

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
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5 THE MANAGER

THE RELATIONSHIP BETWEEN ARTIST AND MANAGER IS HUGELY IMPORTANT. FEW ARTISTS CAN ACHIEVE MORE THAN A MODICUM OF SUCCESS WITHOUT COMPETENT AND ENERGETIC MANAGEMENT. THIS CHAPTER EXAMINES THE SELECTION OF MANAGERS, THEIR FUNCTION AND THE BUSINESS RELATIONSHIP BETWEEN ARTIST AND MANAGER. SAMPLES FROM MANAGEMENT AGREEMENTS (WITH COMMENTARY) ARE PROVIDED.

Although an outsider might view the music industry as simple (indeed primitive) in its structures, like any billion-dollar industry it has many, many subtleties and nuances. Managers must comprehend and manipulate these nuances or risk the act's career becoming stagnant and even going down the plug-hole altogether.

Unfortunately, in the past, management acquired a tarnished reputation. Music management was seen as one of the few ways that someone with enough rat-cunning could drag themselves out of the mire and make a fortune without having to step into a boxing ring, provided he or she got to manage the right act. Nowadays, a top manager has to be as tough as a marine with an accounting degree, be a capable business person and still retain the suave charm of an international diplomat.

The musician's search for the perfect manager is never over. The 'Perfect Manager' would be an amalgam of hard-headed business executive, snake oil seller, economist, Tangier rug trader, kick-boxer, parent, stand-in spouse, friend, confessor, psychologist, fall-guy, punching-bag and stand-over merchant. He or she would also be on first-name terms with all the big-hitters of the business in three continents, enjoy an independent source of income, love your music and have a bullet-proof belief in your future.

QUALIFICATIONS

Too many musicians employ inexperienced and untrained friends, parents or admirers as their managers. This may work for a while but, once your career starts to take off, you will need a manager with real skills!

Once stardom arrives, many artists think that they can now afford to appoint a trusted loved one as their manager rather than an experienced industry professional. They forget how important good management was to their success and give their own talent all the credit. Tread cautiously. Many will be familiar with how Delta Goodrem appointed her mother as manager at the end of her contract with Glenn Wheatley. Many will also be familiar with Delta's rather rapid subsequent search for a new international manager amid public controversy.

One of the most noticeable changes in the last few years has been the increase in younger talented managers and, in particular, the increase in female managers. That said, there are all too few 'exhibition-quality' managers. There are numerous capable ones who may well become top managers but, unfortunately, there are also hundreds of undeniably enthusiastic but nonetheless untrained, unqualified, inexperienced and unduly over-confident people acting as managers. These are the ones who, in all probability, will never make it and may even inadvertently harm the artists who put themselves into these managers' hands.

No degree course can guarantee that anyone can actually 'manage' anything. Nevertheless, it is no longer true that the best university for a manager is the University of Hunger and Hard Knocks. The music business has become sophisticated. Successful managers have to possess much higher levels of skill and knowledge than they did in the past. The traditional route to management was to start out as a musician or road crew and to learn the trade by long exposure in the real world. This apprenticeship was (and remains) valuable, but it does not train individual managers to higher standards of performance in marketing, accounting, law and the other survival skills needed in an increasingly complex business world.

Managers really should have backgrounds in accountancy, marketing or administration. They need to know how to put a proficient marketing campaign together, run efficient offices, prepare and read a balance sheet and understand that accrual accounting is not just the work of 'a cruel accountant'.

The artist looking for the perfect manager is, of course, doomed to disappointment. Even the best have, like all professionals, their strengths and weaknesses. Look for a reasonable match between the artist's needs and the manager's talents.

In selecting a manager, consider the following factors:

- Has the manager had previous experience within the industry as a manager?
- Does the manager have established contacts and business connections that will assist the musician's career?
- Has the manager proven skills to perform all management functions and to comply with all the requirements of the management contract?
- If the manager is currently managing other acts, what is the level of success of those acts? Will the manager be looking after the act's affairs exclusively or delegating the work to a personal manager?
- If the manager has other business experience or interests, are they compatible and is that experience relevant?
- Is the manager genuinely interested in the group and its music and prepared to put the artist's interests ahead of personal interests at all times?
- If the manager offers loans to, or investment in, the group, what are the terms of such loans? Is getting a loan the deciding factor, rather than the manager's business skills?
- Has the manager demonstrated honesty and integrity?
- Is he or she a person you can work with? Can you spend a lot of time with this person?
- Is this the kind of person you want to represent you, both within the music industry and to the public?
- Are the terms that the manager is requiring, fair? Do they indicate that this is going to be a relationship in which the interests are mutually beneficial?

WHEN DO YOU NEED MANAGEMENT?

There is no standard answer to this question. It depends on your individual circumstances. Many new groups acquire a manager almost as a designer accessory; a status symbol. Even though they don't yet need a manager, saying they have one suggests that they are serious and successful - even though the manager may be a friend from school who goes out with the lead singer's sister and enjoys being able to call himself a manager. This sort of posturing doesn't hurt, unless the band actually does get a break. Unfortunately, unless your manager is already competent, he or she is unlikely to be able learn in time the skills that you will need if you are to capitalise on your opportunity.

Don't commit to management too early. Many bands do not really need a manager when they start out. You need to realise that, until you can attract

a good manager, you may be better looking after your own affairs and instead retain a good accountant and a good lawyer upon whom you can call as needed.

