company's ABN.
- (b) If they say they are a registered company, but have not yet obtained an ABN, you are probably safe if they sign the employment contract as a director of the company. Otherwise, you must insist upon a letter from their accountant or tax agent confirming that a partnership return has been lodged and accepted by the Commissioner.
- (c) If they say they are a partnership, they must supply you with the tax file number of their partnership.
- (d) If they say they are a partnership, but have not yet filed a tax return and therefore have not yet got a tax file number, only a letter from their accountant or tax agent will do.

If the artist does provide these details, you may pay the whole of the fee and it becomes their responsibility to pay tax. If the musicians are individuals or any groups who do not conform with any of the above, you must deduct the tax from their payments (these deductions are rather engagingly called 'Group Tax' - who said the Commissioner hasn't got a sense of whimsy?) and at the end of the financial year, you must issue Group Certificates to everyone from whom you have deducted tax.

If the artists want the fee to be exclusive of GST they have to provide the venue (or its agent) with their ABN and a Tax Invoice. Without this, the artist (as the provider of the services) may be liable for the tax and if so will have to pay it out of the fee. (See Chapter 35, Keeping the Books.) GST is presently 10% of the cost of the supply. The artist is usually paid the fee plus 10% GST and the venue (or its agent) remits the tax to the ATO. The venue then charges the customer the ticket price plus 10% GST and remits the net tax to the ATO. In this way there is no double tax paid but the government receives tax on the whole transaction.

All this can make the venue consultant unpopular with agents and artists, but there is really no alternative. Venue consultants undertaking payroll services must be very cautious, for they are the ones the Commissioner is going to chase if there is any unpaid tax to be collected.

To avoid these problems, venue consultants providing payroll services should use a very carefully drafted form, which provides all the artists' relevant taxation details. They should also provide standard GST Tax Invoices for use by their artists (because not many are in the habit of carrying them around).