

Public Art: Design and Commissioning

Introduction

Public art as discussed in this information sheet refers to any permanent or temporary artistic works situated in public spaces and accessible by members of the public, excluding artworks held in the collections of galleries and museums. Such public art is often specially commissioned by local councils and other publically funded bodies to add character and atmosphere to a public space, whilst at the same time supporting local artists and the local economy.

Public art commissions create exciting opportunities for artists, allow Australians to enjoy aesthetically beautiful environments, and stimulate community engagement with the arts.

Public Art Policies

Many public art commissions are the result of current Local Council Public Art Policies (the Policies). The Policies are enacted by local councils and aim to create a culturally rich and prosperous community through support and encouragement of the arts. The growth in popularity of such Policies means that more artists are engaging with local councils and other similar bodies, and therefore require cost efficient access to commission agreements.

Public art commissions may also arise through a 'Percent for Art' scheme. Western Australia's [Percent for Art Scheme](#) uses an allocation of up to one percent of the estimated total cost of public building projects to commission public artworks from West Australian artists. Public building projects identified from the State Government's capital works list with an estimated total cost in excess of \$2 million are eligible for the consideration and inclusion of a Percent for Art component.

Increasingly public art projects are also funded by property developers creating public spaces within a commercial development. This may be due to public art private developer contribution requirements in the relevant local council's planning policies.

For example, the [City of Sydney public art policy](#) encourages the installation of public art in all commercial developments; however it is not a prerequisite for approval in single dwelling houses and other small developments. Public art may be included as a condition of consent in large developments, such as urban renewal areas and in all privately initiated multiple residential, commercial or industrial

projects which include a significant amount of public space or which have a construction value exceeding \$10 million.¹

City of South Perth gives a developer, in cases where public art is required as a condition of development approval, three options to satisfy the condition.² The developer may choose to provide their contribution as cash in lieu to the City's Public Art Fund, provide public art within the development or choose a suitable location within the neighbouring precinct of the development.

Commissioning models

The Policies generally specify three commissioning models depending on the nature of the project, the project scale and budgets.³ For projects with a significant budget, there would usually be an open competition, where councils would place an advertisement in appropriate publications inviting artists to submit expressions of interest to make proposals for public artworks. From the submissions, a shortlist of artists would be engaged to prepare concept proposals for a concept fee.

Where project budgets are small, where projects relate to specific cultural groups, or where the requirement is that the artist lives in a particular area, limited competition commissioning model would generally be used.⁴

In some circumstances, for example, where it is considered that the work of a particular artist would meet project objective, council may make a direct invitation to a particular artist to undertake a commission.⁵

There is also a hybrid model, suitable for smaller scale projects, a panel of providers, chosen from expressions of interest every couple of years, from which artists with relevant experience could be engaged. This combines limited competition and direct engagement.⁶

The commissioning process is similar in all models: establishing the brief and the selection criteria, artists' response to the brief, including their experience, shortlisting of artists (selection of the artist in the direct commission model), development of a design concept by the shortlisted artists (the selected

¹ City of Sydney Interim Guidelines for Public Art in Private Developments http://www.cityofsydney.nsw.gov.au/_data/assets/pdf_file/0005/139811/INTERIM_GUIDELINES_PUBLIC_ART_IN_PRIVATE_DEVELOPMENTS_SEP2006.pdf p. 2

² Public Art Guidelines for Community Groups and Individuals, City of South Perth <http://www.southperth.wa.gov.au/Documents/Services/Art-Collection-and-Public-Art/Public-Art-Toolkit---August-2014.pdf> p. 8.