If you wait until you have developed a reputation and had some success, you will find it easier to attract better quality management. Moreover, you have more bargaining power when negotiating the management contract. If you have interest from a record label, and, even better, the promise of a large advance, good management will be even easier to attract as the manager will have a financial reward immediately in sight. Even then, do not rush to sign with management. Remember that you have done most of the hard work to date. You've established the act, stabilised the line-up, developed the repertoire, obtained agency support, and perhaps record company interest and now you are looking for a manager and will have to sign a percentage (perhaps a large percentage) of your income away!

Bear in mind also that your record company (or future one) may have particular ideas about management. For example, some record companies refuse to deal with some managers after bad experiences and may ask that you give up or change management. Such requests should be considered cautiously, while your manager must have a good working relationship with the record company, he or she is also there to represent your interests (not those of the record company).

There is no right time to have management. Each act's needs are different.

THE LEGAL RELATIONSHIP BETWEEN MANAGER AND ARTIST

Most managers have a written contract with the artists they manage. This is just good business practice (and in NSW it is compulsory). By describing each party's rights and obligations, the contract sets out the terms of the relationship. The function of the contract is to protect both parties' rights, not just those of the manager or the artist.

Even if there is no valid contract between the artist and the manager, this does not mean the artist can avoid paying the manager for his or her services. In a remarkable case, *Brenner & Ors v. First Artists' Management Pty Ltd and Braithwaite* (No. 3606 of 1988, 30 October 1992), Daryl Braithwaite was sued by his ex-managers. The facts of the case are complicated and a brief outline is all but impossible.

Suffice it to say, Braithwaite's career had languished for some time. Having been the lead singer in a hugely successful group, his solo career had slowly slipped to the stage that he was performing in clubs and hotels - something that would have been unthinkable in his heyday. The managers were retained to assist in resurrecting his career. There was no signed management agreement. Eventually, their services were terminated.

It is common in the music business (perhaps more common in times past) for managers to supply their services on the basis of a handshake deal. The only term discussed may be the amount of the commission. Nevertheless, it has been widely assumed that the relationship is a contractual one and that any deficiency in the terms would be overcome by implied terms determined by the 'trade and custom' of the business.

In this case, from the outset, the ex-managers (the plaintiffs) argued that although they had performed services at his request and for his benefit, there was no enforceable management agreement with him. They sought reasonable payment for work and services provided in assisting him to further his career. In other words, unlike most management disputes, this was a claim based on the law of unjust enrichment, rather than upon the existence of any express or implied management agreement.

His Honour, the judge, found that Braithwaite had benefited from the plaintiffs' services and that those services had been provided pursuant to a request which had been accompanied by a discussion about payment. He found that Braithwaite had accepted the benefit of the managers' services, in circumstances where it would be unjust for him to do so without paying them.

The short message of the Braithwaite case is, if you use a manager's services, you must expect to pay for them. But more about payment later.

THE FINANCIAL RELATIONSHIP BETWEEN MANAGER AND ARTIST

Although it is possible to hire a manager on a salary, this is very rarely done. The standard expectation is that the manager will be paid on a contingency basis (i.e. according to success).

There are two main methods used by managers to structure their relationships with the artists they represent:

1. MANAGER AS GROUP MEMBER

The manager may be treated as a non-performing group member and entitled to an equal share of net profits. In this kind of deal, the manager is an equal participant in the business of the group and is therefore entitled to be treated as an equal partner or shareholder in all the group's activities.

As a partner or shareholder, the manager is a part-owner of the business and has an equal vote in the conduct of the business, but is subject to the directions of the majority of group members. Moreover, as a part-owner, the manager may be entitled to rights in the group name, the benefit of recording contracts and to receive a share of the band's profits after payment of all expenses including group costs and management costs.

This form may have initial appeal because it gives everyone a sense of 'All for one and one for all!' However, its disadvantages (these have been proven over the years) mean it is now almost extinct. The disadvantages include:

- (a) Conflicts arising from the allocation of income to necessary group or management expenses.
- (b) Conflicts of interest and allocation of management expenses if the manager takes on other artists.
- (c) Upon termination, conflicts as to the nature and extent of the manager's rights in the group's name, benefit of recording and publishing contracts, ownership of copyrights and goodwill in the continuing business.

It is significant that 20 years ago this was the most common management structure. Now it is hardly used at all. There are still occasions when it is useful, but they are exceptional and need a lot of discussion and careful drafting.

2. MANAGER AS SEPARATE BUSINESS

More commonly these days, the manager is contracted by the artist to supply management services on a non-salaried, contingency basis whereby the manager is entitled to a percentage of the artist's income but owns no part of the artist's business.

This has become the accepted structure because it reflects the fact that the business of the band and the business of the manager are quite distinct. Each is a separate business and each has its own functions, goals and interests. In particular:

- (a) The manager and act are each the sole owners of their respective business. The manager does not own a part of the act's business.
- (b) The manager and the act are each solely responsible for the allocation and payment of expenses associated with their particular activities.
- (c) The manager may undertake management of other acts, without any conflict of interest or dispute about allocation of expenses.
- (d) The manager will not have any property interests in the act's name, its contracts, copyrights, goodwill and so on, which makes separation easier and cleaner when that time comes.

