

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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CONTROLLING MANAGERS, AGENTS AND VENUE CONSULTANTS BY LEGISLATION

THE NEW SOUTH WALES MODEL

THE ENTERTAINMENT INDUSTRY ACT 1989 (NSW) IS THE MOST HIGHLY EVOLVED FORM OF REGULATION IN AUSTRALIA OF THE RELATIONSHIP BETWEEN MANAGERS, AGENTS AND PERFORMERS. AMONG OTHER THINGS, IT PROVIDES A SYSTEM OF LICENSING, REGULATES COMMISSION RATES, SETS OUT OBLIGATIONS, AND PROVIDES FOR PENALTIES WHEN THOSE OBLIGATIONS ARE NOT MET.

In 1935, the New South Wales Industrial Arbitration Act 1912 was amended to introduce requirements for the licensing of theatrical agents and employers. In 1952, a Regulation was introduced, limiting agents' fees to 10%.

These laws remained virtually unchanged until in 1987, when a new piece of legislation was passed - the Industrial Arbitration (Theatrical Agents and Employers) Amendment Act (NSW). The uproar from the industry was so great that the government effectively reintroduced the old provisions of the Industrial Arbitration Act in April 1988 and by September of that year, the New South Wales Parliament revoked the 1987 Act altogether. (See the rather grandly titled Industrial Arbitration (Revocation of Proclamation) Act 1988.)

The process of industry consultation that followed was probably unsurpassed in the history of any legislation affecting the Australian entertainment industry. The Minister set up a Committee of Review (headed by the Hon. John Hannaford) which was made up of representatives from various industry organisations, spanning most branches of the industry.

The Committee received 56 submissions from a wide range of groups and individuals.

After this industry consultation the Committee, in an excellent report, recommended establishing a system by which the entertainment industry would 'self-regulate'. (See the Report of the Ministerial Committee To Review

Theatrical Agents and Employers Legislation, February 1989.) At first glance, the concept of a law to help an industry self-regulate looks like a contradiction in terms. In fact, the idea was to impose, on an otherwise unregulated industry, a structure for licences to be issued and policed by representatives of the industry, rather than by bureaucrats. Seen this way, the idea looks much less absurd.

The Entertainment Industry Act (NSW) 1989 came into effect on 18 May 1990. The Act, although not perfect, is the most ambitious and fully articulated system of regulating entertainment industry representatives in Australia. When it was first introduced, other States said that they would treat the experience of New South Wales as a pilot before deciding whether to use it as a model for their own legislation. If they did, it would appear that they either didn't like what they saw or they thought that there were other politically more pressing priorities. No other State has such legislation.

This is an industry that cries out for co-ordinated national treatment. At the moment, the fact that only New South Wales requires licensing, in an industry which by its nature crosses many State borders, continues to cause confusion and uncertainty for performers' representatives based outside New South Wales but who place acts in that State. This is discussed at the end of this chapter.

PURPOSE

The purpose of the Act is to regulate the business relationships between performers and their representatives. The definition of 'performer' for the purposes of the Act includes any actor, singer, dancer, acrobat, model, musician or other performer of any kind.

In this context, 'regulate' means applying certain standards of behaviour and controls to minimise unfair practices or exploitation of inexperienced performers or those with little negotiation power. It is meant to be a life-ring for performers, not a straitjacket on them or their representatives.

THE ENTERTAINMENT INDUSTRY INTERIM COUNCIL

The Act established the Entertainment Industry Interim Council (EIIC) which was given the task of developing a Code of Ethics and the other framework necessary for self-regulation of the industry (such as issuing licences and establishing a tribunal for hearing industry complaints). It was called an Interim Council because it was seen as perhaps being superseded by another body if the Interim Council made recommendations to that effect to the Minister. That was never to be. At the end of the term of its statutory

determined life, the Interim Council dissolved and was not replaced with any other mechanism for industry representation. Now, the former functions of the Industry Council are dealt with as merely administrative issues and are administered entirely by the NSW Department of Industrial Relations.

