



COMPLIANCE REVIEW

QUARTERLY

A TALENTPAY PUBLICATION

ASF. The Fee that Keeps on Giving

Employers Ignore Statutory Obligations at their Peril

BY BRIAN GEACH

It seems the issue of Agency Service Fees (ASF) first canvassed in the previous edition of CRQ (*CRQ, vol.1 no.19*), will simply not go away. In that edition we pointed out that one of the reasons the imposition of ASF appeared to be increasing was in no small way a reaction to the more prescriptive mandating of performer agent's commissions under the new Entertainment Industry Act, 2013.

On a number of occasions CRQ has heard reports that some performer representatives are charging their advertising agency an ASF because the representative is claiming they will perform the administrative role of deducting PAYG and paying the superannuation, workers

compensation and payroll tax, where applicable. This in itself is quite acceptable but it has become clear to CRQ that some performer representatives are then paying the performer the gross amount, less their commission, and claiming the

“ If this is true, it may be because of ignorance rather than illegal intent but the outcome is the same ”

performer is a contractor and not entitled to superannuation. If this is true, it may be because of ignorance rather than illegal intent but the outcome is the same, namely that ultimately the performer is denied superannuation, not to mention the non-payment of payroll tax and workers compensation premiums.

Whether this practice has arisen out of ignorance or illegal intent is irrelevant in law. This model is simply wrong. There is a specific ATO ruling that covers all performers who appear in advertisements, classifying them as either Pty Ltd companies or 'employees'. There are no other options or classifications set out in this ATO ruling.

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Talentpay's Year in Review

CRQ sat down with Talentpay's Chief Executive Greg Reilly to gain some insight on Talentpay's past year and the challenges that lie ahead in 2017.

BY BRIAN GEACH

CRQ: 2016 seems to have been quite a year for Talentpay. What do you see as the significant developments in Talentpay's evolution?

GR: Sometimes it's easy to forget that Talentpay has been in business for over fifteen years and during that time I'd like to think that each year since then we've significantly progressed the business. That said though, 2016 has seen some noteworthy changes in the Talentpay operation.

CRQ: How so?

GR: We've broadened Talentpay's skill

base and operational footprint for a start, dividing the company into three divisions, namely Talentpay Casting, Talentpay Processing and Talentpay Music. And apart from our longstanding Australian presence, we now have representation in Singapore, New Zealand, India, Thailand and China.

CRQ: How does Talentpay Casting fit into this picture?

GR: Talentpay very early in the piece recognised a need in Asia to bring some form of structure to the existing

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Music to our Ears

Talentpay Music to Open in 2017

BY CARLY CONSTANTINIDES

The strong growth of Talentpay over the past fifteen years has resulted in Talentpay currently processing approximately 60% of the talent who appear in advertisements across Australia. Part of the reason for Talentpay's success has been its agility in reacting to clients' needs and requirements in talent processing.

Of late there have been increasing requests from our clients and the industry in general for Talentpay to assert its own business model into the music licencing and rights landscape, particularly as it applies to music used in the production of advertisements. This input has prompted us to set up Talentpay Music, scheduled to begin operations in early 2017.

“Talentpay Music as a natural extension of our core expertise”

Operating through the Talentpay Online portal (TPO) and on behalf of our advertiser and agency clients, we see Talentpay Music as a natural extension of our core expertise. Under the auspices of a senior music supervisor, Talentpay's offering will include facilitating music licencing, negotiation of music rights, rollovers, extensions and access to centralised, stored information on demand 24/7, providing transparency and accountability in the process.

Our clients in the main understand the need for a professional approach to the often arcane complexities involved in acquiring licences and the rights to music. The music landscape is a legal and compliance minefield characterised by multiple licence and rights holders. The consequences of not understanding or ignoring these complexities can be serious.

Talentpay already specialises in the area of talent processing through our

From the Editor

Welcome to the 2016 year end's edition of CRQ. Whilst the end of the year seems to roll around with ever increasing rapidity, a quick glance at previous editions of CRQ provides a nuanced and rolling commentary on the year's events and issues affecting our industry. Some topics raised appear to have been resolved whilst others are still evolving with new developments arising, often in response to changed legislation and compliance rules.