SCOPE OF MANAGEMENT

A manager usually becomes responsible for all of the act's entertainment industry activities. The management contract will probably provide that the management function and duties will include the following:

All of the Artist's entertainment industry activities, in particular:

- (a) the making, distribution, sale and promotion of audio and audiovisual recordings in every medium and by every technology, whether now known or yet to be invented;*
- (b) personal live appearances before an audience whether in public or private, paying or not;*
- (c) personal recorded appearances for video, film, television or Internet, irrespective of the medium or technology of delivery;*
- (d) performance as a program presenter and as an actor in films in any medium;*
- (e) the writing of lyrics and the composing of music including (but not limited to) songs for records, commercial jingles, TV or film theme or background music and for any other use;*
- (f) the provision of services as an engineer or producer or director of audio or audiovisual recordings of the Artist's own performances or the performances of others;*
- (g) the merchandising and other commercial use of the Artist's name, likeness and reputation by way of licence or otherwise in connection with products or services and sponsorship, product endorsement or otherwise; and*
- (h) any other activity service or performance by the Artist in connection with any of the above as may be agreed between the parties from time to time.*

As you can see, a clause like this covers all of the musician's entertainment industry activities. The scope is wide because the manager is, presumably, at least partly responsible for establishing the profile and success of the musician which (hopefully) will lead to film and television work, the autobiography, advertising opportunities, merchandising deals and so on. Moreover, the manager is usually expected to assist in the negotiation and administration of these associated areas of work. Also, the manager will expect to share in the income from these sources because, while the musician is acting or writing books rather than performing or recording, the term of the manager's contract is ticking away without reward.

At the outset of the relationship, when the management agreement is first negotiated, it is important to question the appropriate scope of the manager's activities and if you wish some of your activities to remain outside the scope of the relationship, these should be specifically written into the agreement. Some musicians already have an acting career (and an agent who already looks after that side of the business). Some have a jingle-writing business, while others work in a music store or teach an instrument or whatever. No matter what this other work may be, you should discuss it with your would-be manager and come to a mutually acceptable arrangement. When this is done up-front, there is rarely a problem. If there is a problem, it is best to find out before you commit yourself.

EXCLUSIVITY

All management agreements provide that the musician will have no other manager without the contracted manager's express agreement. Managers have to demand exclusivity otherwise, as soon as the dollars start flowing, the vultures will start circling in the hope of juicy pickings.

Almost all management agreements provide that the manager may look after more than one act. Few acts earn enough, in the early days at least, to support a manager and the costs of administration. Even established managers tend to look after more than one act. There are at least two good reasons for this: First they are able to recover their overheads and administration costs across a greater income base and secondly, because the shelf-life of many acts is so short, they can develop new acts at the same time as looking after the affairs of the established one, which is good for the continuity of the manager's business.

This obviously can create conflict of interests between the musicians, who want the maximum attention from their manager, and the managers who need to maximise their cost effectiveness and profitability. For this reason, management contracts that allow the manager to look after more than one artist often provide that this is subject to the proviso that:

...the Manager shall not devote so much time to other business activities as to jeopardise the Artist's career and interests.

Of course, when you start arguing about these sorts of issues, it is often the beginning of the end of the relationship in any event.

CO-MANAGERS

It is common for artists to have co-managers when they get to the stage of having international careers. Few Australian managers are physically able to take on the major overseas markets, particularly the United States, Japan and Europe, so local co-managers are often appointed for those territories. The appointment of a co-manager must always be subject to prior consultation with, and the approval of, the artist. Moreover, the commission payable where another manager is introduced must be carefully negotiated and agreed in writing. The most common arrangement is for the co-managers either to split the principal manager's commission, or to divide up the territories so that each gets a full commission on their own territory but nothing from the others. Of course, paying of double commissions is not on!

PERSONAL MANAGERS

It is customary to allow managers to appoint a 'personal manager' to perform their duties and tasks. Many of the busier managers who have several artists on their books, will designate a staff member to have particular responsibility for an artist. The salary of a personal manager is a management expense and should not be charged to the artist. Given the personal nature of the management relationship, the artist should always have the power of approval over the appointment of such individuals. Many artists insist on the right to end or replace the personal manager's services.

It is essential that the artist be involved in the selection and appointment of any personal manager or co-manager. After all, the artist-manager relationship is one that demands great faith and confidence. Perhaps the most famous case that demonstrates this involved the Kinks.

In 1964 the Kinks appointed Boscobel Productions Ltd to manage them for 40% commission (a rate that would never stand up today!) In turn, Boscobel retained a co-manager (Denmark Productions Ltd, which was half owned by Larry Page) to actually carry out the management functions. Boscobel agreed to pay Denmark a 10% commission which was paid out of Boscobel's 40%.

In 1965 the group undertook a tour of the United States. Ray Davies (leader of the Kinks) had not wanted to tour but had eventually agreed on the condition that Larry Page acted as personal manager for the tour. Halfway through the tour Page returned to England without warning Davies, and appointed another personal manager to the group. Ray Davies did not approve of the new manager. Unhappiness followed.

In the resulting case, one of the things that was made very clear by the judge was that the relationship of artist and manager is one which demands great trust and confidence and, because of that, the artist should not be locked into such a relationship if the management has breached its obligations in such a way as to destroy that fundamental trust.

TERRITORY

Most managers would prefer to be the manager for the whole world. If a band gets a break overseas, its income (and consequently the manager's income) can grow from nil to millions in a matter of months. Peter Frampton's prodigious success with his live album in the early 1970s and Savage Garden's emergence in the 1990s are classic examples. These artists are reputed to have become multimillionaires within two years from the proceeds of touring, publishing and record royalties.

As the musician, you must ask whether your manager has the skills (or the potential to develop them) to create that international opportunity and then adequately manage your affairs in that tough competitive arena. Less than a dozen Australian managers have a proven record of success overseas although more are starting actively to seek the overseas experience and contacts that are so important. If in doubt, artists should limit the territory as much as possible and include ways of measuring the manager's achievements, perhaps in terms of media coverage, gigs booked or whatever. It is always possible to enlarge a territory if the manager does a good job in the local territory, but it is very difficult to reduce a world territory if it turns out that the manager is not up to the job after all.