³ Hobart City Council Public Art Strategy, http://www.hobartcity.com.au/files/783dd9ea-2f5f-44bc-a2f0-9d1f00b5f5a2/public_art_strategy.pdf p. 31

Public Art making it happen, commissioning guidelines for local councils https://www.lga.sa.gov.au/webdata/resources/files/PublicArt_MakingItHappen.pdf p. 8

City of Sydney City Art Public Art Strategy http://www.cityofsydney.nsw.gov.au/_data/assets/pdf_file/0004/139810/Final-Version-City-Art-Public-Art-Strategy.pdf, p. 62

Public Art Guidelines for Community Groups and Individuals, City of South Perth <http://www.southperth.wa.gov.au/Documents/Services/Art-Collection-and-Public-Art/Public-Art-Toolkit---August-2014.pdf> p. 14

⁴ Public Art making it happen, commissioning guidelines for local councils https://www.lga.sa.gov.au/webdata/resources/files/PublicArt_MakingItHappen.pdf p. 10.

There is a variety of limited commission models, such as where a (competitively appointed) curator or tenderer develops a shortlist of appropriate artists, or where a public art body (e.g. Public Art Advisory Panel in the City of Sydney) recommends suitable artists. City of Sydney City Art Public Art Strategy http://www.cityofsydney.nsw.gov.au/_data/assets/pdf_file/0004/139810/Final-Version-City-Art-Public-Art-Strategy.pdf, p. 62

⁵ Public Art making it happen, commissioning guidelines for local councils https://www.lga.sa.gov.au/webdata/resources/files/PublicArt_MakingItHappen.pdf p. 10.

⁶ Hobart City Council Public Art Strategy, http://www.hobartcity.com.au/files/783dd9ea-2f5f-44bc-a2f0-9d1f00b5f5a2/public_art_strategy.pdf p. 32

artist in the direct commission model), concept presentation and assessment against the brief, selection of concept (except in direct commission), signing of commissioning agreement, design development by the selected artist, creation of artwork, installation and handover of artwork.

When developing a design brief, the Policies require thorough planning, establishing clear objectives and ensuring that stakeholders' purposes are reflected in the brief, consideration of broader legislative requirements, development plans and council policies that impact on urban design decisions, public infrastructure, capital works, etc.⁷

Artists working with Local Councils

Arts Law is often approached by councils seeking advice on developing fair and reasonable systems for negotiating or contracting with artists, as well as by artists involved in public art commissions. To assist both the commissioners and artists, Arts Law has developed [public art guidelines](#) explaining all stages of a public art project and important issues to be addressed by the parties, as well as each parties' responsibilities during the commissioning process and for the life of the artwork, which should be read by the parties prior to committing to a project.

For an example of guidelines for creators and commissioners of public artworks – see: [City of Melbourne Public Art Program: Expressions of Interest 2012](#)

Public Art Design and Commission Agreement

Arts Law's [Public Art Design and Commission Agreement \(the Agreement\)](#) can be used whenever a public body such as a local council commissions an artist to create an artwork which will be publically exhibited. The Agreement can also be used where an artwork has been commissioned by a private entity, such as a building developer, and will be exhibited in a public place such as a lobby of a building. The aim of the Agreement is to create provisions which protect both the artist and the commissioner, allowing them to work together throughout the stages of development to achieve the best possible artistic output.

If an artist is being commissioned to design and create an artwork for private or commercial purposes, then Arts Law's sample [Design and Commission Agreement](#) may be more appropriate.

The commissioning process

When a public body commissions a work of art there are usually four stages: issuing of the brief to artist, designing the artwork, creation of the artwork and finally installation of the work.

The Agreement can help ensure each party is aware of their obligations and rights at each stage of the process as well as guiding them through any problems that may arise during the course of creation.

As well as covering the obligations of both parties throughout the creative process involved with the commission of a piece of public art, the Agreement deals with the associated copyright ownership in the artwork. Copyright ownership can be a contentious issue, and dealing with it at the start of the commission arrangement can reduce the likelihood of copyright ownership disputes further down the track.

⁷ Public Art making it happen, commissioning guidelines for local councils
https://www.lga.sa.gov.au/webdata/resources/files/PublicArt_MakingItHappen.pdf p. 15

Issuing of the brief to Artist

The Agreement assumes that this stage has already been completed at the time of entering into the Agreement and that the artist's preliminary design has been selected for a development into a detailed design.

Designing the artwork

At this stage, the artist is required to produce a more detailed design based on the brief and the preliminary design. If the commissioner accepts the design, the design forms part of the Agreement.