As usual, CRQ tries to keep on top of these matters with the help of our highly experienced contributors and the considered expertise they bring to the pages of this journal and for that I am eternally grateful. Without this coterie of experienced professionals, CRQ would not exist.

And so to this edition which covers further developments in the Agency Service Fee debate and includes articles on misleading product claims and stress management in the workplace by two of our most esteemed contributors, Ian McDonald and Leanne Jezercic respectively.

An interview with Greg Reilly, Talentpay's CEO, gives form to Talentpay's past year and future plans in the marketplace.

Articles from Talentpay's Carly Constantinides and Kathryn Courtney-Prior and an introduction from Sophie Bogdan, Talentpay's new Global Head of Marketing, along with our normal feature articles, complete this Christmas edition of CRQ.

So as the year inexorably draws to an end I'd like to take this opportunity on behalf of CRQ to thank all our contributors, editorial staff and valued readers and wish you and your families the very best for the festive season and for the coming new year.

Best Wishes,
BRIAN GEACH
Editor, CRQ

centralised business model and expertise supported by technology. In 2017 we are confident the same model can be applied to music within the advertising world. Stay tuned!

CARLY CONSTANTINIDES

*Head of Talentpay,
Australia and New Zealand*

Is there a Duty of Care for Excessive Workloads and Bullying?

“Get Over It” Just Doesn’t Cut It BY LEANNE JEZERCIC

The advertising industry is well known for being one where pressure and stress are par for the course. Dealing with deadlines and high client expectations within a competitive and ever changing environment can be exciting for some, but others are just overworked and overwhelmed. It is not uncommon for us to hear of instances where agency staff have been left distressed and in tears because of unreasonable demands or difficult situations.

In this environment, it’s important that employers are aware that there is a duty of reasonable care to protect vulnerable employees. While there is no obligation to ensure a happy workplace, a duty does arise where a person exhibits a vulnerability to psychiatric injury.

While the High Court has previously found that it is too large a step to say that all employees are at risk of psychiatric injury from stress at work, if there is something more, the nature and extent of the work or signals from the employee for instance or frequent absenteeism or visible changes in behavior, this could make the risk foreseeable.

A recent decision from the Queensland Court of Appeal awarded more than \$435,000 to an employee who suffered major depression, anxiety and post traumatic stress as a result of being overworked and subject to harassment by her manager.

In that case, the employee was an administrative assistant at a nursing home. Two years into her employment, a new manager was appointed and within around 11 months of working under this manager, the employee’s mental state had deteriorated to the point where she was no longer able to work.

Evidence was given that the manager took an authoritarian approach that was unreasonable, aggressive, and rude, including dishing out insults to the employee such as “I’ve never met anybody

“ A recent decision from the Queensland Court of Appeal awarded more than \$435,000 to an employee who suffered major depression, anxiety and post traumatic stress as a result of being overworked and subject to harassment ”

so stupid as you”. In addition, when the employee complained to the manager about being significantly overworked, she was simply told to “get over it”.

As a result of this and other similar conduct and in combination with being so overworked, the employee’s mental state visibly deteriorated from being “bright and bubbly” to noticeably withdrawn and preoccupied. She also developed a nervous tremor and often cried at work and this was admitted by the manager.

The reason this employee was able to succeed in her claim is that she overcame the hurdle of proving that her psychiatric illness was reasonably foreseeable to her employer. It was the visible deterioration in her psychological state under the new manager that made the risk of psychiatric injury foreseeable. The court found that the manager ought to have foreseen that there was a particular vulnerability which meant that the employee was at risk of developing a psychiatric illness and that the employer should have exercised reasonable care to avoid or minimise her stressful experiences in the workplace.

The Court found that the employer’s failure to exercise reasonable care to avoid or minimize risk of psychiatric injury, such as by ensuring that the manager did not behave in a harassing or belittling way, amounted to negligence.