The issues raised by co-management are relevant here because, if a manager is given world rights, it may be necessary for the management role to be subcontracted to co-management for particular territories. Indeed it may also be sensible to include a clause that states that the manager must appoint a co-manager in a particular overseas territory if so required by the artist. That said, because of the very personal nature of the management relationship, the management contract should specify that co-management is an issue that requires both consultation and consent.

LENGTH OF THE MANAGEMENT CONTRACT

Most management contracts are for periods of between three and five years. Certainly where the act is not established, three years is usually the minimum a manager will accept. The manager will probably not earn anything in the first year, may balance the books in the second year and will (hopefully) start making a profit in the third. Management of new acts (even when they include musicians who have been successful in other line-ups), is speculative and needs time for the risk to pay off.

Usually, the contract period is split into an initial period, followed by one or two options to extend the period. The options are almost always in favour of the manager. That is to say, it is the manager's decision whether or not to extend the term of the contract. This, of course, depends on the relative bargaining power of artist and manager. There is usually little justification for this when both artist and manager are at an equal level in their careers.

A standard Term clause will look something like this:

Initial period

This Agreement commences on the date first written in this Agreement and will continue for an initial period of one (1) year ('the initial period'), unless earlier terminated in accordance with the terms hereof.

Option

For the consideration of one dollar (\$1) (payment of which is hereby acknowledged) the Artist agrees that this Agreement may be extended (at the sole discretion of the Manager) for two (2) further periods, each of two (2) years (each such period being 'a contract period'). To exercise any such option, the Manager must give the Artist notice, in writing, of the Manager's intention to exercise any option. Such notice must be given at least one month before the expiration of the then current contract period. Each option period shall run from the expiration of the preceding contract period.

Continuation upon expiration

Notwithstanding expiration of the initial period, the Term will continue from month to month unless and until either party gives to the other at least thirty days' written notice of termination.

If the artist has more bargaining power, he or she can insist that options be subject to the parties' mutual consent.

A more common way of building equity into the agreement is to build in some simple performance criteria, e.g. management contracts for non-established artists commonly provide that if the musician does not obtain a recording agreement (and/or a publishing contract) within the initial period, the option can only be exercised by mutual consent. Some deals provide for specific weekly income goals.

Most experienced managers realise that the fundamental characteristic of the management relationship is its personal nature. If the relationship breaks down it is an impossible situation for both parties. (Not even a court will force a musician to continue management with someone if the relationship has broken down. You might have to buy your way out, but you certainly don't have to work together!) Consequently, if you can build objective performance indicators into the agreement, you reduce the chance of friction when the time comes to exercise an option.

THE FUNCTIONS OF THE MANAGER

Every manager has a different view of the job. Nevertheless, they all have fairly similar basic duties. These are: administration and accounting; promotion and advertising; negotiating with, liaising with and harassing record and publishing companies; providing creative career guidance to the artists; organising production, sound, light and crew; liaising with the booking

agency; tour organisation; consulting with and scheduling the musicians; co-ordinating television, radio and personal appearances; obtaining and overseeing sponsorships and merchandising; co-ordinating record and video production.

These may perhaps be best summarised by looking at the relevant clause in a management agreement:

MANAGER'S FUNCTIONS AND OBLIGATIONS

Procuring and Administering Engagements

The Manager must use the Manager's reasonable commercial endeavours to promote and further the Artist's career, including without limitation:

- (a) procuring suitable engagements for the Artist to which the Artist is suited by talent and ability, or by obtaining an agent to do so; and*
- (b) commercially exploiting the Activities to the Artist's advantage within the entertainment industry by all appropriate media, methods and formats currently existing or developed from time to time.*

Procuring and Administering Contracts

The Manager will on the Artist's behalf, negotiate and confer to the best of the Manager's ability with agencies, employers, record companies, publishers, sponsors, merchandisers and other users and potential users of the Artist's services or properties, insofar as they relate to the Activities.

Promotion and Publicity

The Manager will plan and implement promotion, publicity and advertising relating to the Artist, and will supervise the provision of services relating to the same if performed by anyone other than the Manager.

Consultation and Advice

The Manager shall regularly confer with and advise the Artist concerning the Artist's Activities throughout the Term, including:

- (a) being reasonably available to consult with the Artist; and*
- (b) preparing plans for the future direction of the Artist's career in consultation with the Artist.*

Business Management

The Manager will act as the business manager for the Artist in all matters relating to the Activities and will make best endeavours to do everything that is reasonable and proper to ensure that such affairs are conducted in a competent, honest and professional manner.

Exclusions

This Agreement shall not impose upon the Manager any authority liability or duty to the Artist in connection with:

- (a) Individual taxation matters;*
- (b) individual investment advice; or*
- (c) individual financial advice.*

FINDING WORK

It is a fundamental part of the manager's task to find the musician work that is suited to his or her talents and career direction.

Some of the 'standard' management agreements floating around specify that the manager 'has not offered or attempted or promised to obtain employment or engagements for the artist and is not obligated, authorised or expected to do so'. Managers who have this clause in their contract are either trying to contract out of one of the basic tasks of a manager in Australia, or they merely have a lawyer who has copied an American precedent without knowing the custom of the Australian industry. (American management agreements contain this clause because of local legislation requiring people doing such work to be licensed.)

