

EXPLANATORY NOTES

USING THE EXPLANATORY NOTES

The Explanatory Notes are intended to provide more detailed explanations of certain clauses in this **sample agreement**, or to give more detail about the law involved.

The Explanatory Notes **DO NOT** form part of the agreement and **SHOULD NOT** be included in your final redrafted agreement.

The Explanatory Notes are not intended as legal advice and should be considered information only. You can contact Arts Law for legal advice.

PARTIES

The agreement should clearly identify the name, address and preferably the telephone and fax numbers, of the persons or entities who enter it (**Parties**). Throughout the rest of the agreement, the parties are referred to or “defined” by shorthand terms for ease of reference, for example Artist. Other terms could be used, or the parties could simply use their own name.

If a party has an Australian Business Number (**ABN**), Australian Company Number (**ACN**) or Australian Registered Body Number (**ARBN**), the number must be included. The ABN is important for GST purposes.

If either party is a company, its Australian Company Number (**ACN**) and the address of its registered office must be stated.

BACKGROUND

This agreement is designed for use in situations where there is a four stage process:

1. **Stage 1:** Council, government body, company or other organisation (called the **Commissioner**) issues a creative brief (**Brief**) for a public Artwork and selects one or more artists (**Artist**) based on a preliminary design submitted in response to the brief;
2. **Stage 2:** The Artist develops a more detailed design based on the Brief and preliminary design. This more detailed design (**Design**) is submitted to the Commissioner for acceptance and may be amended following consultation with the Commissioner.
3. **Stage 3:** If the detailed design is accepted, the Artist creates the Artwork (**Artwork**) based on the design accepted in stage 2.
4. **Stage 4:** Installation of the Artwork.

This agreement assumes that stage 1 has already been completed at the time of entering into this agreement, and that the Artist’s preliminary design (**Preliminary Design**) has been selected for development into a detailed design.

TIMEFRAMES

PROJECT TIMEFRAMES (CLAUSE 1)

This is often one of the most critical issues. An agreed timeline for the expected completion of each stage is included in the Schedule to the agreement and the Artist and Commissioner agree to use their best efforts to ensure the project is completed according to that agreed timeline.

DELAY (CLAUSE 2)

In the event that there is a delay beyond the parties’ control, each party agrees to take all reasonable steps to minimize any losses resulting from the delay. This does not affect a party’s right to terminate if the delay extends beyond a specific period. See clause 30 (Termination).

DESIGN DEVELOPMENT: STAGE 2

THE DESIGN (CLAUSE 3)

The Artist must produce a Design based on the Brief and the Preliminary Design.

The Brief should be attached to the agreement as **Annexure 1**. The Brief should set out the Commissioner's expectations and the parameters with which the Artwork should comply. For example, the Brief should include:

- an overview of the project;
- a statement of the design philosophy;
- goals and outcomes expected by the Commissioner;
- site where the Artwork will be located as well as location of the Artwork on the site and any site specific requirements;
- stylistic preferences;
- information as to the selection process and criteria;
- the amount of detail required to be included in the Preliminary Design;
- timetables and deadlines;
- budget, breakdown of costs; and
- all other relevant information which may have an impact on the design, production and installation of the Artwork.

In clause 3, the Commissioner confirms that the Artist's Preliminary Design, which must be attached as **Annexure 2** to the agreement, conforms with the Brief.

CHANGES TO THE DESIGN (CLAUSE 4)

The Commissioner can request changes to the Design prior to accepting it but must include all changes in one notice and cannot request an unreasonable number of changes. The Commissioner must also pay the Artist an agreed fee to produce an amended design responding to those changes. The Commissioner may not request any change to make the Design substantially different from the Brief or the Preliminary Design.

The Commissioner must request any changes to the Design within the time specified in the Timeline.

ACCEPTANCE OF THE DESIGN (CLAUSE 5)

Once the Commissioner has accepted the Design, the Design forms a part of the agreement. Although it is preferable that the Commissioner accepts the Design in writing, clause 5.3 provides that the Design is considered to have been accepted if the Commissioner does not expressly request changes to the Design or reject the Design in writing within the agreed timeframes.

REJECTION OF THE DESIGN (CLAUSE 6)

The Commissioner has complete discretion to reject the Design. It is therefore very important that the Commissioner and the Artist agree on what the Artwork will look like. Both parties should ask questions and discuss the Preliminary Design and Design and any changes in detail to ensure that they have similar expectations.

