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## SUITE OF LEGAL INFORMATION SHEETS AND AGREEMENTS FOR CREATIVE ENTERPRISE HUBS IN NEW SOUTH WALES

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### Introduction and acknowledgment

The suite of legal information sheets and agreements for Creative Enterprise Hubs in NSW (**Suite**) is an initiative of Arts NSW ([www.arts.nsw.gov.au](http://www.arts.nsw.gov.au)) in association with the Arts Law Centre of Australia ([www.artslaw.com.au](http://www.artslaw.com.au); **Arts Law**).

The Suite is designed as a blueprint for councils, communities and local businesses interested in the development of Creative Enterprise Hubs. Such hubs nurture creative, artistic and cultural projects and enterprises by giving them short term access to unused or abandoned spaces pending redevelopment or rental on commercial terms. This brings life and energy back to the area with resulting benefits to local business and residents.

### Renew Newcastle

The Suite is modelled on the successful Renew Newcastle project ([renewnewcastle.org](http://renewnewcastle.org)) launched in 2008. Renew Newcastle is a not for profit organisation that finds short and medium term uses for buildings in Newcastle's CBD that are vacant, disused, or awaiting redevelopment. The organisation connects artists, cultural projects and community groups with the owners of such buildings. Occupancy on this basis has led to noticeable reductions in vandalism and squatting. The artists and groups who participate pay a nominal licence fee (\$20/week) to use the property with the understanding that they can be asked to leave the property upon 30 days notice. Projects have included the use of buildings for visual art studios, exhibition and project spaces, offices for designers, a millinery, a dance costume design workshop and retail spaces for crafts and clothing.

Several of the documents in the Suite, including this overview and the two licence agreements discussed below, are based largely on documents provided to Arts NSW and Arts Law by Renew Newcastle) and their solicitors at Sparke Helmore. Arts NSW and Arts Law gratefully acknowledge and thank Renew Newcastle and Sparke Helmore for providing their documents and allowing their use for the elaboration of the Suite.

### Program objectives

Creative Enterprise Hubs should be designed with the following objectives in mind:

- Generating community benefits by reinvigorating culture and vitality into deteriorating urban

centres;

- Maintaining and making more attractive buildings that are vacant, disused, or awaiting redevelopment and removing the eyesore of vandalised, boarded up, and dilapidated buildings;
- Creating incentives for property owners to invest in their vacant/disused properties;
- Providing artists and cultural organisations with a low-cost opportunity to pursue their art and exhibit their work.

## Setting up an "Administering Body"

### Role of the Administering Body

An entity, or 'administering body' (the **Administering Body**) is necessary to coordinate the activities of the Creative Enterprise Hub, seek out property owners willing to grant licences to use their buildings, and approve projects and participants in the hub (**Program Participants**).

### Possible structure of the Administering Body

There are several options for the structure of the Administering Body:

- **Government-run program:** a local council could establish the Administering Body as a program or initiative of the local government.
- **Not for Profit Company Limited by Guarantee:** a company limited by guarantee is a type of company under the *Corporations Act 2001* (Cth) (**Corporations Act**) which is formed on the principle that the liability of its members is limited to the respective amounts that the members undertake to contribute to the property of the company if it is wound up.

The following steps are necessary to establish a company limited by guarantee:

- Determine a name for the company after ensuring that the name you want is available. Generally, a company is required to indicate any limitation on the liability of its members in its name by including the word 'Limited' (eg. Creative Enterprise Hub Pty Limited). Upon request the Australian Securities and Investment Commission ([www.asic.gov.au](http://www.asic.gov.au); **ASIC**) can, however, approve the deletion of the word 'Limited' in certain circumstances, in particular if the company is set up as a not for profit organisation;
- Register the company by lodging the relevant form with ASIC. Only one member is required to register a company limited by guarantee. The company must, however, have at least three directors, who have certain duties towards the company.

Once registered, the company is allocated an Australian Company Number (**ACN**) and has to comply with the provisions of the Corporations Act, such as:

- Keep accounting records and issue annual financial reports and directors' reports;
  - Hold an general meeting at least once each calendar year;
  - Use its company name and ACN on all of its public documents and negotiable instruments.
- **Not for Profit Incorporated Association:** an incorporated association is a business structure formed by a group of people with a common interest and purpose who undertake activities in the name of the organisation. An incorporated association is a body corporate with a legal identity of

its own. This means that the association and its members are separate legal entities. The association continues through changes of membership until it is wound up and can acquire, hold and dispose of property as well as enter into agreements in its own name. The liability of its members is limited.

The requirements to establish an incorporated association are as follow:

- There must be at least five members;
- The members must authorise a person to apply for incorporation on their behalf, approve the organisation's objects and rules, and nominate at least two people to be committee members;
- The members or their representative must reserve a name by lodging an Application for Reservation of name with the department of Fair Trading;
- The members or their representative must lodge an Application for Incorporation.

