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Better Regulation Office

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BETTER REGULATION OFFICE AND OFFICE OF INDUSTRIAL RELATIONS

OPTIONS PAPER

REVIEW OF THE ENTERTAINMENT INDUSTRY ACT 1989

July 2009

Written submissions due 3 August 2009

HOW TO MAKE A SUBMISSION

Interested persons are invited to provide written submissions to the Better Regulation Office and the Office of Industrial Relations.

Please send submissions by email to: [**entertainmentreview@dpc.nsw.gov.au**](mailto:entertainmentreview@dpc.nsw.gov.au)

If you do not have access to email, please send submissions to:

Better Regulation Office
GPO Box 5341
SYDNEY NSW 2001

Phone: 02 9228 5414
Fax: 02 9228 4408

Submissions must be received by **3 August 2009**.

All submissions will be made publicly available. If you do not want your personal details released, please indicate this clearly in your submission.

Additional copies of this discussion paper are available on the Better Regulation Office website (www.betterregulation.nsw.gov.au).

1. INTRODUCTION

The *Entertainment Industry Act 1989* (the Act) provides a suite of laws aimed at protecting performers in their dealings with agents, managers and venue consultants (commonly known as booking agents). The Act was introduced because performers often have a poor bargaining position in their commercial relationships with agents, managers and venue consultants and should be protected from unfair practices.

A key feature of the Act is that agents, managers and venue consultants must obtain a licence from the Office of Industrial Relations (OIR) to work in NSW. NSW is the only state of Australia to specifically licence entertainment industry representatives, although WA and the ACT require employment agents (including those operating in the entertainment industry) to be licensed, and SA requires them to be registered.

The Better Regulation Office (BRO) completed a review of a range of occupational licensing, including entertainment industry licences, in April 2009. In response to the final report, *Licensing of Selected Occupations*¹, the NSW Government agreed that the licensing scheme is not protecting performers effectively and should be removed, subject to:

- amendment of the Act to clarify its coverage, remove outdated provisions, provide a clear mechanism for dealing with complaints and provide effective sanctions for breach of consumer protection provisions
- the development of industry-endorsed performance standards for assessing claims of misconduct by entertainment industry participants, and
- further consultation with industry about its role in the regulatory model.

The Government also agreed that a review of the Act is necessary to ensure that effective protections for performers are maintained when the licence is removed. The review is being undertaken jointly by BRO and OIR.

2. PURPOSE OF THIS OPTIONS PAPER

In order to make sure the Act provides adequate and appropriate protection for performers we are seeking stakeholder input on:

- the nature and extent of the 'problem', that is, what are the main risks for performers in their commercial relationship with agents, managers and venue consultants?
- the appropriate level, type and targeting of regulation to address these problems without imposing red tape.

We have researched the sorts of regulatory provisions that could meet the needs of the entertainment industry. Some of these are already in place but could be improved. Other provisions currently in place have not proven effective and are recommended to be removed, while others have been proposed to the Government but are not considered viable.

¹ Further information about this review can be found at http://www.betterregulation.nsw.gov.au/targeted_reviews/licensing_of_selected_occupations.

3. WHY IS REGULATION NEEDED?

The entertainment industry employs thousands of people in NSW and generates economic activity worth hundreds of millions of dollars per year. Representatives are an important part of this industry. Managers and agents find work on behalf of performers and receive a commission (set percentage of the performer's fee), as a fee for service. Venue consultants or booking agents work on behalf of venues and receive a payment in exchange for booking performers. Some operators act as both agent/manager and venue consultant. Representatives provide an important link between clubs, pubs and other venues, and the talent they must source.

There are 256 agents, 198 managers and 84 venue consultants licensed in NSW, representing many performers. There may also be significant numbers operating unlicensed. Being a creative industry, the entertainment industry is very diverse and 'gigs' or performances are often short term and can be irregular. Some performers have high incomes but many do not and need to undertake supplementary work to meet financial commitments. Representatives tend to be specialised in a particular sector of the industry, such as the music industry, but even within these groups, there is high degree of specialisation.