In Australia, if the manager of a young band is not prepared to get out and find the musicians work, both the manager and the musicians are going to have very little to eat.

Some do this themselves but in most cases it is a priority of the manager's job to find an experienced agent to do the job. Even getting onto the books of a powerful booking agent is no easy task. The competition is considerable because there are more acts than there are work opportunities.

BUSINESS MANAGEMENT

You will note that in the above list, there is no obligation to keep the books, bank the money and so forth. If these tasks are going to be the manager's, obviously this should be included. However, both artists and managers should think twice about this. If lawyers are ever instructed to get an artist out of a management contract, the first thing they do is call for the books and have them audited. Very few managers are also accountants so many find it difficult to produce books of account that can withstand more than a cursory examination. This is not to say that they are necessarily dishonest; just that they will probably have made mistakes and the chances are that the mistakes will be assumed to benefit the manager unless proven otherwise.

Although it is customary in Australia for the manager to take care of the business affairs of the artist, this is certainly not so in the United States. There it is recognised that very few managers have the time or expertise to do the accounting and bookkeeping, efficiently monitor and collect all the income from all sources, prepare and supervise the budgets (both the artist's personal expenditure and those of the act), as well as to supervise insurance protection, investments, tax planning, tour accounting and undertake royalty examinations. In the United States this work is generally perceived to be that of the business manager.

For this work, the business manager usually is paid a fee or 5% commission. Most personal managers in the United States charge 15%,

because the business managers charge 5%, thus taking the total commission to the magical 20% figure that is so common.

It is increasingly common for musicians in Australia to structure their business affairs in this way. The advantages should be obvious: the skills necessary for each role are so very different that it is hardly surprising that great all-round managers are hard to find.

Perhaps one of the reasons that Australian managers have been reluctant to adopt the American model is that it has been customary for the manager to hold the artist's money and to operate the bank accounts, paying the band expenses and, when there is enough in the account, paying the artists their share. Although most at least set up separate bank accounts in the artists' names, some managers simply pay the artists' money into their own account and mix the funds. It is not necessarily a case of 'What's yours is mine; what's mine is my own', but it is extremely bad business and may well amount to negligent trusteeship. (In New South Wales, such mixing of funds is illegal.)

This practice, perhaps more than any other, has tended to tarnish managers' reputations generally. It is cause for huge resentment when there is only enough money to pay the expenses and the manager's commission but not enough to feed and water the musicians and is cause for very real suspicion when the management treats the artist's income as its own.

These problems are very easily overcome if the band retains an independent qualified person (usually an accountant) to handle the administration of the money. (Where this is done, the artist pays the accountant and the manager drops the commission by 5% to reflect the lesser workload and responsibility.) In this kind of deal:

- All income is paid to the accountant;
- All expenses are paid by the accountant;
- The manager provides the accountant with receipts for all reimbursable expenses;
- The accountant administers the paying of expenses, calculation and payment of commissions payable and the maintenance of the bank accounts and all of the artists' other financial administration matters.

This creates a clear money trail for both parties and removes the potential for the common accusations about managers misusing the artist's money. It is simple, cost-efficient and removes a potential problem area from the artist-manager relationship.

CONFIDENTIALITY, INTEGRITY AND HARD WORK

Although it should not need stating, it cannot be over-emphasised that the role of the manager is one of great trust and responsibility. There have been several decided cases in which the court made it clear that the relationship of

the manager to the artist is 'fiduciary'. This means that managers must put the artists' interests above their own.

It is important that the manager observe the confidentiality of the information, secrets, private finances, dealings and relationships relating to the artist. Similarly, the manager has a duty to exercise his or her powers, zealously, responsibly, with integrity and in absolute good faith. All managers should promise this in the management agreement. However, even if they don't, the courts have made it clear that they will demand this high degree of trust and responsibility of the manager.

THE MANAGER'S REMUNERATION

COMMISSION

The standard rate of commission in Australia is between 15% and 20%. If you are paying more than 20%, you could be paying too much. In *Terzian v Gattelari* [1972] AR (NSW) 591, the court determined that the commission rate of 25% of gross income was excessive in comparison with normal entertainment industry rates and reduced the rate to 10% of the gross income. A contributing factor to this reduction was the manager's inexperience in the industry.

In *Layton v. Vaud Vision Promotions* (unreported, Industrial Commission of NSW, 11th October 1983 No 354 of 1983) the Commission indicated that the agreed commission rate of 40% of the gross income was excessive and indicated that a rate of 17% of the gross income was not unreasonable, taking into account the manager's investment of time and money in a new and unknown musical group.

Of course, the percentage figure is meaningless unless you specify what the percentage is based upon. In earlier days, it was standard practice for managers to charge their percentage on 'gross income from all sources'. Although there are some managers who still insist on this, it is now the exception rather than the rule. The manager who is being paid 20% of gross on everything, will make far more money than any of the band members. It isn't going to take long before the musicians start getting resentful about this and the end of the relationship is almost inevitable.

Even remuneration in goods and services is commissionable. If an artist agrees to be paid in airfares or cars the manager should still get paid. After all, the manager has probably put the deal together! The only question is what value should be put on those goods or services. Some managers agree to a wholesale value or corporate rate while others insist on the full retail value. If you accept the saying 'there are no free lunches', then it is not hard to see why a balance needs to be shown between the cost of the manager's services and

what the manager can actually provide. Too low a commission can remove the performance incentive. Too high a commission is a gift.

ADVANCES

Commission is payable on income - but what is income? Is an advance commissionable given that it is actually a payment 'in advance' of receiving income?

