

Guide Sheet – Legal Questions for Circus and Physical Theatre 2022

This Guide Sheet is for circus performers and producers. It provides general information on common legal issues related to putting on a show, including how copyright works, what should be in a performance contract, and how to manage the risk of injuries and cancellations.

NOTE FROM TNA:

If you're struggling to get your head around any of the concepts or language in this guide, check out the final page for links to a bunch of additional resources, including in-depth explainers about legal stuff like copyright, liability and patents.

You are also welcome to get in touch for a chat.

What is the difference between employees and contractors?

This Guide Sheet assumes that you are engaging with others (performers, producers, technicians, etc.) as independent contractors.

A contractor is different to an employee. An employee works inside their employer's business, while a contractor works as part of their own, separate business. The Australian Taxation Office has information about how you can tell if someone is a contractor or an employee (see the linked resources at the end of this Guide Sheet).

Some common factors that suggest a person is a contractor are:

- They are free to sub-contract and delegate the work.
- They are free to take on other work during an engagement.
- They are paid to achieve a specific outcome (rather than for their time).
- They provide most of their own tools and equipment.

It is important to work out if people you engage are employees or contractors. If they are employees, you may be responsible for getting workers' compensation insurance, paying withholding tax, and complying with other labour laws. This Guide Sheet does not address these responsibilities, which are governed by different Federal, State and Territory laws.

How do copyright and moral rights apply to performances?

Copyright protects ‘dramatic works’, which are works that are made to be performed. This could be a stage play or notes for choreography. Copyright may also protect other parts of your show like the music (as ‘musical works’ and ‘sound recordings’) and set design (as ‘artistic works’).

You don’t have to register your work for protection. It’s automatic. But it is still a good idea to keep records of your work. Remember to keep back-ups of your stage play or video recordings of your choreography. Put your name and the date on these records.

If you are using other people’s work (like the music or set design mentioned above) then you need to make sure you have permission from the copyright owner. Usually, the copyright owner is the creator, but that is not always the case. You have to ask people to confirm.

The other thing to think about is when someone wants to record your show. As a performer, they must get your consent before they create a recording. You also have the chance (when they ask for permission) to put limits on how they can use that recording. For example, you could specify that the recording cannot be used on social media without your prior approval of the form it’s in.

Should I have a contract when I am working on a show with others?

The short answer: yes! Written contracts are a good way to make sure projects are fair for everyone involved. They can help you clarify the parameters of the project (i.e., what is expected of you and others). They don’t have to be written by a lawyer. It is best if they use plain language and are easy-to-understand.

The process of preparing a contract will often allow you to have an open discussion with collaborators. Having a frank discussion at the start of a project can help ensure everyone is on the same page about their rights and responsibilities.

If there is a dispute between you and others you have collaborated with, a well-written contract will give everyone guidance about their rights and responsibilities. It can provide a roadmap.

What are some of the ways that performers and producers might work together?

You might collaborate by sharing responsibility for organising a show

The law can deem you to be in a 'legal partnership' if you work towards a common profit and share costs with collaborators. This can happen automatically, without you signing an agreement or intending to be in a partnership. If you are deemed to be in a partnership, the law creates special rules that apply to your collaboration: for example, you can legally bind your partners to contracts, and you are all equally responsible for the project's debts. To keep control over the rules that apply to your partnership, it is a good idea to set up a written partnership agreement. This is explained in more detail under the next question in this Guide Sheet.

*You might want to set up a separate legal entity like a company to organise a show**

Using a separate legal entity can help reduce your liability because you don't have to enter into contracts personally. Generally, this means that the separate legal entity will be liable for paying debts under those contracts (and not you personally). However, setting up a separate legal entity like a company, for example, involves other costs and administrative obligations. If you want to set up a separate legal entity such as a company, you should seek legal advice on the process and the best business structure for your project. The Australian Government has more information on business structures like sole traders, companies, partnerships, trusts and co-operatives (see the linked resources at the end of this Guide Sheet).

***NOTE FROM TNA:**

We've found that the admin and costs of setting up a company are often unnecessarily onerous for many solo practitioners, so typically we encourage performers/producers to register for an ABN (free, low admin, tax deductions etc.) over registering a company. Individuals or small project groups might also consider using an auspicing service, such as Auspicious Arts.