The agreement will come to an end if the Commissioner rejects the Design. The Commissioner is still required to pay a fee to the Artist for the development of the Design (**Design Development Fee**) unless the Design was delivered late or differs substantially from the Preliminary Design. The Design Development Fee is part of the Commission Fee referred to in clause 15 and set out in the Schedule, which details the payment owed to the Artist.

CREATION OF THE ARTWORK: STAGE 3

THE ARTWORK (CLAUSE 7)

The Artist is responsible for the creation of the Artwork in accordance with the design approved by the Commissioner.

Both the Artist and the Commissioner need to consider the issue of whether particular reports (eg. engineer's or safety reports) are required in connection with the fabrication and installation of the Artwork. If so, such reports should be listed in the Schedule. In this agreement, the Artist is responsible for providing these reports. Both parties should consider the cost of these reports when budgeting for the project and deciding the amount and timing of any instalments of the Commission Fee.

The parties should consider carefully the Timeline and ensure that it is realistic in the context of the project as a whole and the time needed to procure any reports which are required.

If the Artwork is to be created onsite, the Commissioner must provide the Artist with full access to the Site to complete the Artwork (**Clause 7.2**).

If there are access issues with the Site, for example if it can only be accessed outside normal business hours, this needs to be addressed in the agreement. The impact of access problems should be taken into account when determining the Timeline and overall budget of the Artwork.

The Artist must notify the Commissioner and provide access to the Artwork when the Artwork is completed. Clause 7.3 specifies the length of time the Commissioner has to accept or reject the Artwork or request changes.

CHANGES TO THE ARTWORK (CLAUSE 8)

Clause 8 provides an opportunity for the Commissioner to request a certain number of minor changes to the Artwork. The Commissioner cannot request the Artist to change the Artwork in a way which is substantially different from the Design. It is important that the parties discuss proposed changes in detail and try to agree on their scope and nature so that both parties are happy with the final Artwork.

The Artist should carefully consider whether he/she is comfortable with a process that involves making changes to the Artwork. In some cases, the nature of the Preliminary Design may mean that changes to the Artwork are likely to be complicated, expensive or even impossible. If this is the case, the agreement may need to be amended to delete the clauses giving the Commissioner a right to seek changes. The Commissioner will still be able to reject the Artwork for any reason.

ACCEPTANCE OF THE ARTWORK (CLAUSE 9)

Clause 9 provides for the Commissioner to notify the Artist in writing when the Commissioner accepts the Artwork. The Artwork is deemed accepted if the Commissioner does nothing.

REJECTION OF THE ARTWORK (CLAUSE 10)

The Commissioner may reject the Artwork only on the basis that the Artist **has not** created it according to the Design. The Commissioner must allow the Artist an opportunity to correct the Artwork to meet the requirements of the Design. If the Commissioner rejects the Artwork under clause 10, the agreement is automatically terminated and the Artist must return any payments other than the Design Development Fee but may keep the Artwork.

INSTALLATION: STAGE 4

THE SITE (CLAUSE 11)

Attach a copy of the Site plan to the agreement. The Commissioner is responsible for preparing the Site for the installation of the Artwork. The parties should discuss this to ensure that any specific requirements are met on time.

DELIVERY AND INSTALLATION (CLAUSE 12)

In this agreement the Artist is responsible for installation and the costs associated with that. If the artwork is created offsite, it is important to agree who will take responsibility for the safe transport of the Artwork.

The parties can share these responsibilities. It must be clear who is responsible and paying for each stage of the process. If the Artist is paying for the transport of the Work to the site, this will almost certainly affect the Commission Fee.

MAINTENANCE MANUAL (CLAUSE 13)

The Artist is required to provide the Commissioner with a written manual containing detailed instructions for proper cleaning, operation and maintenance of the Artwork.

The commissioner must ensure that the Artwork is properly maintained according to the Artist's instructions in the Manual.

DEFECTS LIABILITY (CLAUSE 14)

Artists should be aware that this agreement contains a 12 month warranty (i.e. a promise) requiring the Artist to rectify, without charge to the Commissioner, any defects in the Artwork.

The agreement provides that the Artist will rectify, at no cost to the Commissioner, any latent (i.e. hidden) defects in the Artwork arising within 12 months from the date of acceptance of the Artwork by the Commissioner.

Clause 14 will not apply to any fair wear and tear, or to defects that are inherent in the materials selected or are the result of the Site's environment.

ARTIST PAYMENTS

COMMISSION FEES (CLAUSE 15)

The agreement involves progress payments at different stages which will be set out in the Timeline. The parties can negotiate how the fee will be paid to reflect the particular project. For example, there may be several stages of production and the Artist may want the instalments in different amounts at particular times to cover materials or subcontractor fees.