The industry practice is quite clear. The manager is generally entitled to commission an advance at the time it is paid to the artist. This is the case irrespective of whether the advance is recoupable or non-recoupable.

Where the manager has commissioned an advance, it cannot also commission the money used to recoup that advance. For example, assume that a writer signs a publishing agreement with a recoupable advance of \$100,000. There are two ways that a manager can deal with this. Either:

- (a) The manager commissions the writer's advance when it is paid to the writer. Because the advance is recoupable, the publisher will allocate the next \$100,000 of writer royalties towards the recoupment of the advance. The royalties used to recoup the advance cannot be commissioned. The royalties were paid in advance and the commission has already been taken in advance; or
- (b) The manager does not commission the advance when it is paid to the writer. Rather, it commissions the actual income as it is received. Managers understandably resist this because the commission on advances provides important cash flow for the manager as well as the artist. Also, many advances are never fully recouped. On the other hand, if the management is new and unproven (or, conversely, is coming to an end) this option is usually the fairest way to go. If the manager commissions an advance just before the relationship ends, it is an unfair windfall. That advance is going to take a lot of work to recoup: The exiting manager isn't going to participate and, unless the artist is going to pay double commission, the new manager isn't going to get rewarded.

Whichever way the deal is negotiated the principle remains the same: the manager either commissions the advance and not the income used to recoup the advance or it doesn't commission the advance and commissions the income. If it were otherwise, the manager would be double dipping.

EXCLUSIONS

RECORDING COSTS

In the early days of the industry, record deals were differently structured. Production costs were non-recoupable but the royalty rates were much lower. (This is discussed at greater length in Chapter 23, **Record Royalties**.) The

effect of this was that the artists (and thus the managers) started earning from the first record sold. In this situation, it was appropriate for the manager to commission all income.

These days the most common record deal characterises the recording costs as an 'advance' to the artists. They don't earn any royalties until those production costs (and any other advances) are recouped. In this situation, if the manager is commissioning all ('gross') income, he or she will be earning while the artists are not. If the artists don't recoup the cost of production it is very likely that they will have incurred a very considerable debt to the manager. They will only start receiving an income after they have both recouped the production costs and repaid the manager! Clearly, this is not on! It is an example of an old management custom not reflecting current practice in the record industry.

If the manager has reason to be scared that the band will spend half a million dollars on an album and never be able to recoup it, the sensible protection is to provide a maximum production budget which will be non-commissionable and provide that expenditure in excess of that figure will be excluded.

A straightforward production costs clause might look like this:

Commission shall not be payable on:
 (i) *direct recording costs of sound recordings (made for the purpose of creating albums and singles but not demos) and promotional videos; musician, performer or producer fees and royalties payable to persons other than the Artist in connection with the sound recordings; and any reasonable expenses incurred with the Manager's prior written consent. Indirect costs such as travel or accommodation are not excluded.*

LIVE PERFORMANCE COSTS

The cost incurred in earning live-performance income is one of the most contentious items when determining what should be deducted from gross income for the purpose of calculating management commissions. The cost of travel and accommodation, renting and transport of gear, hiring the essential support staff, publicity and promotion and so on, all mean that the chance of making a net profit from live work is sometimes slim. In Australia, the ratio of expense to potential earnings is particularly high.

Because of this, you often hear that 'no-one can make money out of touring in Australia'. Of course this is not true. Many Australian artists make very good profits from live work. What is true is that acts have to budget their expenditure in accord with their likely income.

Creating a profile and public following are essential for promoting record sales and thus making more money. Musicians (and record companies) argue that the exposure provided by live performance is essential to establishing a profile for the act and a popular following for their music and that this justifies deduction of expenses and overheads before calculating the manager's commission. Managers agree but argue that, because of the work they have to do to organise and administer the live performance work, a return on the 'net' is simply not economic.

When commission is being paid on gross income, musicians become resentful when they work night after night for little or no cash, if their manager gets 20% of the gross. (This is particularly galling if one of the band's expenses is a tour manager!) Clearly, unless there is some compromise, the resulting resentment will damage the working relationship between artist and manager.

If the parties agree on a net basis of commission calculation, the clause may be along the following lines.

In respect of live personal appearances (whether at concerts, on tours or otherwise) the commission will be calculated on the net profit thereof. 'Net profit' means the gross fees received less the total costs incurred reasonably and attributable to staging the event, plus any tour support provided by third parties.

Note that this example stipulates that any third party tour support money gets taken off the total of the expenses before the calculation of the net. This assumes that the manager has not already commissioned the tour support money! The manager either commissions tour support funds up front or gets the benefit of it in deducting it from the expenses. Either way the manager will benefit from the tour support received, but it must not be commissioned twice.

Managers who are scared that the band will over-spend on production and associated costs should either: specify what costs they are prepared to have subtracted from the gross income received; or commission the whole of the gross, but at a lower rate; say between 5% and 10%.

There is no one right answer. There are a number of factors that have to be taken into account when working out a fair approach to the commissioning of income from live work: the normal costs of delivering the artist's show (from unplugged to major production), genre (from jazz to metal), track record (from development tour to stadium tour), venues (pubs to entertainment centres). No-one commissions the full gross any more; some managers do nett deals, but most managers work on a modified gross deal. A benevolent one might look like this:

In respect of live personal appearances (whether at concerts, on tours or otherwise) the commission will be calculated on gross earnings less any booking agent's fees, support band's fees, and any "tour support" monies provided by third parties that have already been commissioned by the Manager.