**this is not legal advice!*

One of you might engage the other simply to provide certain services

For example, a producer might engage a performer to perform in a show. Alternatively, a performer might engage a producer to secure funding, hire a venue, promote the show or engage technicians/engineers. In these situations, it is important to put in place a contractor agreement that clearly sets out everyone's rights and responsibilities. How to do this is explained under the next question in this Guide Sheet.

I'm engaging a producer, what do I need to include in our contract?

If a performer wants to engage a producer to provide certain services (for example, to manage the responsibility of securing funding, engaging other performers or crew, and securing a venue), this contract should cover key terms such as:

- **Performer and producer responsibilities** – including who will secure and acquit any funds.
- **Timeline** – when tasks have to be completed by (and, for example, the dates of performances).
- **Payment** – how any money will be spent or shared (for example, will the producer be paid a set fee or will they receive a percentage of the ticket sales or net profit).
- **Copyright** – who owns copyright in the material you are performing or producing (and in any other material being used in the show).
- **Credits** – how the producer and performer will be credited for their role in the show.
- **Future performances** – whether the performance is to tour or be licensed to another person or business, and who has the right to benefit from this (and are they entitled to a credit).
- **Insurance, risk and liability** – who is responsible for getting different types of insurance cover, and what steps you both have to take to manage your risks.
- **Cancellations** – when a show can be cancelled, by whom, and what the consequences are (including who bears the financial risk).
- **Superannuation*** – if a performer is an eligible employee for super purposes, the producer must contribute to their super and the contract should address this obligation.
- **Termination** – how and when can you end the contract.
- **Disputes** – how the performer and producer must deal with any disagreements (i.e., the process they have to go through to try and resolve the dispute).

*NOTE FROM TNA:

Keep in mind there are *very few* circumstances where a performer is not eligible to be paid super. If a performer is engaged solely for their services, they will always be considered an employee for super purposes.

Depending on who is being engaged by whom, and whether they are being engaged for their personal individual work (and cannot outsource that work to someone else), then these days it is more likely than not that an indie is eligible for superannuation.

Always check with the ATO - they have a [handy tool you can use!](#)

*this is not legal advice!

By contrast, if a performer wants to engage the producer as a general collaborator (rather than to provide specific services), you need a different kind of agreement.

If you are working towards a common profit, and sharing costs as you go, you might be deemed to be in a legal partnership*. This has legal consequences (as discussed under the previous question in this Guide Sheet).

***NOTE FROM TNA:**

See page three above: the law can deem you to be in a partnership even if you don't have a formal partnership agreement, and even if you didn't intend to be in a partnership!

This is why it is important to figure out what agreements you need and set them up from the start of a project.

*this is not legal advice!

To make sure everyone understands their role and obligations, you should set up a partnership agreement.

That agreement will cover things like:

- **Term** – how long the partnership will last for.
- **Decision making** – how you will make decisions together.
- **Duties** – what your responsibilities are. It is possible for one partner to take a leading role.
- **Ownership of intellectual property** – who owns creative material created by the partnership (or pre-existing material brought into the partnership).
- **Income and expenses** – how the partnership's income and assets will be distributed, and how will you share costs.
- **Departing members and dissolution** – what happens when someone leaves the partnership.
- **Disputes** – how disagreements will be addressed.

What are some of the most important things to cover in performance contracts?

When a producer asks a performer to perform in a show, there are a few key terms the contract should cover:

- **Performer and producer responsibilities** – what is expected of you.
- **Payment** – how, when and how much you are going to be paid.
- **Copyright** – who owns copyright in the material you are performing or producing (and in any other material being used in the show).
- **Credits** – how the performer will be credited for their performance.
- **Recordings** – whether you consent to the performances being recorded and who controls the use of the recordings after the event or project.
- **Insurance, risk and liability** – who is responsible for getting different types of insurance cover, and what steps you both have to take to manage your risks. Additionally, if you are a performer and are injured before a show, should the producer be able to use a substitute performer. If you brought your own unique apparatus, should the new performer be able to use that apparatus.
- **Cancellations** – what happens if you can't perform or the show gets cancelled.
- **Superannuation** – if a performer is an eligible employee for super purposes, the producer must contribute to their super. It is important for the contract to address this.
- **Termination** – how and when can you end the contract.
- **Disputes** – how disagreements will be addressed.