AMENDMENT FEES (CLAUSE 16)

Clause 16 provides that the Artist is entitled to additional payments for work done to produce an Amended Design or Amended Artwork in response to changes requested by the Commissioner.

SUBSTANTIAL VARIATION (CLAUSE 17)

Clause 17 provides the Artist with the right to request a variation of the Commission Fee where amendment to the Artwork will increase costs by an agreed percentage. Upon receiving the Notice of Variation, the Commissioner must either agree to vary the Commission Fee, withdraw the Amendment Notice and accept the previous Design or Amended Design or reject the Design or Amended Design.

DEATH OR INCAPACITY OF THE ARTIST (CLAUSE 18)

Hopefully the situation will not arise where the Artist is unable to complete the Artwork through death or incapacity. However, it is important to agree what will happen in that event.

This agreement provides for a pro-rata compensation of costs based on Artwork already performed or expenses incurred up to the date of death or incapacity. The purpose of clause 18.2 is to ensure that the Artist or the Artist's estate recovers all expenses incurred in relation to the Artwork.

Once any payment under clause 18.2 has been made, the Commissioner will own the Artwork, and may engage another artist or craftsperson to complete it, in consultation with the Artist or the Artist's estate.

Copyright in the Artwork will be owned jointly by the Artist or his/her estate and the other artist or craftsman who complete the Artwork.

Alternatively, clause 18 should be amended if the Artist does not wish his/her Artwork to be completed by another artist or craftsman under any circumstances.

INTEREST (CLAUSE 19)

Clause 16 provides that the Commissioner must pay interest on any late payments at the agreed rate.

GOODS AND SERVICES TAX (CLAUSE 20)

The parties to the agreement must consider their obligations with respect to taxation and other statutory fees and charges.

GST is a general tax on goods and services supplied in Australia. Most supplies for arts businesses made for consideration (e.g. money or payment in kind) will be subject to GST. Clause 20 provides that payments are *exclusive* of GST. If this does not suit your situation, you will need to consider an alternative clause.

You should obtain specific professional advice on your GST and tax position and obligations under the agreement and generally.

For more information contact the Australian Taxation Office on 13 28 66 or visit the website www.ato.gov.au. In addition, the Australia Council for the Arts has published [*Artefacts: the Arts and Tax - a practical tax Artworkbook for the arts sector*](#) which can be downloaded free from the Australia Council website.

INTELLECTUAL PROPERTY

TITLE AND COPYRIGHT (CLAUSE 21)

Title refers to the ownership of the actual physical artwork object itself. It is appropriate that title in the Design and the Artwork belongs to the Commissioner once the Commissioner has accepted the Artwork and paid the full Commission Fee.

Title is separate from copyright in the Artwork. Arts Law recommends that the Artist retain ownership of copyright in the Preliminary Design, the Design and the Artwork.

NOTE: If the Commissioner wants to obtain ownership of any copyright, the Commissioner should pay the Artist an additional fee for this. This sample agreement does not deal with this situation. Arts Law recommends that the parties seek advice if they wish to vary the copyright arrangement.

Clause 21 contains a warranty (i.e. a promise) by the Artist that the Design and the Artwork are the Artist's original Artwork and do not infringe the copyright or moral rights of any third party. If this is not the case, the Artist will be in breach of the agreement and possibly infringe the *Copyright Act 1968* (Cth).

As the owner of the copyright, the Artist has the exclusive right to reproduce, publish and communicate the Preliminary Design, the Design and the Artwork to the public. Communicate includes making copies or images of the Artwork available online or electronically transmitting copies or images, for example in a television broadcast or film. Normally the copyright owner's permission is required to make a reproduction of an Artwork such as taking a photograph, making a drawing or including it in a film.

Clause 21.5 allows the Commissioner to reproduce (eg. photograph) the Artwork for certain limited purposes without further payment provided the Artist is attributed to the Artwork as per clause 21.6.

However, the Artist should be aware that there is an exception under the Copyright Act that allows people to make reproductions (eg. to make a painting, drawing, engraving or photograph of the Artwork or to include it in a film or a television broadcast) of sculpture and certain other Artworks that are permanently displayed in public spaces. For example, the Henry Moore sculpture outside the Art Gallery of NSW can be photographed without the copyright owner's permission.

ATTRIBUTION (CLAUSE 22)

The right to be attributed is one of the moral rights that artists have under the Copyright Act. Clause 22 provides an avenue through which the Artist is able to specify the way he/she would like to be attributed.

The agreement also includes the option for an Indigenous community to be attributed if any Indigenous Cultural Intellectual Property (ICIP) has been used in creating the Artwork. Please refer to the section above on ICIP.