While being overworked does not of itself establish a breach of duty, this case has shown that it is an important factor when other stresses are involved as being overworked was found to have been a factor that exacerbated and compounded the employee’s condition. The high work demands were found to make it more difficult for the employee to cope with the manager’s behavior, as did the refusal of the manager to have her workload reduced.

In the agency environment where stresses abound, it’s important for employers to be aware of any high risk employees who may be exhibiting signs of distress caused by their workload or by dealings with other co-workers or clients. Any requests for assistance or reports of stress must also be taken seriously by management.

Anisimoff Legal has recently expanded its core expertise to now include advice on employment matters. If you would like further information on this case or other employer obligations please feel free to get in touch.



LEANNE JEZERCIC
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Trust Me, I'm an Agent

Trust Accounts Still a Sore Point

In the last edition of CRQ (*CRQ, vol.1, no.19*) we published a letter from actor and academic Gerry Sont who decried the number of performer representatives who'd gone broke over the past year, in many cases owing thousands of dollars to their book talent. Gerry noted that often talent had little recourse in recovering their due fees, in most cases appearing well down on the creditors list after their representative had either gone into administration or had been declared bankrupt.

Gerry pointed out significant aspect of this disturbing situation was the reliance talent had placed on the so called 'trust accounts' mandated in NSW legislation, introduced in an effort to quarantine and protect talents' fees. However the term 'trust account' in this situation is virtually meaningless with no defined meaning or status in the Entertainment Industry Act (2013), leaving talent no more protected than they would have been had no such term or concept existed in the first place.

The reaction to Gerry's piece at the time was immediate, with talent and performer representatives alike contacting CRQ to air their views and add tales of their frustration with the situation as it now stands. Many talent representatives spoke of increased compliance costs and restrictions on commission rates recently legislated and complained that prudent and compliant agents were being disadvantaged by those agents that ignored their responsibilities toward their talent. Interestingly, many of the talent who contacted CRQ wanted the legislation tightened and enforced (particularly in regards to trust accounts) but were quite happy to pay larger commissions to their representatives as long as it improved the representative's financial security.

In early October, Gerry addressed a gathering convened by NAFA (Networking Action for Filmmakers and Actors) and invited representatives from Talentpay to attend. In his talk, entitled 'A Trusting Relationship: The Actor and the Agent', he reiterated how vulnerable talent was, particularly if they relied upon the false security of trust accounts to ease their fears. Much of which he spoke had been covered in his letter to CRQ. In addition, Andrew Pavli a solicitor with an active interest in these matters, spoke generally about the NSW Entertainment Industry Act (2013) and why these so called trust accounts are not as carefully regulated as those in other industries (travel agencies or real estate agents for example).

Carly Constantinides, Kathryn Courtney-Prior and Ashlee Driscoll from Talentpay then took to the podium to answer questions on the Talentpay model and to give an oversight of the talent landscape as a whole. Carly described how much of what Gerry had canvassed had been on the Talentpay radar for some time. She went on to say that in the Talentpay model, talent are paid promptly and compliantly, and have adequate cover regarding super, workers compensation and payroll. Talentpay were able to do this as their business model mandated transparency in dealing with all players and was characterised by the centralised service provided. She also spoke on the ramifications of the NSW Entertainment Industry Act (2013), entertainment managerial agreements, commission rates, deal memos and agent obligations. Kathryn then spoke on the benefits of Talentpay Casting.

“ the term ‘trust account’ in this situation is virtually meaningless ”

Gerry further remarked that MEAA were aware of the situation and were pursuing the matter but he noted that as far as NSW Industrial Relations were concerned, they could only act when a complaint was received. Some actors in the audience though expressed frustration at the lack of support they received from their union despite contributing substantial membership fees each year. All believed more robust action on their behalf by MEAA and NSW Industrial Relations was needed to address the issues raised.

This is a problem that will not go away. Apart from the injustice served up to trusting talent by their failed representatives, investigations into the reasons for the spate of performer representative collapses over the past eighteen months needs to be thoroughly and openly undertaken with appropriate action taken. For most players, the acting profession is precarious enough without the added burden of failing talent representatives, ill-considered legislation and limited advocacy.