Before it went, the Interim Council produced a Code of Ethics, though only in draft form. It was far too vague and too general to be of practical assistance to the regulation of the industry. With a few changes of terminology it could have been a model for real estate agents or plumbers. Codes of Ethics are very difficult to draft and if they are to be useful to the industry they seek to regulate, they must be full, detailed and industry specific. This wasn't. It was a waste of time and opportunity.

Any Code of Ethics is largely of cosmetic value unless there is some force or sanction that may be applied to enforce it. The power to grant and remove licences is the single most potent sanction and one that must be exercised with great discretion, since the decision to grant or revoke a licence may have tremendous financial consequences. Refusal to grant a licence, or revocation of an existing licence, would prevent the person from working in the industry. Goodbye Entertainment Industry licence. Hello taxi licence.

ENTERTAINMENT INDUSTRY REPRESENTATIVES

The Act regulates the professional activities of all people acting as entertainment industry representatives. It divides these into the following categories.

'ENTERTAINMENT INDUSTRY AGENT'

This is defined as anyone who:

for financial benefit, carries out any one or more of the following entertainment industry activities on behalf of a performer:

- (a) seeking or finding work opportunities for the performer;*
- (b) negotiating the terms of an agreement for, and the conditions of, a performance;*
- (c) finalising arrangements concerning the payment of the performer;*
- (d) negotiating arrangements relating to the attendance of the performer at a performance;*
- (e) administering the contract of the performer with an entertainment industry employer but does not include a person who carries out those activities solely as an employee of any such agents.*

Notice that this applies to anyone who performs these functions for ‘financial benefit’. (This expression covers much more than actually being paid money. It covers receiving indirect benefits such as contras and the like.)

The activities covered by the section are very broad. It is hard to think of any activity by performers’ representatives that would not come within one or more of the categories of activities. Anyone even remotely involved in the industry should carefully review all their activities to determine whether they are properly licensed under the Act.

The final exemption in this section is included to avoid the absurd situation of all employees having to be licensed as well as their employer.

‘MANAGER’

This is defined as being:

a person (whether called a personal representative or a personal manager, or otherwise) who, for financial benefit, represents a performer and who agrees, pursuant to a written agreement, to carry out or arrange to be carried out any or all of the activities of an entertainment industry agent and other additional activities or duties specified in the agreement on behalf of the performer but does not include a person who carries out those activities or duties solely as an employee of any such manager.

Like most legalese, this definition could do with a few full stops to help non-lawyers understand it.

In effect, the definition means that a manager may perform the five functions of an agent but must also perform additional activities or duties for the artist. It is these additional obligations that give rise to the manager’s right to charge a greater commission. Given this, it is important that management agreements make it very clear exactly what duties and obligations are being undertaken by the manager in addition to the five functions of an agent.

Also notice that, for a manager to be a ‘manager’ under the terms of the Act, he or she must have a written agreement with the performer. Unless the manager has a written agreement the ‘manager’ is restricted to the percentage payable to agents. This is why managers in New South Wales (at least those who know what they are doing) do not do ‘hand-shake’ deals any more.

‘VENUE CONSULTANT’

This is defined as being:

a person who acts on behalf of an entertainment industry employer, for a fee or remuneration paid by any such employer and who arranges for a performance by a performer at a particular venue, but does not include a person who arranges for a performance solely as an employee of a venue consultant or an employer.

This means that venues can arrange for performances without a licence, but anyone arranging performances on a venue's behalf in return for any payment, has to be licensed.

LICENCES

All 'entertainment industry representatives' must have a licence from the Department. The process is cheap. At the time of writing, the application fee is \$100 and the licence fees are \$200 each.