Regulation of the entertainment industry is needed to address three key problems.

3.1 Performers are often in a weak bargaining position compared to representatives

The entertainment industry is competitive for performers and they may find it difficult to negotiate a fair deal with representatives because of a poor bargaining position. Young and inexperienced performers are often the most vulnerable.

Creative professionals are not usually in the entertainment industry for profit alone, but also to pursue their own artistic endeavour and the enjoyment of performing, which can also make them vulnerable when dealing with agents or managers.

Performers may be heavily reliant on the agent or manager for work because agents have more employer contacts or a special relationship with employers. Performances are often one-off and unpredictable so performers may not be in a position to refuse unfavourable service agreement terms like high commissions, or complain about poor service like late payment of fees.

The agent or manager typically receives the performer's remuneration from the employer and gives it to the performer, after deducting a commission and any other agreed fees. The performer may not know whether they have been paid a fair amount and must rely on the representative to pay them accurately and promptly.

The performer is unlikely to have the same knowledge or experience of contracts and negotiations as the agent or manager. The agent or manager may retain a lawyer who can be contacted when needed, whereas a performer may not be experienced in how to get legal advice.

Is the power imbalance generally true across all parts of the industry, or are the dynamics different for some types of performers eg modelling or acting compared to musicians?

3.2 Performers are often reluctant to take legal action

Agents have a number of duties to the performer under the common law² and generic fair trading laws and performers have the option of taking court action if these are breached. An agent has a duty to exercise due care, skill and diligence under the service contract and an agent at common law must:

- act honestly
- exercise due care, skill and diligence
- avoid conflicts of interest
- maintain confidentiality
- not profit secretly from the agency, and
- keep proper accounts.

Despite these protections, legal action through the courts may be too expensive, too risky and take too long when compared to the value of a claim. The legal costs may outweigh the amount a performer is likely to gain from taking action.

Performers may also be reluctant to pursue complaints because of the influence of representatives in the industry. This might explain the low level of take up of lower cost legal options that are available to performers, including making a complaint to OIR, and taking action through the Consumer, Trader and Tenancy Tribunal (CTTT). The CTTT is available to all consumers, including performers³, under the *Consumer Claims Act 1998* to take action over small claims⁴ that would not be worth pursuing through the courts. If a representative has not paid a performer, the CTTT may order the representative to pay the money owing. Application fees for taking a matter to the CTTT range from \$34 to \$183 and no legal representative is required.

It is not clear whether the main factor deterring performers from using these lower cost legal options is poor knowledge, or fear or retribution because of the influence of representatives in the industry. In any case, the particular characteristics of the industry indicate a need to actively regulate to prevent unscrupulous behaviour rather than having performers rely on the legal system to seek redress.

Another problem is that if a performer does complain about a representative to OIR, OIR may be unable to prosecute because of the relatively short timeframe for commencing legal proceedings under the *Criminal Procedure Act 1989*. Proceedings must be commenced no later than six months from when the offence was alleged to have been committed and this is often insufficient time once usual attempts to recover the money directly from representatives have been exhausted.

3.3 A representative who acts for both a performer and a venue may have a conflict of interest.

² Common law is law made by judges and not made by Acts of Parliament. A person wishing to defend common law rights must take action themselves, usually by negotiating with the other party or taking court action.

³ A performer has a service contract with the representative and is considered a 'consumer' with access to the CTTT.

⁴ For service contracts worth less than \$30,000.

An agent or manager who also acts as a venue consultant over the one deal has a conflict of interest. As an agent or manager, he or she must work to get the best terms for the performer from the venue. As a venue consultant, he or she must get the venue the best terms from the performer. This conflict means that there is a risk that he or she will not act in the best interests of the performer, the venue, or both.

As the agent or manager may receive a commission from both parties, there is also an incentive for them to find work for the performer at a venue that will also pay a booking commission. This may be disadvantageous for the performer if it results in better paid work being passed up by the agent. At the same time, however, there may be advantages in the same person undertaking the two functions. A performer may be more likely to be given work at a venue that their agent or manager also represents as a booking agent.