THE GLOBAL EYE

News from around the world

- ◆ In a decision set to rock the very foundations of the international confectionary industry, Toblerone has decided to increase the gaps between the peaks of its iconic chocolate bar. The change will reduce the actual weight of the largest Toblerone bar by 40 gms but controversially the price of the new bar will remain the same. The decision has been greeted with dismay across Toblerone's 120 country export market with one British Facebook user characterising the decision as one of 'the dumbest corporate decisions ever made'.

- ◆ Harry Shearer, the actor who played Derek Smalls in the cult classic mockumentary, 'Spinal Tap' has launched a \$A163 million lawsuit against the French conglomerate Vivendi and Studio Canal alleging mis-reporting of profits from the film's film and video distribution, merchandising and music releases, and the subsequent withholding of royalties from those who created the film. Shearer, despite not been joined in the action by his co-creators of the film, nevertheless said he discovered the alleged fraud after commissioning an independent audit of the film's income stream and accounting statements.

- ◆ A company specialising in the marketing and representation of photographers and their images has been set up in Hong Kong. Super Image Market utilises the latest rights tracking technology and in conjunction with a local law firm, the company has been aggressively pursuing breaches of copyright and intellectual property rights, a situation particularly rife in China. The owner of Super Image Market said that part of the problem, not just in China, is the assumption that if something appears online then it is free and available and can be shared or used without payment or attribution. The sophisticated technology involved is not language based but rather uses artificial intelligence to compare a client's image with 50 million other images in one tenth of a second.

The Casting Guild of Australia Awards Evening a Great Success

BY KATHRYN COURTNEY-PRIOR



Dave Eastgate and Danielle Cormack



Greg Apps, President CGA

For the second year running, the Casting Guild of Australia (CGA) held its annual awards ceremony in November to recognise outstanding achievements in casting over the preceding twelve months*. Organised by Rodd Richards Presents and held in the Sydney boardroom of one of the principal sponsors of the evening, Holding Redlich, the evening drew together many

of Australia's pre eminent casting directors along with talent, agents and sponsors.

Hosts David Eastgate and Danielle Cormack set a warm and witty tone for the evening whilst Greg Apps, the president of the CGA delivered a heartfelt speech thanking those who had made the evening possible, in particular the major sponsors, Holding Redlich, Foxtel, Casting Networks and Talentpay.

Identifying a need for a professional body to recognise and represent the casting profession in Australia, the CGA was established in 2013, as a not-for-profit organisation representing casting directors

who work in the film, television, TVC and theatre industries in Australia. The CGA aims to provide a central and united forum for its members, maintain professional standards by highlighting the the contributions made by the casting profession to the industry as a whole whilst recognising and celebrating those members' achievements. The awards evening then, is an integral part of the CGA's mission statement.

As one of CGA's major sponsors, Talentpay representatives attended the awards evening and all were impressed by the sense of community the CGA has established over the last three years. They also enjoyed the opportunity to show casting directors our support.

Talentpay's senior producer Donna Frost remarked, "It was great to catch up with with familiar faces and put faces to names, especially casting directors and agents who we deal with each day. These type of gatherings are invaluable in my view."

THE WINNERS WERE...

Best Casting for a TVC Casting

Anousha Zarkesh and Megan D'Arcy

Best Casting for a Short Film

Danny Long

Best Casting for TV Drama

Anousha Zarkesh

Best Casting for a Mini Series or Telemovie

Anousha Zarkesh

Best Casting for a TV Comedy

Tom McSweeney and David Newman

Best Casting in a Feature Film

Stevie Ray and Kirsty McGregor

Sirius Award Female

Katherine Langford

Sirius Award Male

Jacob Collins Levy

KATHRYN COURTNEY-PRIOR

Head of Talentpay Casting



Vesna Njegovan, Donna Frost, Sophie Bogdan and Jemma Kay from Talentpay with Tim Pietranski from Publicis

Misleading Your Customers can be an Expensive Proposition

BY IAN MCDONALD

Claims for Your Product Need to be Demonstrable

Everyone knows that an advertisement will always put a product or service in the best possible light and that generally, any advertising needs to be taken with a grain of salt. Everyone also knows that advertisers look to push all the right buttons to make it more likely that people will buy their product or service.

