



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 should contact Arts Law for specific legal advice.

PARTIES

The agreement should clearly identify the name and address, and preferably the telephone and fax numbers, of the persons or organisations entering into the agreement (**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 names.

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.

CONSIGNMENT (CLAUSE 1)

The consigned works (**Works**) should be described as fully as possible in the Schedule by referring to their description or title, materials and dimensions, and any other features that distinguish the Works. Both parties must be clear about what the consigned Works actually are. Where feasible, a photograph should be attached.

Describe the Works accurately. For example, do not give a false impression about their quality or composition. Do not describe any Work as a “one-off” or “limited edition” if this is not true.

The parties must agree on the start and finish dates for the consignment (**Consignment Period**). The start date is the date when the Works are delivered to

the Gallery (clause 1.1.c) and the end date is the date stated in clause 1.3. If the parties want the option to extend the initial Consignment Period, this clause should provide for that option and detail the process for seeking an extension. Clause 1.3 should be amended if the agreement should be open-ended rather than for a fixed period of time.

Once the Consignment Period expires, the Gallery must cease exhibiting and selling the Works and must return any remaining Works to the Artist, as provided under clause 11.4.

Clause 1.1.c states when the Artist must deliver the Works to the Gallery. The parties must insert the address for delivery and the date and time by which the Works must be delivered to the Gallery.

Clause 1.2.b refers to the price set by the Artist for sale of the Works (**Retail Price**). Artists should be careful to set their prices and commissions independently from other artists who may also supply the same gallery. It is good to be competitive in pricing but illegal to fix prices with competitors.

Clause 1.2.c provides that the Gallery cannot discount Works without the Artist's prior written permission, as it is the Artist who is selling the Work to the purchaser through the Gallery. Another reason for a Gallery to obtain the Artist's permission prior to discounting any Retail Price is that some artists may consider that "bargain pricing" affects the integrity of their artwork, with the result that the Gallery would infringe the Artist's moral rights if the Gallery acted without permission.

GALLERY'S COMMISSION AND COSTS (CLAUSE 2)

The Gallery's commission percentage should be inserted in clause 2.1.

If a Work is discounted under clause 1.1.c, clauses 2.2 and 2.3 provide an alternative as to who bears the discount. Under clause 2.2, the discount is shared between the Gallery and the Artist. Under clause 2.3, the discount is deducted from the Gallery's commission and the Artist gets paid on the basis of the original Retail Price.

Clause 2.4 ensures that the Gallery cannot charge the Artist for any hidden costs involved in the consignment. The Artist will be liable for any other cost, for instance framing, only if he/she has agreed to that cost in writing.

PAYMENT TO THE ARTIST (CLAUSE 3)

The Artist should specify the method of payment, for instance by cheque, bank cheque, direct deposit, cash or some other arrangement.

The parties must agree how sales are to be made from the Gallery. Is the Gallery allowed to make credit or instalment sales? If instalment sales are allowed, is the Gallery allowed to release the Work to the purchaser before all instalments are received? It is in the Artist's best interest that the Work is not released until all payments are made so that the purchaser does not default after receiving delivery. Will instalments be paid to the Artist as they come in, or as a lump sum when the full payment is received, or will the Gallery take on the risk of the purchaser defaulting and pay the total price to the Artist immediately as if a "full" sale has taken place? What happens if the purchaser defaults? These issues should be considered carefully and clause 3 amended to reflect the parties' agreement.

In *Earning a Living in the Visual Arts*, James Stokes argues that purchaser information is the property of the Artist, as the Artist is in fact selling directly to purchaser in a consignment arrangement. Purchaser information is valuable marketing information for the Artist. Accordingly, clause 3.4 requires the Gallery to use best efforts to collect this information and pass it on to the Artist. However, the

Artist should be aware that some galleries may resist assuming this obligation. Purchasers may also be wary of providing personal details.

You should ensure that you comply with any privacy laws in collecting and using purchaser information. Please refer to the Arts Law Centre's Information Sheet [Privacy and the Private Sector](#).

GOODS AND SERVICES TAX (CLAUSE 4)

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 4 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 workbook for the arts sector](#) which can be downloaded free from the Australia Council website.

THE GALLERY'S OTHER RESPONSIBILITIES (CLAUSE 5)

Clause 5.1 needs to be changed if the Artist wishes to be present to supervise unpacking and installation of the Works or if the Gallery is working with a stock room and is not going to display the Artist's Works at all times.

The Gallery may frame or remount the Works only at the Artist's request or with the Artist's written permission (clause 5.1.d). Clause 5.2 provides that if the Gallery undertakes any framing or remounting, the Artist should be consulted in order to ensure that this does not damage the Works, make them difficult to sell through other outlets if the Works are unsold at the end of the Consignment Period, or infringe the Artist's moral rights (see clause 10).

The parties should also consider who is going to pay for reframing or remounting. Clause 5.2 provides that the Gallery pays for this out of its commission unless otherwise agreed in writing. You should change this if there is a different arrangement.