It is recognised that many agents and managers also act as venue consultants to make their business viable. Restricting this practice as is currently done removes the conflict of interest but also affects the business of these representatives.

The NSW Government continues to support regulatory intervention to protect performers from unfair practices. The problems categorised above have been previously acknowledged by stakeholders.

We are seeking more information from stakeholders to better understand the nature and seriousness of these risks, so as to develop regulation that is appropriately targeted.

Is the above (3.1, 3.2, 3.3) an accurate description of the main risks for performers in their commercial relationships with agents, managers and venue consultants? Are there any other major sources of disadvantage for performers in the entertainment industry? Please provide details and examples.

4. ENTERTAINMENT INDUSTRY ACT 1989

Under the *Entertainment Industry Act 1989*, a *performer* is defined as an actor, singer, dancer, acrobat, model, musician or 'other performer of any kind employed to give a performance'. This definition may not include visual artists as they exhibit their work rather than perform. An *agent* is someone carrying out any of the following for a performer for financial benefit:

- seeking or finding work opportunities
- negotiating terms and conditions for a performance
- finalising arrangements for the performer's payment
- negotiating arrangements for the performer's attendance at a performance, and
- administering the performer's contract with someone who employs the performer for a performance.

A *manager* is a person who represents a performer and agrees, by way of a written agreement, to carry out for financial benefit the activities of an agent and other activities specified in the agreement.

A *venue consultant* is a person who acts on behalf of an entertainment industry employer, for a fee, and who arranges for a performance by a performer at a particular venue.

An *entertainment industry representative* (or representative) means an agent, manager or venue consultant.

An *entertainment industry employer* (or employer) means a person who employs a performer for the purpose of performance.

The main elements of the current regulatory regime set out in the Act are:

- a licensing regime which applies to agents, managers and venue consultants
- restrictions on fees charged by representatives
- trust account requirements
- record keeping requirements
- requirements to provide financial statements
- requirements for agents to put up a bond of \$2,000 while on a probationary licence (held for 12 months), in order that outstanding monies can be quickly recovered
- a complaints mechanism – this no longer functions. However, disputes can be resolved under the *Consumer Claims Act 1998* using the CTTT.
- provision for the development of a code of ethics – this was never finalised.
- a range of sanctions for breaches, including fines and suspension or loss of licence.

Are there any problems with the current definitions in the Act? If so, what are they?

4.1 Problems with the Act

BRO's recent review found a number of significant problems with the Act, most importantly that the licensing scheme as it currently operates is doing little to protect vulnerable performers. The review also highlighted that many parts of the Act are out of date.

Licensing

Licensing was introduced to protect performers in two ways. Firstly, it provides a means of stopping unsuitable people from entering the industry by vetting licence applicants. Secondly, it enables those in the industry found to have acted inappropriately to be delicensed and thus excluded from operating in that profession.

However, BRO found that in practice, these protections are not working properly and are not the best way to protect performers. The vetting of applicants does not determine with much certainty whether an applicant is suitable to work in the industry or not. Few complaints are made to OIR against licence holders, and complaints do not generally result in enforcement action. A bond is only held for 12 months while a

person has a probationary licence. In addition, it appears there are significant numbers of representatives working unlicensed.

BRO recognised the importance to performers of the other consumer protection provisions in the Act and recommended that it was better to concentrate on effectively enforcing these requirements than to continue with a licensing regime that was not achieving what it was designed to do.

Out of date provisions

The Act was originally intended to set up a system of industry self-regulation, whereby industry would set the standard required of representatives and manage and resolve complaints. However, this did not occur and many parts of the Act are now inoperative. In particular, the Act established an Entertainment Industry Interim Industry Council to support the creation of an industry self-regulatory body and to perform key functions, including:

- developing a code of ethics, and
- constituting a Complaints Committee to hear and resolve disputes.