Once incorporated, an association must comply with the rules in the *Incorporated Associations Act 2009* (NSW), including:

- Adopt governing rules;
- Holding an annual general meeting and at least three other general meetings per year;
- Maintain solvency and keep financial and other records;
- Operate only within New South Wales. If it carries on business outside that State, it must register as an Australian registrable body with ASIC. Similarly, an association incorporated in a State other than New South Wales must register as an Australian registrable body with ASIC if its wants to carry on business in New South Wales.

See Arts Law's publication *Business Structures and Governance: A Practical Guide for the Arts*, for more information on companies limited by guarantee and incorporated associations.

## Criteria for suitable properties / spaces

The following criteria are helpful in assessing whether a property or building is suitable for use as part of the Creative Enterprise Hub:

- **Properties should be vacant, disused or awaiting redevelopment:** the Creative Enterprise Hub should not be designed to replace existing tenants. Accordingly, the Administrative Body should seek out the owners of empty (or partially empty) buildings;
- **Partially occupied properties are suitable if the property owner can licence the use of a specific empty unit or space:** buildings with some existing tenants, such as office buildings or malls, are suitable as long as the property owner is willing to designate a space for a project;
- **Properties with storefront space or well-positioned signage are ideal:** they allow Program Participants to display their projects to the public. Projects which are visible to passers-by are more likely to reinvigorate the disused area;
- **Properties should be safe for immediate use and comply with applicable building, fire and safety codes:** although some maintenance by the Administering Body and Program Participants (such as repainting and removing vandalism) may be appropriate, properties should not be in a condition such that they pose an undue hazard to individuals who use and visit the space;
- **The property should have functioning utilities:** the properties should have functioning water,

electricity and (if necessary) gas. It is, however, not necessary for the property owner to bear the cost of utilities, which can be borne by the Administering Body and Program Participants. Given the essentially short term character of the licence, properties which require major maintenance or construction are not suitable;

- **Properties can be made available for short term or long term use:** when considering the licence term, the Administering Body should remember the following: One incentive for property owners for licensing a suitable property or building is that they retain control over the property by committing to a term which allows them to claim possession of their property in a quick and flexible manner. The Administering Body can be flexible in the length of the licence term it negotiates with property owners. Although anything under 30 days is probably too short to accomplish the program's goals, various term lengths can be negotiated and accommodated depending on the nature of projects.

## Criteria for eligible program participants / projects

In assessing whether a project would be a good fit for the Creative Enterprise Hub, the Administering Body may consider several criteria:

- **Projects should not compete with already existing businesses:** the point driving Creative Enterprise Hubs should be to reinvigorate a disused area (often the city centre) without harming any existing party. Property owners who licence their space are not at a loss, as the program targets unused spaces which they do not want to lease or have not been able to lease on commercial terms. In addition, other local businesses should not be disadvantaged by projects that compete with them (without having to pay rent);
- **Program Participants should be comfortable with the lack of secure, long-term arrangements:** Program Participants can be asked to leave the property upon 30 days notice from the property owner and Administering Body. They must be willing to trade-off the very low rent against the lack of security;
- **Ongoing uses are preferred to one-off or very short-term projects:** continuous projects are more likely to contribute to the ongoing life of the disused area. For example, a Program Participant wishing to run a gallery or host a series of exhibitions is preferable to an artist who wants space for a single exhibition;
- **Projects should be creative or cultural enterprises that inject vitality into the area:** projects should be unique, original and should serve as a draw to bring people back to the disused area;
- **Projects should have a high degree of professionalism and a clear vision:** there will be a limited number of spaces available to house projects. Accordingly, program candidates should be eligible only if they are serious about what they are doing and have a clear idea of what they are trying to accomplish. In addition, projects should be ready to begin and not require months of development before the space is put to use;
- **Projects should have the support of the property owner:** property owners have the ultimate right to decide what uses the Administering Body and Program Participants may make of their property;
- **Projects should be practicable in view of planning, local government and Building Code of Australia regulations:** some projects, in particular in the area of performing arts, may not be possible to implement because of legal restrictions related to places of public entertainment.

## Steps to implement Creative Enterprise Hubs

The following is a non-exhaustive list of steps necessary to implement a Creative Enterprise Hub:

## 1. Establish an Administering Body

Refer to the above section on 'Setting up an Administering Body' for more details;

## 2. Obtain insurance coverage

The Administering Body should obtain a public liability insurance policy to cover any potential liability it may face. If possible, the insurance policy should include coverage for participating projects. However, this policy would only cover damage a Program Participant causes to a person (or their property) who visits a Program Participant's project space. Accordingly, the Administering Body should strongly encourage Program Participants to take out their own insurance policies, including workers compensation insurance (if they have employees) and contents insurance. The Suite contains an information sheet that discusses insurance and liability issues;