At law, the Gallery has a duty to take all "reasonable care" with the Works. What is reasonable will depend on the circumstances, including the durability of the Works. If the Works are fragile, or susceptible to climatic conditions, section 5.1.e should specifically refer to this, and the required insurance should be sufficient to cover any damage. Clauses 5.1.e to 5.1.h deal with the Gallery's duty to take all reasonable care with the Works and state specific precautions which the Gallery will take to ensure it exercises reasonable care.

TRANSPORT OF THE WORKS (CLAUSE 6)

The parties must determine which party will be responsible for the safe transport of the Works to and from the Gallery. The party responsible for transport must take out insurance that is appropriate and sufficient to cover the potential risks of loss, damage or destruction of the Works in transit.

Clause 6 provides that either the Artist or the Gallery is responsible for the transport of the Works until they reach the Gallery, and that the Gallery is responsible for the return of Works to the Artist or for the delivery of any Work sold to the purchaser.

This is a matter for negotiation and clause 6 should be amended to reflect any agreement reached.

TITLE (CLAUSE 7)

Title refers to the actual physical ownership of the Work. Title in the Work is separate from any copyright or moral rights in the Work.

Clause 7.1 confirms that the Gallery never owns title to any of the Works at any time. The Artist remains the owner until the purchaser has paid the price in full. At that time ownership of the Work passes directly from the Artist to the purchaser. Therefore, if the Artist passes away, any unsold or partly paid works belong to the Artist's estate, not to the Gallery.

Should there be a written contract of sale with the purchaser?

The Artist should require the Gallery to use a written contract of sale with the purchaser. A sample Sale of Artwork agreement is available from Arts Law.

A written contract should include a clause providing that title to the physical Work remains with the Artist until the full sale price is paid (as provided for in the agreement), and a clause stating that copyright remains with the Artist (see clause 8). The Artist needs to either sign the contract personally, or authorise the Gallery to sign as the Artist's agent. In addition, the Artist should ensure that there is a "moral rights" clause in the agreement under which the purchaser agrees to attribute the Artist and, without limitation, not to mutilate, repaint or destroy the Work. The purchaser could also agree to use best efforts to ensure that the same obligations are passed onto new purchasers.

There are some other clauses that an Artist might consider inserting into a written contract of sale with the purchaser. One is a clause for designating who is responsible for the transport of a sold Work from the Gallery to the purchaser. This has already been discussed. Further, pending the introduction of a mandatory resale royalty scheme in Australia, Arts Law recommends to include resale rights in any agreement providing for the transfer of an artwork from the artist to a third party, for instance a purchaser, commissioner, etc. An artist's resale royalty clause would require the purchaser to pay a specified percentage of any resale price to the artist.

If an Artist wants to be able to access a sold Work, for instance to exhibit it in a retrospective, the Artist should require the purchaser to agree to provide access to the Work on certain conditions (eg. written notice at least 30 days before the Work is needed, maximum period during which the Work can be away from the purchaser, maximum number of times in a set period that the Artist can make such a request).

COPYRIGHT (CLAUSE 8)

The *Copyright Act 1968* (Cth) provides that the creator of an artwork is usually the first copyright owner of that work. The agreement assumes that the Artist is the copyright owner. This, however, should always be ascertained. For example, if the Work was created in the course of employment, the employer rather than the Artist is likely to be the copyright owner. The Artist may also incorporate aspects of another artist's original work into his/her own, or may have assigned copyright to someone else. For further information, refer to the Australian Copyright Council's Information Sheet [Artworks: Getting Permission](#).

Copyright is a property interest that is separate from ownership of the artwork itself. Clause 8.1 confirms that the Artist remains the copyright owner of the Work at all times, including after a transfer of physical ownership of the Work to the purchaser. This is important as copyright rights can provide an important income stream for artists.

If the Gallery needs to exercise some of the rights of the copyright owner, for instance the right to reproduce a Work for inclusion in a catalogue, this should be agreed between the parties. It may, for example, be appropriate to grant the Gallery a limited licence to reproduce the Artist's Work for the purpose of publicising and promoting the Artist's artwork. Any licence granted to the Gallery should be limited, by determining exactly what uses are allowed. The parties might negotiate an extra fee for a licence of the copyright, for instance if the Gallery wants to advertise the Gallery itself (as opposed to advertising the exhibition) using an image of a Work. Any agreement to that effect may be either incorporated into the agreement or be agreed in Arts Law's sample [Image Reproduction Licence for Publication](#).

Artists should be aware that if the Work is a sculpture and is permanently displayed in a public place, for example if it is displayed in a public park, photographing or making drawings of the Work does not infringe copyright.

The display of the copyright notice required under clause 8.3 is not a legal requirement but ensures that people are aware of the copyright owner of the Work.

INSURANCE AND REPAIRS (CLAUSE 9)

Under clause 9.3, the Gallery must effectively "buy" from the Artist (minus commission) any Work which is lost, stolen, irreparably damaged or destroyed while under the Gallery's control. If the Work is repairable, the Artist can choose whether to repair himself/herself or whether the Gallery pays for the repairs (clause 9.2).