This Council was dissolved in 1994 before a code of ethics was established and the dispute mechanisms in the Act then ceased to work. Currently, there is no way of resolving misconduct complaints. In addition, many of the sanctions which were provided to punish and deter breaches of the consumer protections requirements cannot be used because they did not pass to OIR after the Council was dissolved.

Some of the objects of the Act also reflect the original intention to move to self-regulation. These are out of date, and will need to be updated to reflect the outcomes of this review.

5. REGULATORY OPTIONS

There are a number of different ways to protect performers in this industry.

- Industry can self-regulate, with or without the support of Government through legislation. Self-regulation was the original intent in the entertainment industry. This has not been achievable in the past, and is unlikely to be viable now given the industry continues to be diverse and there is no single industry body that adequately represents all sectors of the industry. For this reason, the transition to self-regulation is not examined further in this paper. Close industry involvement in some aspects of the regulatory approach, such as the development of codes and, potentially, the ability to prosecute, is covered.
- Laws applying specifically to the entertainment industry could be repealed leaving generic fair trading protections. Given the specific risks faced by performers, this approach is not considered appropriate for the entertainment industry.
- The Government can provide stand-alone legislation which is tailored to the specific needs of the entertainment industry. This is the current approach and is the focus of the options outlined below.

This paper will therefore focus on developing effective stand-alone legislation, by proposing amendments to the existing *Entertainment Industry Act 1989* to improve protections for performers, strengthen compliance and remove red tape.

The effectiveness of regulation depends on the ability of the Government to enforce the laws. There are a number of ways to monitor and enforce compliance, but there are particular challenges in the entertainment industry which can limit the effectiveness of regulation. For example, there is an apparent reluctance of performers to complain about poor quality service from representatives, and transactions can be relatively small or one-off, meaning that performers may choose to write off the loss rather than seek redress.

The proposed changes to the Act are intended to improve the ability of Government to monitor and enforce regulatory requirements. The provision of information to performers about their rights and how to resolve disputes is intended to empower them to demand quality services from industry representatives. Regulatory requirements which better suit current industry practices and a code of ethics are intended to make it easier for representatives to understand expectations and their responsibilities.

5.1 Proposed model

The table below summarises the proposed changes to the Act. Key regulatory requirements are listed in the left column with changes in bold text, and requirements to be removed are listed in the right column.

<i>What's In?</i>	<i>What's Out?</i>
<ul style="list-style-type: none"> Maximum agent fees of 10% 	<ul style="list-style-type: none"> Maximum agent fees that vary from 5-10% Exclusions for charging commission on regular overtime and penalty payments
<ul style="list-style-type: none"> Written contract if fees above 10% Must use trust account, except if transaction below \$1000 Must disburse money within 14 days Must keep records of trust account status and fee payments Must keep all records for five years Must provide financial statements to performers 	<ul style="list-style-type: none"> Trust accounts for all transactions
<ul style="list-style-type: none"> Must keep a copy of all contracts and provide information to performers about dispute resolution mechanisms Code of ethics with penalties 12 months for OIR to commence prosecutions Representative to disclose to performer if also acting for venue 	<ul style="list-style-type: none"> \$2,000 bond for probationary licensees 6 months for OIR to commence prosecutions Fee charging restriction for representative acting for both performer and venue
<ul style="list-style-type: none"> Financial penalties for breaches Auditing and inspection powers Power for OIR to issue directions to representatives 	<ul style="list-style-type: none"> Power for OIR to issue directions to employers and performers

Retain maximum fees

Setting maximum fees can stop an agent from using their bargaining power to negotiate unfair terms.

Currently, agents may not:

- charge a fee in excess of 10 per cent for up to 5 weeks and 5 per cent for any period after 5 weeks for live musical or variety performance work, or
- charge a fee in excess of 10 per cent in all other cases, including for film, television or electronic media⁵.

A person may charge fees higher than these if they become a manager by entering into a written service contract with the performer and negotiating a higher amount as part of that contract.