Can I use contracts to manage the risk of a show getting cancelled?

Shows can get cancelled for many different reasons: bad weather, poor management, not enough tickets sold, and so on. There are different ways to protect against the risk of cancellations, including:

- **Talk about it in your contract** – your contracts should address when a show can be cancelled, by whom, and what the consequences are. By doing this, you can try to agree with your collaborators how you will share the risks and responsibilities of cancellation in a fair way. If you are a producer, you need to think about how your different venue and services contracts (e.g., for lighting and sound) deal with cancellation: for example, do you still have to pay the full fee? Or do you only have to pay a discounted fee, depending on the reason for cancellation?

- **Include a ‘force majeure’ clause in the contract** – this is a type of clause that sets out what happens when something unforeseen and uncontrollable happens. A good force majeure clause should explain what situations it will cover, when and how you have to notify each other, and what impacts the situation has on your responsibilities under the contract (for example, it might put them ‘on hold’). You can negotiate what a force majeure clause will cover and what the consequences are.
- **Consider getting cancellations insurance*** – one way to manage financial risk is to make sure everyone has adequate insurance cover (you can make this responsibility part of the contract too). It is a good idea to weigh up the cost of an insurance policy with the financial risk you are concerned about.
- **Tie payment milestones to responsibilities in the contract** – rather than making your performance fee payable at the end of a show (which might get cancelled), it is a good idea to create payment ‘milestones’ tied to things you have to do before the show. These milestones can split your fee up across different responsibilities: for example, you could be paid a deposit on signing the contract, a further fee for attending a certain number of rehearsals or finalising parts of the choreography, and a final fee after the show. This means that even when a show is cancelled, you have been paid for all of the hard work you’ve done beforehand.

***NOTE FROM TNA:**

Cancellation insurance is a great idea in theory, but for many small independent projects it can be difficult to find a policy that is financially viable. We are often in conversation with insurers to stay up to date with their arts-related policies and to advocate for the insurance needs of the sector, so if you'd like more information please feel free to get in touch.

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I'm presenting or producing a show, what are some of the key contracts I will need in place?

You should think about having a contract for each of your key working relationships. Some common examples include:

- **Licence to use material like scripts, books, music, film** – if you are using copyright material created by someone else to produce your show (for example, a book or a film), you will need permission to use that material.
- **Commissioning agreements for material like music, artworks, apparatus** – when engaging someone else to create material for your show, you should have an agreement with them that covers things like payment, the deliverables, timing, ownership of copyright, and any licence to use that material.
- **Partnership agreement with collaborators** – if you are collaborating with other circus artists to create a profitable show, sharing costs as you go, you may be in a legal partnership. This has legal consequences, so it is a good idea to set up a partnership agreement. Partnership agreements generally deal with how any profits will be shared, what representations the partners are allowed to make on behalf of the partnership, and what duties each of the partners have. Importantly, the agreement should also deal with what happens if the partnership comes to an end.
- **Producer and director agreement (or other creative leadership roles in the show)** – if you are engaging someone like a director to assist with the creative development of the show, it is important to have an agreement with them addressing their rights and responsibilities and how they will be paid.
- **Contractor or employment agreement for performers and crew members** – if you plan to engage a cast of performers and/or crew members for an ongoing schedule of performances, you may need an employment agreement with them to formalise and clearly set out the scope of your relationship. Depending on how independent the cast and crew are of your business (and whether you are exercising a lot of control over their work) you might instead need a contractor agreement for this.
- **Venue hire agreement** – if you are hiring a venue to put on a show, you will need an agreement with the owners setting out, for example, the dates you need it, the fee, insurance requirements, and your responsibilities to look after the venue while using it.

I'm working with engineers (e.g., for equipment, structures or apparatus) or technicians (e.g., for sound and lighting), what should my contracts with them include?