TOUR SUPPORT

The commissioning of tour support is always complicated to deal with in a contract because of the various ways in which tour support can be provided. Sometimes the record company may simply provide a recoupable lump sum towards the tour costs or, as is more common, it provides a negative pick-up (where it promises to pay up to a certain amount of any loss that may be incurred). Either way, the contract has to cope.

If the manager commissions the gross receipts, it is taking the commission irrespective of whether the tour makes a profit and commissions the tour support, even though such tour support is provided to mitigate against the losses that would otherwise be incurred by the artist. This is obviously unfair and is an incentive to book high-grossing tours without the incentive to minimise expenses.

Where the manager is on any variant of the net receipts deal, the tour support should not be directly commissioned. Rather, it should be added to the gross receipts from which the expenses are deducted in order to reach the net commissionable figure. This way, all advances (even negative pick-up advances) are commissioned - but in a fair way and only once.

BOOKING AGENTS' COMMISSION

The 10% paid to booking agents is not commissionable by the manager. This custom has arisen in Australia because the agent is fulfilling one of the manager's functions. The agent's commission is taken from the gross before calculating the manager's commission.

Where an agent is also acting as manager, no income should be subject to double commissions. Accordingly, if one person is acting as an agent and as a manager, it is not proper for them to take 10% of the fee as an agency fee plus 20% as a management fee. (In NSW that conduct is illegal.)

MERCHANDISING EXPENSES

Most acts license their merchandising rights to specialist merchandising companies. These companies incur all of the expenses and pay the artist a royalty. That royalty is commissionable. However, if the act is doing its own merchandising, the costs of producing and selling that merchandise should be deducted before calculating the manager's commission.

THE RIGHT TO PAYMENT AFTER TERMINATION

Whether or not a manager has any right to receive commission after the expiration or termination of the management agreement is one of the most vexed parts of any management negotiation. Certainly it is true that the manager's efforts are likely to continue to create income even after the management agreement has ended. On the other hand, the artist needs to be able to get on with his or her career without having to keep paying the old manager for past services. **There is no implied right to receive management commission after termination of the contract.** If the manager believes that such commission is justifiable, it must be in writing.

The variations are almost limitless:

- If the manager is to continue earning a commission after the management period is over, that commission should diminish over no more than three years, e.g. year 1, 10%; year 2, 7.5%; year 3, 5%; year 4, 0%.
- The commission should never be the full commission payable during the term of the contract, because the manager no longer has any expenses or duties in respect of the artist whereas the artist's on-going work, and that of the new manager, will directly and indirectly be promoting the back-catalogue.
- Some managers insist that they receive full commission on any money earned from a contract entered during their time. This is indefensibly unfair. In effect, this means that all recording and publishing income continues to be commissionable by the previous manager. This leaves nothing in it for the new manager who is expected to work the artist's recording and publishing career without reward. The artist will never be able to find a new, competent manager on such terms. Given that, such a term is economically fruitless to both parties: the artist won't have a career and the old manager won't make any money out of the failure that it ensured at the outset of the relationship. No one wins.

At most, the right to commission should be restricted to income derived from product recorded (and live performances actually contracted) during the period. In other words, the commission is directly related to the product on which the manager worked. It should go without saying that no post-termination commission should be payable where the termination has occurred due to breach by the manager.

In *Brenner & Ors v. First Artists' Management Pty Ltd and Braithwaite*, the plaintiffs' claim was for remuneration for the period of their actual work and for the three years after termination of the relationship.

In the period of management, no records were sold. The album 'Edge' had not been released until three months after the termination of management services. The second album 'Rise' was released some two years after termination and was not taken into account at all by the Judge, on the basis that the success or otherwise of this album had not been effected by the ex-managers. He did not accept the managers' argument that the effect of their work would continue to endure for three years after termination.

The judge drew various implications from the evidence before him and found that 'the normal run-off period following termination of a management agreement is six to seven months ... Common sense, however, dictates that this must be dependant upon the management services concerned and the source of the relevant earnings'.

In this case, as the managers had been working to re-establish Braithwaite's career, it was akin to making a debut album. Accordingly, the managers' effect was impliedly of greater effect than for an established artist. The judge went on to decide that the services of the managers would have had a diminishing effect over a period of approximately 12 months. After that date, record sales were considered 'so remote in time as to be considered not to be a benefit of the services provided' by the managers.

Established musicians insist that there will be no post-termination commission payable.

THE MANAGER'S POWERS

Because it is their job to 'look after business', managers usually need to have certain powers delegated to them by their acts. In a legal sense, the manager is the 'agent' and the musician is the 'principal'. The degree of autonomy and control exercised by the manager/agent over the musician/principal varies from time to time and from act to act.

If you look at the old-fashioned contracts that were prevalent up to just a few years ago (and there are quite a few still around), it seemed that the artist was almost the manager's employee. Many of the older contracts stated that 'the artists shall render their services to the manager' and went on to say that the artists could only enter contracts that had the written approval of the manager, that the manager had the power of approval over choice of repertoire and so on.