“ any statement or suggestion that is misleading or deceptive may get them into serious strife under laws aimed at protecting consumers ”

Nonetheless, businesses need to take care when making claims about their products and services, as any statement or suggestion that is misleading or deceptive may get them into serious strife under laws aimed at protecting consumers. If you're not careful, breach of these laws can result in both public shaming (through unwanted media attention and through having to publish notices about what you have done) and financial pain (having to make large payments by way of damages or fines).

In part, the old common law action for 'passing off' deals with these issues. In one old case, a record company was found liable for having used a photo of a well-known and champion ballroom dancing couple on the cover of an album of ballroom dance music without asking them first.

Consumer protection is more comprehensively covered by the Australian

Consumer Law (the ACL), which is a Schedule to the Competition and Consumer Act 2010 (the CCA). This is federal legislation which replaced the old Trade Practices Act 1975. You will still often hear people referring to a particular set of facts as giving rise to 'trade practices' issues.

The main thing to bear in mind for current purposes is that the CCA provisions will apply if your advertising for example, creates a false or misleading impression or if you make false and misleading representations, including in relation to the quality or standard of goods or services, their origin or who authorised them.

Such an impression might result from either what you're saying about a product or service, or what images or statements you use or make. Liability can also result from your 'conduct' in relation to your goods or services.

Importantly, it doesn't matter whether or not you intend to create the relevant impression or to make the relevant representation; the issue is determined objectively, by looking at whether or not that was the result. Also, you can be liable without it being proved that

“ Importantly, it doesn't matter whether or not you intended to create the relevant impression or to make the relevant representation; the issue is determined objectively ”

people were in fact misled or deceived; the likelihood of this being the case is all that needs to be proved.

“ Coles had to pay a fine of \$2.5 million, together with the legal costs of the Australian Competition and Consumer Commission (“the ACCC”) ”

By way of example, Coles got into strife in 2015 over claims on packaging and in-store signage that its bread was “Baked Today” and “Freshly Baked”. The relevant loaves, however, had in fact been pre-prepared overseas and delivered par-baked and frozen to Coles, with only the final part of the baking taking place instore. The Federal Court found that people generally would find the relevant phrases to imply that all the baking of the bread had occurred instore when this was not in fact the case. As a result, Coles had to pay a fine of \$2.5 million, together with the legal costs of the Australian Competition and Consumer Commission (“the ACCC”).

In other examples:

- in April 2016, two egg producers were found to be in breach of the Australian Consumer Law for falsely claiming that eggs were free range when they were not (the companies were ordered to pay \$300,000 by way of a penalty, ACCC costs, to publish corrective advertising and to put a compliance program in place at their farms).

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Misleading Your Customers can be an Expensive Proposition

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- in December 2015, the company that makes the “Nurofen” brand of pain control medicine got into trouble for stating that its tablets targeted particular types or areas of pain when this was not in fact the case. The company was subsequently ordered to pay a penalty of \$1.7 million, together with the ACCC’s legal costs.

The take-out from these cases, is to make sure that any claims you make in advertising, including in-store and on packaging, are true and not expressed in a way that is likely to be either misleading or deceptive.

Be particularly careful that any claims you make match the relevant facts, and that any claims (particularly in relation to health care or food products), are scientifically demonstrable.



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ASF. The Fee that Keeps on Giving

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If you attempt to pay talent outside of these classifications (as independent non Pty Ltd contractors or sole traders for instance), then you could be in breach of the law and you would be advised to seek legal advice.

By implication, performer representatives have a moral and legal obligation to their book talent in ensuring that employers of that talent are compliant in all aspects of an employer’s legal responsibilities. A simple random audit by performer representatives throughout the working year could be carried out, writing to past employers of talent and asking for evidence of superannuation paid.