REPAIRS AND RESTORATION (CLAUSE 23)

Under the *Copyright Act*, the artist has a moral right of integrity in relation to his/her Artwork. This means that no one can make any significant change to the Artwork which may harm the artist's reputation, without the artist's consent.

Clause 23 requires the Commissioner to give the Artist the first option of repairing the Artwork. If someone else makes the repairs, the Artist may request that his/her name be removed from the Artwork.

ALTERATION AND DEACCESSIONING OF THE ARTWORK (CLAUSE 24)

Clause 24 deals with the destruction, relocation or sale of the Artwork. Under the *Copyright Act*, the Artist has a moral right of integrity in relation to his/her Artwork which places certain obligations on people who wish to destroy, remove or relocate Artworks. These obligations include giving the artist an opportunity to make a record of the Artwork (eg. take photographs).

Clause 24 also ensures that the Artist will receive a resale royalty if the Artwork is sold.

LIABILITY AND INSURANCE

RISK OF LOSS OR DAMAGE (CLAUSE 25)

The parties need to decide who will bear the risk of the Artwork being lost or damaged until it is installed. A rough guide to who should bear the risk is considering who has the greatest level of control over the Artwork at that stage of the process. It is appropriate that the Commissioner bears the risk after installation. The sample agreement gives the parties a choice between two options:

1. Option 1: the Artwork is created at the Commissioner's premises; or
2. Option 2: the Artwork is not created at the Commissioner's premises.

If possible the costs of loss or damage, and whether appropriate insurance is available, should be considered when budgeting the Artwork.

Clause 25 provides that whichever party bears the risk of the Artwork being lost or damaged until completion is obliged to obtain and maintain insurance to cover any loss or damage caused to the Artwork.

The Artist is responsible for insuring his/her personal property and equipment.

WORKERS' COMPENSATION (CLAUSE 26)

Under this agreement, the Artist has the obligation to maintain worker's compensation insurance for himself/herself and any employees, contractors or agents (unless otherwise agreed in writing with the contractors and/or agents) as required by law.

PUBLIC LIABILITY (CLAUSE 27)

Clause 27 provides that both the Artist and Commissioner will be responsible for maintaining public liability insurance cover in relation to any work done on their respective premises and the Artwork while situated on their premises..

Public liability insurance is very important. It is used to insure against claims made by other people on the ground that the insured person, by negligence, has caused injury or property damage. For example, if the Artist leaves a piece of equipment in a dangerous place at their premises and a third party falls over the equipment, public liability insurance will cover any claim by that third party

against the Artist for damages suffered as a result of the fall. Public liability insurance is unlikely to cover any loss or damage caused by the the insured person's unlawful or wilfully negligent acts. The Commissioner remains responsible for maintaining the public liability insurance once the Artwork is delivered and/or installed. This is a sensible approach because it is the Commissioner that has the most control over the Artwork at that time.

Arts Law recommends that the parties obtain professional advice to ensure that adequate insurance cover is obtained as required under this agreement.

INSURANCE POLICIES (clause 28)

Clause 28 requires the Artist to provide copies of all required insurance policies to the Commissioner. The Artist may also want to request copies of all relevant policies maintained by the Commissioner.

The Artist must ensure all premiums are paid before the due date. In the event the Artist fails to maintain insurance coverage, the Commissioner may do what is necessary to maintain insurance coverage. Any expense incurred by the Commissioner to maintain insurance coverage, is repayable by the Artist.

INDEMNITY (CLAUSE 29)

The Commissioner will indemnify the Artist against claims arising from injury, death, loss or damage to any third party during production and installation at the Site or at the Commissioner's premises or the premises of its agents or employees, or following installation of the Artwork. Again, this is a sensible approach because it is the Commissioner that has the most control over the Artwork at that time and it is the Commissioner that will have obtained insurance cover for this loss.

The Artist is required to indemnify the Commissioner against any losses arising out of a contravention of the Artist's warranty in clause 21.1.

The parties would normally get insurance for this situation.

TERMINATION

TERMINATION (CLAUSE 30)

The Artist may terminate (i.e. end) the agreement by written notice if the Commissioner fails to make the agreed payments or breaches certain important terms. The Commissioner may terminate the agreement if the Artist fails to remedy any breach of the agreement after the Commissioner has informed the Artist of the breach.

In determining what period of time there should be to put things right, the parties should consider what is appropriate, depending on the time frame of the commission.

The agreement is also terminated following rejection of the Design or the Artwork, or if an unavoidable delay lasts beyond a certain period.

Clauses 30.4 to 30.8 deal with the consequences of termination.