This is no longer the case. These days the relationship is more balanced and artists expect to have greater control over their own lives and careers. For example, current contracts may include the following provisions:

The Artist authorises the Manager during the Term to:

- (a) collect any monies due to the Artist and to instruct all managements, employers, record companies, publishing companies, sponsors and other persons to make such payment to the Manager or such other person as may be mutually agreed;*
- (b) undertake all promotion, public relations and publicity arrangements for the Artist throughout the World with full authority to use and authorise the use of the Artist's likeness and biographical data PROVIDED THAT the Manager must use the Manager's best efforts to consult with the Artist on such matters;*
- (c) arrange the payment of the Artist's debts and expenses, out of monies, salaries, fees, royalties and other payments received on the Artist's behalf PROVIDED THAT the Manager must not incur any expense over 1,000 dollars or more than 3,000 dollars in any month, in the Artist's name, without first obtaining the Artist's approval;*
- (d) audit and examine books of account, royalty statements and other records of persons with whom the Artist has any contractual or other rights of examination; and*
- (e) enter into and bind the Artist to contracts engagements and arrangements relating to the Artist's entertainment industry activities PROVIDED THAT contracts for tours in excess of two weeks and all publishing and recording contracts must be signed by the Artist.*

You will note that certain sensible safeguards are built into the powers in an attempt to balance the manager's need to 'get on with business' and the artist's need to be informed and retain some basic degree of control.

ENFORCEMENT

A management contract is legally described as 'a contract for the performance of personal services'. For many years the courts have been very reluctant to grant any orders that would have the effect of forcing the parties to such contracts to work together. The courts will order damages to compensate the wronged party but will not, for example, order that an artist must work with

a particular manager. The courts recognise the fact that it is very hard to force one person to work with another.

In the Troggs case (*Page One Records Ltd and Dick James Music Ltd v. Britton and Harvey Block Associates Ltd, 1968*), the band alleged that Page One, their manager, had breached their management agreement. They approached Harvey Block to take over their management. Page One commenced legal proceedings. It asked the Court for an injunction forbidding the band signing with Harvey Block. The Court said that although Page One had not breached the management agreement and that the band was in breach of the management agreement, the agreement was one for 'personal services' and refused to grant the injunction. It could award damages for the band's breach but it would not, by forbidding the band from signing with any new manager, force it into working with the old manager.

ENDING THE MANAGEMENT RELATIONSHIP

Sometimes relationships just don't work. The artist-manager relationship is no different. Regardless of everyone's good intentions at the beginning it is highly likely that somewhere along the road, you will need to part ways.

With that in mind, it is important that ground rules are set that allow the relationship to end cleanly. In other words, the contract should provide a mechanism to try and resolve disputes when (rather than if) they arise and if they can't be resolved, how the contract may be terminated (that is, how the obligations under the contract can come to an end).

Many management contracts provide that the contract cannot be terminated unless a series of steps are followed. For example if one party breaches the agreement, the contract may provide that before the other party is allowed to end the contract, it must write to the infringer complaining of the breach and giving them an opportunity to fix the problem. If the problem is not fixed within a certain time, then the contract may provide that the party who is not in breach may write to the other party, terminating the contract.

Whatever the contract says, two things should be remembered:

- (a) if the contract provides steps that must be followed to terminate the contract - follow those steps exactly! If it says that you must write to the other side on pink paper clearly marked "DEAR JOHN", then do it;
- (b) Every effort should be made to deal with the end of the relationship professionally and courteously. It can be difficult but take a step back, put yourself in the other side's shoes for a second and talk about the issues, the procedure and how to move on together before severing the ties. Much angst, heartache, time (and legal fees) can be saved by doing so.

In *Biscayne Partners Pty Ltd v Valance Corp Pty Ltd & Ors* (2003), Biscayne (through Scott Michaelson) sued Holly Valance (aka Holly Vukadinovic) for breach of their management agreement. Holly and Scott had a detailed management agreement that set out the term of the contract and how it could be ended. The agreement provided for a series of particular steps to be followed. The court found that Holly failed to follow the proper steps on two separate occasions and thus unlawfully tried to terminate the contract. It ended up costing her hundreds of thousands of dollars.

CONCLUSION

Many artists tend to look upon the appointment of a manager as a way of washing their hands of any responsibility for the conduct of the business aspects of their career. A manager is not the parent you buy when you leave home.

If you are an artist, although the appointment of a manager should relieve you of many daily administrative and business functions, it is still very important that you take an active and responsible interest in the work undertaken by the manager on your behalf. You should be aware of and participate in contract negotiation, tour planning, financial planning and other important activities. You may delegate these functions to the manager but remember - Good delegation passes the task but not the responsibility. It is your career. It's your business. It will be your failure or your success.

Popular success may take years to attain and yet may last no longer than one hit album. Proper management must ensure not only that the past efforts of the artist are recouped during the success period but also that proper plans are made to ensure the maximum benefit to the artist as success fades.

MANAGEMENT AGREEMENT CHECKLIST

1. NAME AND ADDRESS OF MANAGER
2. NAME(S) AND ADDRESS(ES) OF ARTIST(S)
3. TERRITORY
4. LENGTH OF INITIAL PERIOD
5. OPTIONS:
 - (a) number
 - (b) length
 - (c) performance triggers
6. REMUNERATION:
 - (a) commission
 - (b) exclusions:
 - (i) sound recording costs?
 - (ii) live performance costs?
 - (iii) other?
7. SERVICES OF MANAGER
8. POWERS OF MANAGER
9. LIMITATIONS TO MANAGER'S POWERS
10. ARRANGEMENTS FOR BANKING AND ACCOUNTING
11. REMUNERATION UPON TERMINATION (if any)
 - (a) recording
 - (b) publishing
 - (c) live work
 - (d) other
12. PERIOD OF POST-TERMINATION REMUNERATION (if any)
 - (a) years
 - (b) percentages

(Only New South Wales has legislation that specifically affects managers. The Entertainment Industry Act (1991) is discussed fully in the following chapter.)