The expression 'Entertainment Industry Representative' is defined by the Act as meaning an agent, manager or venue consultant. If you work in more than one capacity, you need a licence for each of those activities. For example, being a licensed manager does not authorise you to act as a venue consultant. Venue consultants have their own particular licences. Applicants for any licence must be:

- 'fit and proper';
- over 18 years; and
- with knowledge and experience in the industry.

There are no hard and fast rules as to who is 'fit and proper'. A conviction for an offence involving dishonesty would certainly come within the description but a conviction for driving whilst unlicensed, may not. That said, convictions for drunk driving might well indicate a degree of irresponsibility that would make a person unsuitable for the management role. This is a very subjective criterion.

The last prerequisite is usually met by anyone who can show a reasonable period of activity in the industry or in an area closely related to the activity for which the licence is sought. (Would-be managers who have been performers can usually demonstrate sufficient knowledge simply from having worked in the particular area of the industry for a reasonable time.)

Successful applicants receive 'provisional' licences for the initial 12 months. Licences must be renewed annually. This way, the Department has the opportunity to review licensees who have had complaints lodged against them and can attach conditions to the particular licence.

There are still many managers working in New South Wales who do not know that they have to be licensed. This can be an expensive oversight because unlicensed representatives face penalties of up to \$25,000 and may not be able to enforce their management contracts. Of course, merely holding a licence does not instantly make a manager competent, but it does mean there is a mechanism for reviewing their performance, which may benefit the industry in the long run.

One of the other big changes introduced by the Act was that 'theatrical employees' no longer needed to be licensed. This does not mean, however,

that those employers are now completely free of regulation. The Department has the power to issue 'directions' to employers and operators of premises concerning any matter relating to the employment of performers and it has the power to enforce these directions.

REGULATION OF FEES

The Act sets maximum fees that industry representatives can charge. These are set out in the Regulations and, in theory, they can be changed at any time if the Minister thinks it appropriate.

AGENTS

Regulation 5 states that the maximum percentage that may be charged is as follows:

- (a) *in the case of an engagement involving film, television or electronic media - 10%;*
- (b) *in the case of an engagement involving live theatre or a live musical or variety performance (being an engagement that does not involve film, television or electronic media) - 10% for any period up to 5 weeks and then 5% for any period after 5 weeks;*
- (c) *in all other cases - 10%.*

The regulation goes on to state that:

the following amounts (being amounts payable to performers) are to be excluded when calculating the percentage of fees or other remuneration that an entertainment industry agent or a manager may demand or receive for or in respect of the engagement of a performer:

- (a) *travelling and meal allowances;*
- (b) *holiday pay;*
- (c) *any long service leave and superannuation payments;*
- (d) *any overtime or penalty payments which are paid on an irregular basis;*
- (e) *any award or minimum payments in respect of rehearsals.*

MANAGERS

Section 38 (4) of the Act states that where there is no written agreement between manager and artist 'in respect of an engagement' the manager is limited to charging the agent's commission of 10%. Obviously this is considerably below the usual 15%-20% allowed by most written management agreements. This reference to 'engagements' is ambiguous. This term is not defined in the Act but usually would be given a restricted

meaning, namely, 'contracts for live performance'. This would exclude other income such as endorsements and royalties - whether from records or merchandising. If this is so and you are acting as a manager in NSW, unless you have a written agreement with the artist you cannot charge more than 10% for income from live work but may be able to charge the usual rates on everything else.

Although the 10% limit for agents was fairly standard (even if often breached), the 10% limit as to managers' commissions was unheard of before the Act. Now, managers can only charge more than the prescribed 10% in respect of live work if they have a written agreement to that effect with the performer. The whole idea is to force managers to produce written contracts so the performers will be fully aware of what the manager is promising to do, what the manager will charge commission on, and what the manager is permitted to do on the performer's behalf. By requiring the agreement to be put in writing, the chances of 'misunderstandings' and nasty surprises (for both parties) are reduced.