Your contract with them should cover things like:

- **Scope of the services** – what the contractor has to deliver and the timeframe (e.g., an engineer certifying that a piece of apparatus is safe).
- **Rights and obligations** – what flexibility and what responsibilities the contractor has in delivering the services.
- **Indemnity** – whether the contractor will cover you financially for any damage caused by their negligence. For an engineer, this could cover any injuries or damage caused by faulty equipment, structures or apparatus they have certified as 'safe'. For a technician, this could cover injuries or damage caused by incorrect operation of lighting or sound equipment.
- **Intellectual property** – who owns the intellectual property in material created by the contractor while providing the services.
- **Moral rights** – how the contractor will be credited in the show for their contribution.
- **Fee** – how much (and when) the contractor will be paid for the services.
- **Expenses and reimbursements** – whether the contractor can incur expenses and get you to reimburse them.
- **Insurance** – the contractor's obligation to make sure they have adequate insurance.
- **Disputes** – how disagreements will be dealt with.

What should a performance contract include about safety and duty of care?

The law requires people to take reasonable care when doing things that could hurt other people or their property. This is called a 'duty of care'. So, when you are operating a venue to host a show, you have a duty of care to everyone onsite: performers, technicians, audience members, and so on. If you are creating apparatus, for example, you have a duty of care to others who might use that apparatus.

Because of that, it is important for performers, engineers, technicians, producers and venues to all think about the risks within their control and take steps to minimise those risks. If there are steps that someone needs to take to minimise risks, you should include those steps in a contract.

What should a performance contract say about this? It depends on the risks (and minimisation strategies) that have been identified for the show at hand. Sometimes, it might require performers to go through safety training at a venue. Other times, it might set out safety gear that performers must wear while onsite.

In general, you should be wary of contracts where a producer or venue tries to waive all responsibility for injuries and other damage. Regardless of what your contract says, there are health and safety laws in different States that cannot be waived.

If I am required to provide my own apparatus or choreography in a performance, how do I make sure I retain ownership of these?

Owning a physical object (like a piece of apparatus) is separate to owning the intellectual property in that object (like copyright or a registered patent). The best way to retain ownership of your equipment and your intellectual property is to have a contract that says so. In a contract, you can set out:

- **Ownership** – of physical items (like apparatus) and/or intellectual property (like copyright in choreography).
- **Permission** – what people other than the owner are allowed to do with physical items and/or intellectual property rights. In other words, what permission the owner gives to others to use their property and intellectual property.
- **Payment** – if there is any fee or royalty payment required for the use of physical items and/or intellectual property rights.

While a contract can help you retain ownership in intellectual property, it will not always be enough to stop other people using your intellectual property rights. For example, if you have a contract that gives other performers the right to use your apparatus, that (by itself) will not always stop different performers who saw the show from making their own version of your apparatus and using it. To protect a practical invention in that way, you would need to register a patent.

It is a good idea to get legal advice about your intellectual property rights, which could cover copyright (in scripts or choreography), trade marks (for brand or show names), patents (over innovative apparatus), confidential information (like trade secrets for how to use apparatus), and other rights. Each of these types of rights are different and might affect you differently.

How can you get help with your legal issues?

The Arts Law Centre of Australia (Arts Law) is a national community legal centre for the arts. It provides free or low cost legal advice, education and resources to Australian artists and arts organisations across all art forms, on a wide range of arts related legal and business matters.

If you have a legal question, you can submit a query [here](#).

Phone: 1800 221 457 | Email: artslaw@artslaw.com.au | Website: artslaw.com.au

Further Resources

Arts Law Information Sheets

- [Contracts: an introduction](#)
- [Copyright](#)
- [Moral Rights](#)
- [Performer's Rights](#)
- [Liability and Insurance](#)
- [Patents](#)
- [Trade marks](#)

Arts Law Template Contracts and Checklists

- [General Contractor Agreement](#)
- [Employment Agreement for Performers](#)
- [Copyright Licensing Agreement](#)
- [Business Partnership Checklist](#)
- [Venue Hire Agreement](#)

Australian Taxation Office

- [Employee or Contractor](#)
- [Am I Entitled to Super?](#)

Australian Government

- [Business Structures](#)

Disclaimer

The information in this information sheet is general. It does not constitute, and should be not relied on as, legal advice. The Arts Law Centre of Australia (Arts Law) recommends seeking advice from a qualified lawyer on the legal issues affecting you before acting on any legal matter.

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