These requirements are aimed at stopping an agent from taking advantage of their bargaining power, while allowing some flexibility so that representatives can charge more for offering better services. Requiring higher fees to be agreed in a written contract also gives the performer a better opportunity to decide whether the representative's services are worth it.

However, the current maximum fee provisions could be improved. There is little justification for a different fee for long term live musical and variety performance work or for excluding regular overtime and penalty payments from the charging base. Applying a flat 10 per cent across the industry would remove anomalies. In addition, a 10% rate is reasonable and has been the industry standard for many years in most areas.

Therefore, it is proposed that the maximum fee for all agent/manager transactions (including regular overtime and penalty payments) is set at 10 per cent. The maximum fee would not apply if there is a written agreement between the agent/manager and performer, and if the agent/manager discloses in writing the services provided.

This is simpler and more straightforward than the existing law which should reduce confusion, make billing simpler and improve compliance.

Do you agree with this approach?

If not, should the maximum fee be higher or lower than 10 per cent?

Retain trust account requirements, but exempt transactions less than \$1,000

Trust requirements are aimed at reducing the risk that the agent or manager intentionally or inadvertently loses a performer's money and does not delay paying a performer.

Currently, agents and managers must:

- pay the performer's money into a band trust account
- keep the performer's money exclusively for the purpose, and

⁵ Section 38 of the Act.

- disperse the performer's money as directed by the performer within 14 days⁶.

These requirements are not overly costly or time consuming to comply with, except where an agent receives a cash payment and is required by law to deposit the funds into a trust account before passing the fee onto the performer. This may be inconvenient or costly for little benefit. The relative costs may be high for small transactions. This could result in higher costs for performers or non-compliance with the requirements.

In other industries, trust requirements are usually only applied when large sums of money are involved, for instance, in the provision of accounting, legal or conveyancing services. On this basis, an exemption for smaller transactions may be appropriate.

It is therefore proposed to retain existing requirements for transactions of \$1,000 or more. Trust account requirements would not apply to transactions below \$1,000.

Are trust account requirements an effective protection for performers?

Are trust account requirements commonly complied with?

Would an exemption for amounts less than \$1,000 present risks, or cut red tape for agents without significant risk to performers?

Expand record keeping requirements

Requiring representatives to keep adequate financial records enables audits of an agent's or manager's account in order to check trust account requirements have been complied with.

Currently, agents and managers must:

- keep accounting records showing the true position of the account at all times, and
- keep accounting records at the agent's or manager's principal place of business⁷.

This level of record keeping is not considered onerous because it is not over and above the records any small business would keep for business and tax purposes. It has become clear that the current record keeping provisions may not be adequate to enable the regulator to identify whether a breach of the legislation has occurred.

It is therefore proposed to retain existing requirements and also require agents, managers and venue consultants to keep records of all fee payments and to retain records for five years.

This proposal would make it easier for performers to take legal action or OIR to take enforcement action because it would ensure that important evidence was available for five years. It would not impose an additional cost on most representatives as most

⁶ Section 39 of the Act.

⁷ Section 39 of the Act.

would already keep records for five years for income tax purposes or in compliance with Commonwealth Goods and Services Tax requirements.

Better record keeping may make performers more confident to take action against representatives when they believe a breach has occurred. Of course, OIR would need to have the power to impose appropriate penalties for non-compliance with the record keeping requirements.

Another option considered was for agents and managers to be required to regularly obtain an independent audit of their accounts and provide evidence of this to OIR. This was considered too costly for industry.

Are the proposed record keeping requirements significantly more onerous than what representatives are already doing? If so, would the proposal impose an unreasonable cost on representatives?

Would better record keeping improve performers' chances of successful prosecutions against breaches of the legislation? Would it therefore encourage performers to take action?

Retain requirement to provide financial statements

Requiring agents and managers to provide performers with information about how much he or she is owed by the agent or manager ensures the performer is informed and also provides a paper trail which can be used to check whether the agent has paid performers correctly.