The Gallery must have insurance covering any loss, damage or destruction to the Works to the value specified in the agreement.

INTEGRITY OF THE WORK AND ARTIST INFORMATION (CLAUSE 10)

Moral rights are personal rights of an artist, provided for under Part IX of the *Copyright Act 1968* (Cth). They cannot be bought or assigned (i.e. sold). They belong to an artist regardless of whether the artist is still the copyright owner. Moral rights apply to artistic, literary, dramatic and musical works and films. Since 26 July 2007 moral rights have also existed for performers in live performances (so far as the performance consists of sounds) and sound recordings of those live performances.

In Australia, there is no need to "assert" your moral rights. However, this is required in some other countries, including the United Kingdom and New Zealand. You should include a clause dealing with this if your Work is likely to be sold or distributed in these countries.

In Australia there are 3 moral rights, namely the right of a creator:

1. to be named as the work's author or creator (*the right of attribution*);
2. not to have his/her work (falsely) attributed to another (*the right against false attribution*); and
3. to protect his/her work from unauthorised alteration, distortion or other derogatory treatment that prejudices his/her honour and reputation (*the right of integrity*).

"*Derogatory treatment*" in relation to an artistic work is defined in the Copyright Act as:

- "(a) *the doing, in relation to the work, of anything that results in a material distortion of, the destruction or mutilation of, or a material alteration to, the work that is prejudicial to the author's honour or reputation; or*

- (b) *an exhibition in public of the work that is prejudicial to the author's honour or reputation because of the manner or place in which the exhibition occurs; or*
- (c) *the doing of anything else in relation to the work that is prejudicial to the author's honour or reputation."*

Sometimes contracts ask creators to waive (i.e. give up) their moral rights. Arts Law recommends that artists refuse to agree to any term whereby they give up their moral rights. The Copyright Act does not specifically allow for the "waiver" of moral rights. However, it does contemplate that artists can give consent in writing to the future infringement of their moral rights. Arts Law considers that general consents or purported waivers of moral rights in relation to all copyright works could potentially breach the *Trade Practices Act 1974* (Cth) and similar State legislation. A moral rights consent that is unfair may also be open to attack under various State legislation regulating contracts and industrial relations.

In some circumstances it may be necessary or appropriate for an Artist to consent to certain acts or omissions in respect to his/her moral rights. You should always carefully consider any consent and seek advice if you are uncertain of the terms of the consent.

Clause 10.1 implements the right of attribution by providing that the Gallery will permanently display a notice attributing the Artist. If the Artist wants specific wording for that attribution, to mandate where the attribution must appear or to specify anything else in connection with the attribution, such as font size, the words "*as set out in the Schedule*" in clause 10.1.a should be used, and the Schedule completed to clearly specify the form and content of the notice. If the Artist does not specify the form of attribution, the Copyright Act requires the use of a "reasonable" form of identification.

Clause 10.2 allows the Gallery to use the Artist's name, approved photograph and biography for promotion of the Works exhibited at the Gallery or in advertising the Artist's exhibition in the Gallery.

If the Artist wishes to have his/her biography displayed with his/her Works at the Gallery, this should be clearly stated. Clause 10.3 provides for this and allows the Artist to specify the exact wording of the biography.

Clause 10.4 ensures that the Gallery is aware of the Artist's right of integrity and respects that right.

TERMINATION (CLAUSE 11)

Clause 11 sets out when the agreement may be terminated, and what will happen in the event of termination. The costs involved in returning Works should also be considered. Further, the agreement specifies that all payments due must be paid. As he/she owns any unsold/unpaid Work, the Artist is entitled to the return of the Works when the agreement ends for any reason.

DISPUTES (CLAUSE 12)

It is almost never worth going to court to resolve a dispute, but not every problem can be solved easily. Clause 12 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 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 13)

Clause 13.1 defines the relationship between the Artist and the Gallery as one of agency *only* in respect of the Works listed in the Schedule. The Gallery is not the Artist's general agent and has no right to commission for other artworks. In respect of the Works listed in the Schedule, the Gallery's duties as agent include the duty to act honestly and in the Artist's best interests.

Clause 13.2 specifies how notices under the agreement can be given, and when they are considered to be served (i.e. given).

Clause 13.3 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 13.4 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 or where one party has made deliberate or negligent misrepresentations on which the other party relied in entering the agreement.

Clause 13.5 addresses possible future changes to the law in favour of Indigenous rights. It provides that the parties to the agreement will comply with the law as enacted.

Clause 13.6 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.

Clause 13.7 specifies that the validity of the agreement as a whole and of its individual clauses is not affected by the invalidity of any clause, unless that invalidity has an impact on any other clause.

Amend clause 13.8 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 12. 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 bottom 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 that party’s 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, that party’s 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 the parent’s or legal guardian’s own right.

If there is a change to the agreement at the last minute before signing, you can either type up a new agreement, or make the change in handwriting and have each party initial next to the change before signing at the bottom of the agreement. You may also wish to initial each page in order to make sure no new pages can be 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 its written terms. 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 originals 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 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 stamp duty, if any, may be payable on your document or transaction.