Further, performer representatives should advise all their book talent that they are entitled to superannuation on all session payments and if they don’t see it noted on their pay slip, then they should contact the ATO who are ultimately charged with the responsibility of ensuring that employers are compliant. Talent should also keep a record of the superannuation payments indicated on their remittance advices and then check this against a statement from their superannuation fund. It should be noted that usually the performer representative will not be aware that no superannuation has been paid into a talent’s private superannuation fund as usually they are not privy to that information. Broadly speaking then, performer representatives have a responsibility to their talent to ensure they are properly informed on superannuation.

Another area of non-compliance which appears to be on the increase, is the practice on print shoots where the photographer or photographer’s agent offers to bundle the talent within their invoice to the agency. CRQ has always found it difficult to find a commercial reason why a photographer would offer such a service, because in doing so they arguably become the employer of the talent and it follows that they assume the obligation to pay superannuation and to ensure their ‘employee’ is covered by a workers compensation policy. It is doubtful there are many photographers or their agents, who are undertaking this administration work or indeed understand the wider compliance implications.

CRQ has spoken to a number of photographers who say they are often pressured by advertising agencies to bundle the talent, believing this exonerates those agencies from the responsibility of superannuation and workers compensation. These advertising agencies would be well advised to consult the ATO to determine if this is the position. The ATO could view the advertising agency as the employer whether or not they asked the photographer to bundle the talent, and may view the advertising agency as the employer even in the case where a photographer offered to bundle. In those latter cases, CRQ believes the ATO could take the view that the advertising agency is the ‘employer’ of the talent and cannot pass off the statutory responsibilities for compliance.

A further complication for photographers in this situation concerns the matter of usage rights. If the photographer bundles the talent and remunerates the talent directly, there are then contractual complications as to who is liable for future usage rights payments or even payments where there has been a breach of usage rights or the talent’s intellectual property rights.

ASF’s are not new. They have been extant in our industry for many years but the recent spike in inappropriate applications of ASF’s is a cause for concern. All parties implicated in the talent employment chain have compliance responsibilities and obligations, most of which cannot simply be signed away or offloaded to a third party. Ignoring these responsibilities by any party is simply not an option.

“ By implication, performer representatives have a moral and legal obligation to their book talent in ensuring that employers of that talent are compliant in all aspects of an employer’s legal responsibilities ”

A New Perspective on the Marketing of Talentpay

Sophie Bogdan Joins Talentpay as Global Head of Marketing

Sophie Bogdan recently joined Talentpay as Global Head of Marketing. With a extensive career in design, advertising and digital account management, Sophie brings years of experience to Talentpay's rapidly expanding global operations. CRQ asked Sophie for her first impressions of Talentpay. Her reply follows:

'I'm new to Talentpay the company, but not Talentpay as a product. Throughout

much of my agency account management career, the producers I worked with used Talentpay, so it was very much a standard part of the production process.

But in my few weeks at Talentpay, I have nevertheless been on a sharp learning curve; as a group account director in an agency, usage rights were something I discussed with my clients, but I did not have exposure to the complexities of the talent management

process which were going on in the background. I certainly wasn't aware of the sophistication of the Talentpay offering or the experienced, specialist team that sits behind it. It's very interesting seeing production from a completely different viewpoint.

Thinking back now on my career with a 'talent specific' filter, I can identify (non-Talentpay) projects where rollovers were mismanaged (with dramatic consequences) and see why my producers insisted on 'details' like contract executions, which to me seemed a very low priority at the time!

I feel like I've joined Talentpay at a particularly interesting time. The team has an ambitious growth plan, from a major software upgrade to music and casting and across multiple markets. I'm looking forward to getting stuck into these projects. More generally, too, my impression is that Talentpay has been building its strengths very quietly, so I think it's time to create some noise and awareness around the brand.