Currently, agents and managers must:

- provide appropriate financial statements as soon as practicable after receiving money on behalf of the performer to the performer, and
- provide a statement of the amount of money received by the agent or manager on behalf of the performer and the money paid to the performer⁸.

It is proposed to retain the existing requirements.

Could these provisions be improved?

Remove bond requirements

Currently, provisional agents and manager licensees must lodge a bond of \$2,000 with OIR to cover failures to pay trust money. A person holds a provisional licence for 12 months. Bonds are designed to make it easier for the performer to get back money owed by an agent or manager. If a representative fails to pay a performer what they are owed, the performer can ask OIR to take the money from the bond. There must be evidence that the money is owed to the performer.

However, not many performers have sought access to bonds and there are costs for government in administering this requirement. It has also been suggested that the bond is too low to adequately compensate performers and that the period OIR holds the bond is insufficient as a performer protection measure.

⁸ Clause 4, *Entertainment Industry Regulation 2004*

Lodging of a bond would require some form of registration system in the absence of licensing. The amount of the bond and the time a bond is held by OIR would also need to increase to provide adequate funds to cover the potential value of claims by performers. The potential costs of making the bond requirements effective seem to outweigh the benefits.

It is therefore proposed to remove the bond requirements.

Another option is to impose an industry levy to create a fund to reimburse performers money owed by agents or managers. A levy could be raised from agents, managers, performers or employers. This was considered unnecessarily costly for the industry.

Is a bond system necessary given other protections, such as access to the CTTT, would be available?

Is it worth retaining a bond system, noting the cost of required improvements?

Expand contract and information disclosure requirements

Written contracts allow the performer to more fully consider the terms of the agreement and value of the manager's services, but may not be practical in many cases. Currently, agents are not required to enter into a written contract with performers. However, the provision allowing a manager to charge higher fees if it is agreed in a written contract encourages the use of written contracts. Agents and managers are not required to disclose any particular information, except that they are licensed.

It is proposed to retain the existing requirement for a contract where the negotiated fee is above the maximum prescribed, and also to require representatives to:

- **keep a copy of all service contracts, and**
- **provide information to performers about available dispute resolution mechanisms.**

Requiring representatives to disclose certain information, such as the available dispute resolution mechanism, is common in consumer protection legislation (such as employment agent and tenancy law). It is a low cost, low burden way of disseminating information to performers about their rights. OIR would have the relevant information available on their website for representatives to obtain and provide to clients when offering a contract. Requiring representatives to keep a copy of their contracts with performers would allow OIR to audit these contracts if necessary.

A mandatory cooling-off period is also a common way to protect performers by giving them more time to consider the complexities of a contract. However, given the relatively low value and short-term nature of many contracts in this industry, this is not considered appropriate.

Are there any other improvements that could be made to contract provisions to improve protections for performers?

Introduce code of ethics

Requiring that representatives comply with performance standards would discourage poor service. Currently, there is no code of conduct for entertainment industry representatives. Without clear standards, there is no way for OIR to assess claims of misconduct.

OIR can refuse a licence on character grounds for repeated dishonest behaviour and has done so in the past. With the removal of licensing, a code of ethics would provide a way to penalise repeated dishonest behaviour by an industry representative.

It is therefore proposed to amend the Act to include a code of ethics with penalties for misconduct.

The code would not include minimum competency requirements, such as a duty to exercise due skill, care and diligence, since it would be difficult to determine what acceptable conduct is. Rather, it would broadly set out the characteristics of fair and ethical conduct in the context of the performer/representative commercial relationship. Representatives would not have to formally sign up to the code, but would be agreeing to abide by it simply by operating as a representative. This would be similar to the ethical requirements that apply in Queensland for private employment agents⁹.

The code would need to be developed in close consultation with industry. If this review recommends development of a code of ethics to be included in the legislation, an industry working group would be engaged to assist government to draft the code.

Do you support the introduction of a mandatory code of ethics? If so, what should be included?

Provide for effective dispute resolution and enforcement

Providing a speedy, effective and cheap dispute resolution body as an alternative to court action makes it easier for performers to take action when they believe a representative has breached the Act.