VENUE CONSULTANTS

In the past, people who performed two functions often charged two fees. For example, if the performer's agent also acted as a consultant to the venue, he or she would often charge the act for obtaining the employment and would charge the venue for obtaining the act. This kind of behaviour was always a clear conflict of duty. Under the Entertainment Industry Act, it is also illegal. As a general rule, venue consultants can only receive payment from the venue/employer. The Act also makes it illegal for the venue to deduct any money from the performer's income and pay it to the venue consultant.

In times past, some performers' agents often acted simultaneously as the venue consultant and charged both parties a fee for placing the performer in the venue. Now, if the performer's agent also happens to be a consultant to the venue in respect of the performance, the agent can only charge the venue/employer. If the performer's manager happens to be a consultant to the venue, the manager can collect a commission from the performer but cannot also charge the venue, unless the manager and the performer have a written agreement that permits this.

TRUST ACCOUNTS

It was a long-standing criticism of many managers and agents that they received money for their artists' performances and either banked it in their own account and got it all muddled up with their own money, or failed to keep proper books of account. This prevented even a cursory investigation of

where the money might have gone. Fortunately, the Act addresses those problems in a very practical way. It effectively prohibits performers' funds being mixed up with those of the agent or manager.

Now, if entertainment industry agents or managers hold money on behalf of their performer clients, they must establish a separate trust account for each artist. The requirements for the accounts are set out in the Regulations. This is not optional.

The artist's money cannot be held for more than 14 days after the performer becomes entitled to receive it. This overcomes the old problem of managers holding onto their artists' money, using it for their own benefit, and all too often depriving artists of access to their own funds.

RECORDS

Both entertainment industry agents and managers who receive money on behalf of a performer, must maintain proper financial accounts on behalf of that artist. These must be accurate and properly maintained so that they show the true position as regards money received on the performer's behalf. These financial records must be kept at the representative's principal place of business and be made available to the performer upon request.

The Regulations also require that, where an agent or manager receives money on behalf of a performer in relation to an engagement, that person must provide certain (minimum) information to the performer and any other agent or manager who acted for the performer, in respect of that particular performance. These records include:

- (a) a statement of the amount received by the agent or the manager on behalf of the performer; and
- (b) a statement of the amount paid to the performer for the engagement.

In addition, the manager or agent who receives money on behalf of the performer must provide a statement to the employer (or other person) who paid the performer for the engagement with a statement setting out the amount of money received from that employer.

These statements may vary in form as some managers and agents will have sophisticated computerised systems and smaller operators may use written receipts with carbon copies. Whatever the form, this provides a clear paper trail for the manager, the agent and the performer and emphasises that regular and accurate accounting is a fundamental duty of every manager or agent who receives money on behalf of an artist.

BONDS

If entertainment industry agents and managers hold performers' money, they must lodge a bond with the NSW Department of Industrial Relations. The amount of the bond is \$2,000 unless otherwise determined by the Department. This bond can be either be in the form of cash, bank guarantee or other security approved by the Department. If entertainment industry agents are not holding performers' money, they do not need to lodge a bond.

If the agent or manager does anything that causes the performer loss, the Department may assist the performer by releasing all or part of the bond. It can then demand that the agent or manager lodge a further bond. If he or she fails to comply, the licence may be suspended until he or she pays the further bond.

The provision is comparable to the situation with rental bonds. It means that if a problem arises, the expense and delay of obtaining a remedy is minimal because the money is readily available (rather than having to sue for it).

COMPLAINTS COMMITTEE

The Act established a Complaints Committee to investigate complaints regarding:

- (a) unfair or dishonest conduct;
- (b) unfair entertainment industry contracts; and
- (c) any failure to pay amounts owing under an award, industrial agreement or entertainment industry contract.

With the abolition of the EIIC, the Department handles any complaints internally. The complaints procedure is not complex. All that is required is a written complaint to the Department.