The Agreement allows the commissioner to seek changes to the design that do not make the design substantially different to the brief or the preliminary design. The commissioner is required to pay the artist a fee for the amended design.

The commissioner has a complete discretion to reject the design, which is why it is important for the parties to discuss the design and any changes in detail. If the design is rejected, the Agreement will automatically come to an end, however, the commissioner will be required to pay a design fee to the artist, provided the design is delivered on time and does not substantially differ from the preliminary design.

Creation of the Artwork

The artist must create the artwork in accordance with the design approved by the commissioner and, if requested by the commissioner, provide particular reports (for example, engineer's or safety reports) in connection with the creation and installation of the artwork. If the artwork is to be created onsite, the commissioner must provide the artist with full access, and the artist must notify the commissioner when the artwork is completed.

The commissioner may request a number of minor changes, but if the artist is not comfortable with making the changes, this clause should be deleted.

The commissioner may only reject the artwork if it is not created according to the design, but only after giving the artist an opportunity to correct the artwork. If the artwork is rejected, the Agreement will come to an end and the artist must return any payments other than the design fee to the commissioner, but may keep the artwork.

Installation of the work

The commissioner must prepare the site for the installation, however, the installation and the costs associated with it are the artist's responsibility. If the artwork is created offsite, the parties are to agree who will take the responsibility for the safe transport of the artwork.

The artist is required to provide the commissioner with the maintenance manual and the commissioner must ensure that the artwork is maintained in accordance with it.

The Agreement contains a 12-month warranty requiring the artist to rectify, at no cost to the commissioner any latent defects in the artwork, except for wear and tear or to defects which are inherent in the material selected or the site's environment.

Death or incapacity of the artist

In the event of death or incapacity of the artist, the Agreement provides for a pro-rata compensation of costs or expenses. Once the commissioner has made the payment, it owns the artwork and may engage another artist to complete the artwork, resulting in joint copyright of the final artwork between the original artist and the artist who completed the artwork.

This clause may be amended if the original artist does not want another artist to complete the artwork.

Intellectual property & ICIP

The Agreement is drafted to give title in the design and artwork to the commissioner, once the commissioner has paid the full commission fee, however, the artist retains ownership of copyright in the preliminary design, design and artwork. This means that the artist has the exclusive right to reproduce, publish and communicate the preliminary design, design and artwork to the public. The commissioner may only reproduce the artwork for certain limited purposes without further payment.

If the artwork is created by an Aboriginal or Torres Strait Islander artist and it contains or refers to Indigenous objects, knowledge or works, the [Indigenous Cultural and Intellectual Property \(ICIP\)](#) must be considered. Protocols have been developed by the Australia Council, which describe appropriate ways of using Indigenous cultural material, and interacting with Indigenous artists and Indigenous communities: [Visual Arts: Protocols for producing Indigenous Australian Visual Arts](#).

The protocols are not legally binding unless inserted into a contract, however, Arts Law strongly urges anyone dealing with works which embody ICIP to act consistently with the protocols.

Photography of the artwork

The Agreement gives the commissioner the right to reproduce the artwork for certain limited purposes (marketing, archival purposes) without further payment.

However, section 65 of the *Copyright Act 1968* (Cth) allows anyone to make reproductions of sculptures and certain other artworks permanently on display in a public place (eg. painting, drawing, engraving or photograph of artwork or including it in a broadcast), including for commercial purposes, without payment to the artist or infringing the artist's copyright. This means that if the artwork is subject to clause 65, the commissioner will be able to use the images for purposes other than those specified in the Agreement.

Moral Rights

Moral rights are rights that are personal to the author of an artwork and include the right of the author to be named as the creator of the work, the right of the author to prevent others to be named as creators of the work and the right of the author to ensure his work is not subjected to derogatory treatment. Arts Law has developed an information sheet on [Moral rights](#).

The Agreement requires the commissioner to attribute the author of the work, and if the artwork involves the use of ICIP, the custodial interest of the community. This is subject to the author's right to have any notice identifying him with the artwork removed where the artwork is completed by another artist, where another artist performs repairs to or restoration of the artwork, or where the commissioner alters, modifies or relocates the artwork.