SOPHIE BOGDAN
Global Head of Marketing, Talentpay

THE LOCAL EYE

News from around Australia

- ◆ The National Library of Australia's new summer exhibition, 'The Sell; Australian Advertising 1790's to 1990's opened on 23rd November and includes over 200 examples of Australian advertising from that period. Advertisements featured include those from the 'It's Time' election campaign, Aeroplane Jelly, Bushell's Tea, Stamina-Trousers, Hills Hoists and Phillips light globes. The earliest ad from the archives and printed in 1796, promotes a play staged in the early Sydney colony called 'Jane Shore'. At the other end of the time frame, television commercials and jingles round out the exhibition. The exhibition's curator characterised 'The

Sell' as 'a journey through a commercial visual culture'.

- ◆ Village Cinemas Southland in partnership with Mattel's Hot Wheels have introduced a kids only cinema experience. Combining interactive play areas with actual screenings and catering for children between the ages of three to ten years, the cinema experience includes light projection games, Hot Wheels activities and blockwalls along with a modified pre-show and intermissions. Parents and children are encouraged to arrive an hour before screenings in order to fully experience the relaxed environment.

- ◆ Seven West Media's chairman Kerry Stokes has come out in defence of so called 'traditional media' saying that major advertisers risk brand value by shifting too much of their ad buy online. Stokes went on to say that marketing departments had been bamboozled by 'buzzwords' and 'bozos' and cast doubt on the efficacy of digital media metrics. "We've got marketing departments now that are in love with Facebook and Google. They work in a foreign language of multiple clicks. We work in the language of cash registers ringing," he said.

Talentpay's Year in Review

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casting environment in that region. The industry as it stands is characterised by a very large number of performer agents, some of whom also undertook a casting function. We found that because the industry is so vast, and people are multi-tasking, that there is a need for greater casting specialisation.

“ Talentpay very early in the piece recognised a need in Asia to bring some form of structure to the existing casting environment in that region ”

CRQ: Sound like quite a challenge?

GR: *It is but the casting landscape in the region is crying out for development and reform.*

Luckily we now have a very experienced casting director on board, namely Kathryn Courtney-Prior who brings years of experience to the role of Head of Talentpay Casting. In September, under Kathryn's guidance, we launched Talentpay Casting into the Asian region.

CRQ: How has this new approach manifested itself?

GR: *We've identified and marked the 'talent supply chain' as a core and critical element of the advertising production supply chain. We've empowered it by integrating, connecting and servicing the parts via technology, and now we are in the process of centralising it regionally and then globally - from casting, through negotiation, contracting, travel, extension and permanent retrieval.*

CRQ: What differentiates Talentpay Casting from other online sites?

GR: *This casting site is quite different to other casting sites in that it is free to performers and agents. This means that agents can place their talent on the site and substantially increase their marketing footprint. For this reason the site is being presented as a 'aggregation' of performer agents, thereby greatly simplifying the process for casting directors and production houses.*

CRQ: And Talentpay Processing?

GR: *Talentpay Processing comes into the picture once talent has been selected. Our producers then prepare the contracts, pay the talent and invoice the production house or advertising agency. Talentpay Processing also negotiates the contract extensions. We've upgraded the technology that drives TP Processing: it's now much more flexible and we've significantly improved the estimate functionality, budget reconciliations, on-set and search capabilities.*

CRQ: Sounds like a big task.

GR: *It was but it is just a part of constantly improving our technology. Early in the year for instance, our IT team designed and built the Risks Manager technology which enables stakeholders to meet the requirements of the respective workplace safety legislation in both Australia and New Zealand.*

“ Broadly speaking we are only motivated by a desire to provide a more innovative and efficient service to our large and growing client base ”

In another example, our IT team commenced work on the Talentpay Casting site in March prior to its launch six months later. Functionality, enhancements and design are being continuously worked on as we set out to make this model a world leader in innovation and functionality all with the ultimate aim of creating a single marketplace for talent.

“ Sometimes its easy to forget that Talentpay has been in business for over fifteen years ”

CRQ: And Talentpay Music?

GR: *Late in the year we made the decision to create a division to undertake the negotiation of music rights. The impetus to create this division came from a number of advertisers who encouraged us to complement our usage-rights skills with a music-rights capability. We will talk more about Talentpay Music in 2017.*

CRQ: And the future?