## 3. Seek out property owners and enter into the appropriate agreements with them

- **Licence Agreement:** the Suite contains a template licence agreement between the Administering Body and property owners for use of buildings. The Licence Agreement grants the Administering Body a right to use the property for agreed-upon purposes on a rolling 30-day basis. Thus, the property owner has the right to terminate the licence at any time so long as it provides the Administering Body with 30 days notice. The Administering Body is not allowed to make alterations to the property without the consent of the property owner unless included in the permitted uses, and the Administering Body must notify the property owner of any damage. The property owner retains the right to enter the premises at any time (after providing reasonable notice) to inspect the premises and make repairs.
- **Outgoings/Utilities:** the Administering Body should negotiate with individual property owners as to how to handle utility payments (gas, water, electricity). The templates in the Suite are drafted on the assumption that property owners pay utility bills directly and then invoice the Administering Body for the amount paid. The Administering Body in turns invoices the Program Participants for the same amount.
- **Maintenance:** the Administering Body should undertake basic maintenance of the property while it is under its care (removing graffiti, re-painting, etc.).

## 4. Seek out Program Participants

- **Participation Agreement:** the Suite contains a template participation agreement between the Administering Body and individuals/organisations whose project proposals are accepted for inclusion (**Program Participants**). The Participation Agreement transfers some of the obligations of the Administering Body under the Licence Agreement to the Program Participant, and provides for reasonable conditions of use in connection with the properties. The Participation Agreement grants the Program Participant a sub-licence to use the property (for specified permitted uses) on a rolling 30-day basis in exchange for a nominal participation fee, for example \$20 per week.

The Participation Agreement makes the Program Participant responsible for paying for utilities and prohibits the Program Participant from using the space to create a nuisance or engage in illegal activities. Furthermore, it makes the Program Participant responsible for maintaining the property so it complies with fire safety and occupational health and safety requirements. Similar to the Licence Agreement, the Program Participant is not allowed to make alterations to the property without the consent of the Administering Body unless included in the permitted uses, and the Program Participant must notify the Administering Body of any damage it causes. The Administering Body and the property owner retain the

right to enter the premises at any time after providing reasonable notice. Although the Administering Body may have insurance which covers damage caused by the Program Participant, the Participation Agreement gives the Administering Body the right to require the Program Participant to take out insurance policies.

## 5. Assess the applicability of the Retail Leases Act:

Some Participation Agreements may fall within the ambit of the *Retail Leases Act 1994* (NSW) (**Act**). There will be a retail lease for the purposes of the Act if there is 'any agreement under which a person grants or agrees to grant another person for value a right of occupation of premises for the purpose of the use of the premises as a retail shop.' The term 'retail shop' covers an extremely wide range of businesses, including art galleries and the sale of art and craft from premises open to the public.

The Act generally does not apply to agreements to occupy premises for less than 6 months ('short term leases' under the Act) provided there is no right for the lessee to extend the lease. However, the Act does apply to successive short term leases where the combined term of the lease is greater than one year. Therefore, even if an agreement is entered into for a term of less than 6 months, the Act may apply if a person remains in the premises for more than one year.

The significance of the Act applying is that the Act can operate to override any agreement reached between the parties and it imposes a number of obligations on those deemed to be a 'lessor' under the Act. Of particular potential concern is the fact that the Act can operate to create a lease with a minimum term of 5 years. Property owners are only likely to be willing to participate in Creative Enterprise Hubs if they can maintain control over their properties and are not required to commit to a long term lease. Under the Act, terms shorter than 5 years can be agreed if the lessee provides the lessor with a certificate under section 16(3) of the Act (**section 16(3) certificate**). The effect of the lessor receiving a section 16(3) certificate is that the minimum 5 year term does not apply.

If the Act applies, a lessor is also legally obligated to provide the lessee with a number of other documents. As there is potential for the Act to apply to a Participation Agreement, the Administering Body should provide the following additional documentation (available at [www.retail.nsw.gov.au/onlineforms.aspx](http://www.retail.nsw.gov.au/onlineforms.aspx)) to Program Participants with the Participation Agreement:

- (1) Lessor's Disclosure Statement and Annexure (including an estimate of outgoings/utilities);
- (2) Lessee's Disclosure Statement. The Program Participant must complete and return the Lessee's Disclosure Statement to the Administering Body within 7 calendar days of receiving it;
- (3) NSW Retail Tenancy Guide;
- (4) section 16(3) certificate; and
- (5) an estimate of utility expenses.

It is very important that the parties understand their rights and obligations under the Act. It is essential that Program Participants understand the meaning and effect of a section 16(3) certificate. Program Participants who need advice on these issues as well as a section 16(3) certificate can contact Arts Law for advice.

## Additional Documents

The following documents are included in the Suite:

- **Template agreements:**
  - Licence Agreement (between the Administering Body and a property owner);
  - Participation Letter and Participation Agreement (between the Administering Body and Program Participant);
  - Agreements checklist.
- **Information sheets:**
  - Employment Issues
  - Liability + Insurance

## Disclaimer

The information in this document is general. It does not constitute, and should be not relied on as, legal advice. 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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