In the event of destruction, removal, deaccession or relocation of the artwork, the Agreement requires compliance with section 195AT of the *Copyright Act 1968* (Cth). This section requires the person who wishes to destroy, remove or relocate the artwork to give the author a reasonable opportunity to remove the work from the place where it was situated, or a notice stating the person's intention to carry out the above acts and an opportunity for the author to seek and have access to the artwork for the purpose of making a record of the work, or consulting with the person about the intended acts.

Resale Royalty Right for Visual Artists Act 2009

If the artwork is sold to a third party during the term of the artist's copyright in the artwork, the Agreement provides that the commissioner is required to pay the artist a resale royalty of 5% of the sale price when eligible artworks are sold commercially for \$1000.00 or more during the artist's life or for a period of 70 years after the artist's death. The [artists' resale royalty scheme](#) is managed by the

[Copyright Agency/Viscopy](#). For more information on resale royalties, refer to Arts Law's Information sheet [Resale royalty rights for visual artists](#).

Liability and insurance

The Agreement allows the parties to agree on who will bear the risk of the artwork being lost or damaged during various stages of the creation process. It would usually be the party who has the greatest level of control over the artwork at that stage and this depends on whether the artwork is created on the commissioner's premises or not. Under the Agreement, both parties must maintain public liability insurance in relation to any artwork created on their premises. Arts Law's information sheet on [Liability and insurance](#) provides further information on various types of insurance.

Disputes

The Agreement requires the party who wants to access the dispute resolution procedure to first send a written notice of the dispute to the other party. The parties are required to act in good faith in attempting to resolve the dispute themselves. However, if this is not possible, then the parties must attend mediation arranged through Arts Law mediation service. Mediation is an informal and less expensive process of dispute resolution where a facilitator encourages the parties to negotiate a resolution which is acceptable to them. Only after the parties have attempted mediation can either of the parties commence court proceedings. For further information on mediation, see Arts Law's [Alternative Dispute Resolution and the Arts Law Mediation Service](#).

Information on the Arts Law site includes some articles related to sculpture

It is very important that all parties have a clear understanding of their rights and obligations in the process of public art commission and it is preferable to have terms of the agreement set out in writing. In addition to this information sheet, there is other valuable information on commissioning artworks on the Arts Law's website, including the following case studies:

[A Cancelled Commission Case Study](#)

Victor Cusack, "Man, Time, and the Environment" - [Negotiating with Councils](#)

The Town of Victoria Park: [Best Practice in Public Art](#)

Further information

Arts Law publishes '*Visual Artists and the Law*' by Shane Simpson. 3rd Edition by Annabel Clemens (2013) in [EPUB format](#), [MOBI format](#) & [eBook - PDF format](#); which provides a commentary on: the basics of copyright (Ch 1); trading copyright (Ch, 2); protecting your copyright (Ch 3); moral rights (Ch 4); contracts (ch 5); collecting societies (Ch 7); resale royalties (Ch 8); securities, sales and galleries (Ch 9); art and the internet (Ch 10); Aboriginal and Torres Strait Islander artists (Ch 11); photography (Ch 12); sculptures (Ch 13); design (Ch 14); insurance and liability (Ch 16); debt (Ch 17); tax and super (Ch 18).

Arts Law publishes: Catherine Fargher and Seth Richardson, [The Arts Insurance Handbook](#): A Practical Guide for Artists and Arts Organisations, 2nd ed., Arts Law Centre of Australia, 2005.

You can find information about copyright at the [Australian Copyright Council](#) website, including:

- An introduction to Copyright in Australia
- Artists & Copyright
- Assigning & Licensing rights

- Street Art and Copyright

Need more help?

Contact Arts Law if you have questions about any of the topics discussed above

Telephone: (02) 9356 2566 or toll-free outside Sydney 1800 221 457

Also visit the [Arts Law website \(www.artslaw.com.au\)](http://www.artslaw.com.au) for more articles and information sheets

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