DISPUTES (CLAUSE 31)

It is almost never worth going to court to resolve a dispute, but not every problem can be solved easily. Clause 31 provides that a party which wants to access the dispute resolution procedure in the contract must first send a written notice of the dispute to each other party. This starts a timetable for resolving the dispute. The parties must make a good faith effort to sort out their dispute themselves, but if that isn't successful the parties must then attend a mediation arranged through the Arts Law mediation service (at least one party must subscribe to access this service). Compared to litigation and arbitration, mediation is an informal and less expensive dispute resolution process, in which an independent person helps the parties in conflict to formulate their own solution. For more information see Arts Law's information sheet: [Mediation and the Arts Law Mediation Service](#).

The Arts Law mediation service expects that the parties will be able to agree on the person to be appointed as the mediator. If however that is not possible, the contract provides that the Arts Law Centre will appoint a mediator. Instead of the Arts Law Centre, the parties may wish to nominate

another independent body within their industry such as NAVA. Only after the parties have attempted mediation, can the dispute be the subject of court proceedings.

GENERAL PROVISIONS (CLAUSE 32)

Clause 32.1 defines the relationship between the Artist and the Commissioner as one of independent contractor as distinct from, among other things, one of employment. It indicates the intention of the parties but may not be legally effective if in reality the Artist is an employee or partner of the Commissioner.

Clause 32.2 specifies how notices under the agreement can be given, and when they are considered to be served (i.e. given).

Clause 32.3 is included to ensure that the parties entering the agreement will solely be responsible for their obligations. If any responsibilities are to be delegated or subcontracted, the subcontractors and their obligations should be first agreed to.

A legally enforceable agreement can comprise both written and verbal (oral) terms. Oral terms can be expressly stated or implied from the circumstances. In the interests of certainty, clause 32.4 seeks to ensure that the written agreement contains all relevant terms. Anything that might have been canvassed during negotiations which is not actually set out in the agreement will generally be *excluded* by this clause. However, there are exceptions, for example, where terms cannot be excluded by statute and where one party has made deliberate or negligent misrepresentations on which the other party relied in entering the agreement.

Clause 32.5 addresses possible future changes to the law in favour of Indigenous rights. It provides that should these laws be enacted that the parties to the agreement will comply with the law.

Clause 32.6 requires any changes to the agreement to be in writing signed by both parties. This avoids confusion over the terms of the agreement and prevents a party arguing that an agreement was varied orally.

Amend clause 32.7 to state the appropriate governing law for the agreement and the place where possible litigation should be conducted if the parties fail to resolve any conflict under clause 31. This is particularly important if the agreement is between people in different states or different countries where laws may vary.

SIGNING THE AGREEMENT

If you are an individual, sign your name and write in the date of signing where indicated at the end of the agreement. This is sometimes called “executing” the agreement.

If a company or association rather than an individual is a party to the agreement, the organisation’s rules and relevant laws determine who is authorised (for example a director, a secretary), and how many authorised signatories (for example two directors, or a director and a secretary) are required, to sign the agreement. It may also be necessary to stamp or “affix” the document with the company’s or association’s seal if this is required under its constitution or articles of association. In that situation, replace the existing wording “Signed for and on behalf of ...” as follows:

“The Common Seal of the [party] was fixed to this agreement ...”

If someone else is signing on behalf of either party as his/her agent, you should insert the following sentence into the signature section:

“I am the authorised agent for ...”

If any of the parties is under the age of 18, his/her parent or legal guardian needs to sign the agreement “on behalf” of the child. This does not mean that the parent or legal guardian becomes a party to the agreement in his/her own right.

If there is a change to the agreement at the last minute before signing, you can either retype the agreement, or make the change in handwriting and have each party initial next to the change before signing at the end. You may also wish to initial each page to make sure no new pages are inserted after you have signed, but this is not strictly necessary.

KEEP RECORDS OF YOUR AGREEMENT

Signing the agreement is evidence that you agreed to what is written there. You will usually be bound to perform the agreement as it is written. For this reason it is a good idea to get the same number of identical originals of the agreement as there are parties to it and have all original signed by all parties. Each party then keeps a fully signed copy. At the very least, however, make sure you have a *copy* of the original agreement so that you can remember what you have signed.

STAMP DUTY

Stamp duty, or duty, is a tax which is enforced and collected by State and Territory governments on certain "instruments" (i.e. documents) and transactions relating to property such as partnership interests or shares, or in some cases, intellectual property such as copyright. You should check with the Office of State Revenue in your State or Territory as to what duty, if any, may be payable on your document or transaction.