If the Department finds that a person is guilty of unfair or dishonest conduct it can order a penalty of up to \$500. If it finds that an entertainment industry contract is unfair, harsh or unconscionable, it can redraft the offending clauses. Provided that the parties agree to be bound at the beginning of the inquiry, the Department can make orders up to \$20,000 in respect of any failure to pay moneys owed.

The Act contains a very important exception to this power of review. Section 12(4) states that 'An entertainment industry contract or a provision of such a contract which has been fully executed may not be varied under this section'. This is very confusing because 'executed' can mean 'formally signed' or it can mean simply 'performed'. The former meaning doesn't make much sense in this context, because it would mean that any written agreement that had been signed by both parties was outside the scope of the Act. If one party had more bargaining power than the other, it would be easy to insist that the

weaker party sign an agreement which contained unfair terms. This would defeat the purpose of the Act, which is to protect both artists and industry agents.

It is more logical to infer that the section uses 'executed' as a synonym for 'performed'. Thus, if both parties have fulfilled their obligations under a contract, neither can go back later and complain that it was unfair.

INTERSTATE REPRESENTATIVES

The application of the Act to interstate managers and agents continues to be uncertain. The generally prevailing view is that any entertainment industry agent, manager or venue consultant carrying on any business within New South Wales must be licensed and, with respect to such activity within New South Wales, must conform to the requirements of the Act. It does not appear to be relevant that the manager, agent, consultant or the performer is usually resident in another State. It is the location of the activity that is relevant.

CONCLUSION

The Act only imposes obligations that even most agents, managers and venue consultants regard as reasonable. Most already had many of the requirements in place before the Act was introduced, but the fact that everyone was not already using these practices made the Act worthwhile.

Having lived with the Act for a few years now, there is a growing realisation that the different branches of the entertainment industry are so varied that different procedures may be needed for different branches. Theatrical agents' operations and needs are quite different from those applicable to musicians' agents. Those of modelling agents differ from those of classical music agents.

This legislation was a bright new industry-backed initiative. Almost two decades later, one has to question whether it was a success. With the demise of the Entertainment Industry Council, the mechanism lost its industry representation and the registration requirement became seen as just another bureaucratic procedure. The industry lost its voice and its feeling of ownership or involvement. The industry didn't fight to retain the Council and there was little evidence of industry commitment to it. The effectiveness of self-regulation always presumes responsibility and perhaps the industry just didn't have it and didn't want it.

In the past, the Department has called for submissions as to the future of the Entertainment Industry Act. Given that its future is uncertain, it is timely to make a few observations.

- (a) When the Department took over the operation of the Entertainment Industry Interim Council and the Complaints Committee, it removed the industry's active participation in achieving the goals of the legislation. It became just another bureaucratic procedure.
- (b) The Department has never publicly released the necessary data to judge either the effectiveness of the Act or the Department's administrative role. To make such judgments, one needs to know things such as:
- What efforts has the Department made to advertise the existence of the Act and to educate the industry about its responsibilities under it?
 - How many complaints have been made under the Act?
 - What were the subjects of those complaints?
 - Was any type of industry representative more prone to complain than another?
 - What were the findings in respect of the complaints?
 - What sanctions have been applied? Has anyone lost their licence?
 - Have any agreements been redrafted on the basis of unfairness?
 - Has anyone been fined for acting as an industry representative without a licence?
 - Has the Department ever exercised its power to issue 'directions' to employers or operators of venues?
 - In what circumstances and to what effect?

Without this kind of basic information, it is impossible to respond sensibly to the Department's call for submissions as to the future of the Act. When the Department was asked (twice) to provide answers to these questions for the purposes of this book, the only response was, 'Look at the Department website'. The information was not on the website. This does not indicate great commitment to purposes of the Act on the part of the Department. Indeed, there has been considerable rumour that the government wishes to abolish the Act and by the time you read this, that rumour may have become a reality.