A Complaints Committee was established by the Act but ceased to exist when the Council was dissolved in 1994. The Act has never been updated to enable OIR to effectively undertake its function. Some simple changes to the Act could provide OIR with the necessary powers to effectively hear and resolve complaints.

Another alternative would be to give the NSW Industrial Relations Commission the power to resolve complaints by performers about representatives, in addition to its power to vary unfair contracts. The Commission could decide whether a representative has breached consumer protections and issue penalties. It could also be given the power to make orders, such as an order that a representative pay money owed to a performer. This alternative is not recommended because it would be costly, unlikely to be frequently used and moves the Commission away from its main role of deciding disputes between employees and employers.

⁹ See the Queensland *Private Employment Agents (Code of Conduct) Regulation 2005*, in particular the requirements for honesty, fairness and professionalism under clause 6 and to act in the client's interests under Division 2.

It is proposed to amend the Act to enable OIR to deal with complaints.

OIR has difficulty taking enforcement action because a prosecution must commence no later than six months from when an offence was alleged to have been committed¹⁰. However, most offences in this industry are not reported for many weeks after the alleged offence which does not give OIR adequate time to investigate a case and commence a prosecution. Extending this time limit by including a specific provision in the Act could address this problem and significantly improve the ability of OIR to prosecute.

It is proposed to amend the Act to specify that proceedings for an offence must be commenced not later than 12 months from when the offence was alleged to have been committed.

In addition to the role of OIR, performers may access the CTTT to resolve disputes of less than \$30,000 but there is not a high level of awareness of this in the industry. The CTTT is an appropriate avenue for resolving complaints between performers and representatives. A claim to the CTTT is not costly. No legal representation is needed and the application fee would be \$34 in most cases. Matters heard by the CTTT are resolved much more quickly than through the courts. While the CTTT can not issue penalties for breaches of the consumer protection requirements, OIR could separately take enforcement action.

It is proposed that performers are informed about their rights to access the CTTT.

Do you agree with the above proposals?

Other than contract provisions outlined above, what are some other ways the Government could assist performers to access the CTTT?

Measures to target conflicts of interest

Currently, the Act provides that:

- an agent also acting as a venue consultant may only charge a fee as a venue consultant and only from the employer
- employers may not include in a venue consultant's fee any payment owing to the performer, and
- managers can only exceed the fee maximum or charge the performer a fee when acting as a venue consultant if the performer has agreed under a written contract¹¹.

The current protections are intended to remove the conflict of interest by prohibiting a representative from charging both parties. However, stakeholders have reported that 'double-dipping' is a problem in the industry. They also claim that it is common industry practice for the employer to pay representatives a global amount, inconsistent with the second requirement above regarding payments by employers to venue consultants. Such a practice gives representatives the opportunity to easily take two commissions, which is prohibited for agents.

¹⁰ This time limit is specified in the *Criminal Procedure Act 1986*.

¹¹ Section 38

On the other hand, it may be reasonable for a representative to be able to charge both parties, as long as a performer knows if their agent/manager is also acting on behalf of the venue. The performer could weigh up the risks of being overcharged with the benefits of having a representative in a good position to find them work.

Some representatives have suggested that the viability of their business depends on being able to also work as a venue consultant and that this should not be prohibited or unduly restricted.

It is proposed to remove existing requirements and instead specify that a representative must disclose to a performer if they are also acting for the venue in relation to that transaction.

This proposal would ensure that a performer can make informed decisions about whether and on what terms to accept a job.

Would disclosure reduce risks for performers arising from a person acting on behalf of both the performer and the venue?

Should a representative be required to disclose to a venue if they are acting as an agent for a particular performer or group?

In practice, is the practice of a person acting on behalf of both the performer and the venue damaging to performers, or does it sometimes benefit performers?

What are the impacts on representatives, performers and venues of restricting the ability of a person to work as both an agent or manager and a venue consultant?