GR: *Broadly speaking we are only motivated by a desire to provide a more innovative and efficient service to our large and growing client base. That requires a talented and committed work force which Talentpay has in spades and so I look forward to 2017 with great confidence.*

CRQ: Is there anything else you'd like to add?

GR: *Only to thank all our people at Talentpay and our valued clients for their efforts and support over the year and to wish them all a happy and safe holiday period and a very successful 2017.*

Q&A

Compliance Review Quarterly's panel answers your compliance questions.

If you have any questions you would like our panel to consider please contact the editor at editor@compliancereview.com.au

Q: *Recently I've found that a number of my clients who have hired talent from our agency have been putting pressure on us to pay the super and PAYE tax applicable to the talent's remuneration in consideration of an Agency Service Fee (ASF) of around 15% in addition to the talent's fee. My accountant has advised us against this practice, maintaining that by paying these statutory taxes and levies, there are workers' compensation and insurance ramifications. In other words the states' work cover bodies may regard the payment of these taxes and levies by an agent as being tantamount to the agent being the employer of record and thus be liable for the various state based obligations, including but not limited to work safety laws and appropriate insurances associated with that status. Is this correct?*

TALENT REPRESENTATIVE
Sydney

A: Whether a person is an employee or not is a question of fact. There are a number of criteria which are examined when determining whether a person is an employee. When a person is an employee, the employer will pay superannuation and make a PAYE tax deduction. As such, if your agency makes a superannuation payment and deducts PAYE tax, you increase the risk of the person being found

to be an employee. This therefore increases the risk of you also being required to pay other employment related statutory payments such as workers compensation levies etc, being responsible for other employment related entitlements and being required to comply with statutory obligations imposed on employers. That said, if a person is a contractor, in some instances, they will also be eligible to receive superannuation and will be covered for workers compensation purposes. This is where the person works under a contract that is wholly or principally for the labour of the person. It sounds like your clients are concerned they will be found to be the employer. As such, they are trying to reduce this risk by passing this risk to you. If you have any questions please do not hesitate to contact us.

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Q: *When appearing in television commercials as an extra or featured extra, remuneration is often dependent on whether we are 'recognisable' in the final cut. How do we define recognisable?*

TALENT
Sydney

A: There is no standard legal definition for "recognisable" but some contracts do include a definition and so the contract should be checked in the first instance as it may set out some requirements for what constitutes being "recognisable". If there is no definition in the contract, the ordinary definition of "recognisable" according to various dictionary sources includes the ability to be recognised or identified, and this is often a basis for assessing a TVC to determine if the extra is recognisable – i.e, in the circumstances, is the extra capable of being identified? When considering this, depicting a face is a reasonable factor in deciding if someone is recognisable, given that facial features are ordinarily distinct. But it will depend on the TVC in context – a distinct haircut, tattoo or profile for example may also lead to an argument that the talent is recognisable. If you need any assistance drafting a clause for "recognisable" or assessing a TVC to determine if someone is recognisable, please contact our team.

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Q&A

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Q: *Recently I appeared as an actor in a TVC. In the contract I signed for my services to the production company my remuneration was noted as my fee plus super. A week or so after I'd received my payment from the production company (less 20% PAYE) I checked with my super fund and found that the super amount had not been paid into my account. When I rang the production company they told me they were only required to pay the super into my account within four months of my hiring. This seems a little unfair as I could be earning interest on my*

super money during this time. Is what they tell me correct?

ACTOR
Melbourne

A: Unfortunately it is correct. The compulsory super guarantee of 9.5% must be paid within three to four months of you rendering the service unless you are under eighteen or earned less than \$450.00 in that calendar month. It is important though that you monitor payments into your super fund from your employers, as a recent report indicates that up to 30% of

employers are failing to apply the super guarantee or underpaying it. If you find this is the case and you are unable to resolve the situation with your employer, then you should immediately contact the Australian Taxation Office with details of your problem. Recent research reveals a four month delay in reimbursement complicates enforcement of the super guarantee provisions, a fact that is bound to be on the agenda at a Senate economics committee meeting early in 2017. In the meantime, vigilance is the watchword.

BRIAN GEACH
Editor, CRQ

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