5.2 Compliance measures

The regulatory framework needs to include mechanisms to encourage representatives to do the right thing and adhere to the law. There are many ways to do this, ranging from information campaigns, auditing and inspection powers, to strict sanctions such as fines and prohibition orders.

Currently, the Act includes the following compliance measures.

- Information and advice – OIR has run campaigns to educate the industry about the Act. It also provides advice in response to enquiries. This is a cost effective compliance measure and should be continued.
- Prosecution and fines – a breach of fee, trust, record keeping, and financial statement requirements is an offence with a maximum penalty of \$5,500 and OIR or authorised unions may prosecute. This is an effective way to achieve compliance with the Act and should be continued. However, the level of the penalty may need to be adjusted to ensure it encourages compliance. An extension of the time allowed to commence a prosecution (see page 14) would also improve the effectiveness of this measure.
- Auditing and inspecting – OIR may audit and inspect the books of representatives to check they are complying with maximum fee, trust, record keeping and financial statement requirements. This can be a cost effective compliance measure and should be continued.

- Power of entry and inspection, search warrants, offence to obstruct etc authorised person and recovery of charges – these powers enable OIR to enforce the laws. It allows them to audit and inspect a representative's business as well as search for evidence without obstruction. This is a necessary compliance measure and should be continued.
- Issuing directions to a representative, performer or employer – the Act provided for the Entertainment Industry Interim Industry Council to require an entertainment industry employer or the owner or operator of the premises of such an employer to comply with a formal direction¹². This is a useful alternative to prosecution because it gives OIR the opportunity to make the representative put right a wrongdoing. However, it is unclear why OIR should also be able to issue a direction to a performer or employer. Representatives are unlikely to need protection from performers and there are already protections against employers under the *Industrial Relations Act 1996*.

It is proposed to retain existing measures except for the power to issue directions. OIR should be provided with the power to issue directions to representatives, but not performers and employers.

A requirement that representatives register their name and contact details with OIR was considered as a way to enable random audits and inspections. It would also provide a means for OIR to communicate with the industry. While not as onerous as the licence, which requires representatives to be assessed against certain entry requirements and pay a fee, registration would impose costs on representatives and may not be necessary.

Do you agree with the proposal to retain most of the existing compliance measures?

Are there other compliance measures that may be effective?

Is a maximum penalty of \$5,500 sufficient for the proposed offences?

5.3 Funding compliance work

Achieving compliance provides significant benefits for performers and the industry in general, but compliance activities need to be funded. Currently, the licensing scheme provides a means to raise funds from industry.

The proposals outlined in this paper would require OIR to take enforcement action against representatives who have been the subject of complaints. This would most likely be effective and could be undertaken without the introduction of an alternative revenue raising mechanism.

Another approach would be to expand compliance activities, such as through large scale inspection and auditing of representatives on a random basis. Additional revenue would be required to fund this. In the absence of license fees, there may be a need to introduce another mechanism to raise funds, such as an industry levy. A levy could be imposed on representatives, performers or employers and would

¹² The Act gave the Council this sanction in sections 36 and 37 but it could not be used by OIR after the Council was dissolved.

require some form of registration to ensure all relevant parties are identified. However, the Government is reluctant to impose costs of this type on the industry without trialling the proposed complaints-based approach for at least one to two years.

Do you support a complaints-based approach?

Would you support an industry levy? If so, how should a levy be applied? What are the problems with raising a levy?

5.4 Representatives from interstate

All agents, managers and venue consultants who operate in NSW are subject to the requirements in the *Entertainment Industry Act 1989*. This includes representatives from interstate who arrange performances in NSW. For this reason, it is important to ensure that the regulatory requirements are not too onerous, can be easily understood and, where possible, are consistent across Australia and internationally.

Any changes to the regulatory framework also need to be considered in light of how they will affect the ability of NSW entertainment industry participants to compete with those from interstate.

The changes proposed in this paper are intended to balance the need to protect performers with the need to ensure the entertainment industry remains competitive and can develop without any unnecessary regulatory barriers.