

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.

BACKGROUND

This agreement is designed for use in situations where the Commissioner wishes the Artist, who accepts, to produce a specific artwork described in the Schedule in a three stages process:

1. Design and development of the Work;
2. Creation of the Work; and
3. Installation of the Work.

STAGE 1: DESIGN DEVELOPMENT

THE WORK AND THE DESIGN (CLAUSE 1)

The Artist must produce a design (**Design**) based on specifications (such as theme, medium, dimensions) provided in the Schedule and then create an artwork (**Work**) following the Design.

Artists should be aware that clause 15 contains a warranty (i.e. a promise) that the Design is the Artist’s original work and does not infringe the copyright or moral rights of another creator. If this is not the case, the Artist will be in breach of the agreement and possibly infringe the *Copyright Act 1968* (Cth).

ACCEPTANCE OF THE DESIGN (CLAUSE 2)

Once the Commissioner has notified the Artist in writing that the Commissioner accepts the Design, the Design forms a part of the agreement. Although it is preferable that the Commissioner accepts the Design in writing, clause 2.3 protects the Artist against the consequences of non-acceptance (the main consequence being the termination of the agreement) by providing that the Design is considered accepted even in the absence of an express acceptance in writing unless the Commissioner expressly requests changes to the Design or rejects the Design in writing.

CHANGES TO THE DESIGN (CLAUSE 3)

The Commissioner can request a certain number of changes to the Design prior to accepting it, but must compensate the Artist at an agreed rate for the additional work involved in amending the

Design. The Commissioner may not request any changes to make the Design substantially different from the specifications in the Schedule.

The Commissioner must request any change to the Design in the manner and within the time specified in clause 2.1 (which refers to the time specified in clause 1.2).

REJECTION OF THE DESIGN (CLAUSE 4)

The Commissioner has complete discretion to reject the Design for any reason. It is therefore very important that the Commissioner and the Artist share the same idea of what the Work will look like. Both parties should ask questions and discuss the specifications and any change 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 specifications in the Schedule. The Design Development Fee is part of the Commission Fee referred to in clause 13 and set out in the Schedule, which details the payment owed to the Artist.

STAGE 2: CREATION OF THE WORK

PRODUCTION OF THE WORK (CLAUSE 5)

The agreement states that the Artist is responsible for the creation of the Work in accordance with the design approved by the Commissioner under clause 2 or 3.4.

The agreement provides for a timeline to be included in the Schedule (**Timeline**), which may be changed by written agreement between the parties, for example to cover unforeseen delays (see clause 12.1). The parties should consider carefully the Timeline and ensure that it is realistic in the context of the project as a whole.

ACCEPTANCE OF THE WORK (CLAUSE 6)

Clause 6 provides that the Commissioner may notify the Artist in writing when the Commissioner accepts the Work. As for the Design, the Work is deemed accepted if the Commissioner does nothing.

CHANGES TO THE WORK (CLAUSE 7)

Clause 7 provides an opportunity for the Commissioner to request a certain number of minor changes to the Work. The Commissioner cannot request the Artist to change the Work 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 Work.

The Artist should carefully consider whether he/she is comfortable with a process that involves making changes to the Work. In some cases the nature of the specifications may mean that changes to the Work are likely to be complicated, expensive or even impossible. If this is the case, the following clauses should be deleted: 7, 5.2.b and 6.2.b.

REJECTION OF THE WORK (CLAUSE 8)

The Commissioner may reject the Work under the agreement 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 Work to meet the requirements of the Design.

If the Commissioner rejects the Work under clause 8, the agreement is automatically terminated and the Artist must return any payments other than the Design Development Fee.

INSPECTION AND ACCESS TO THE WORK (CLAUSE 9)

If the Work is to be created onsite, the Commissioner must provide the Artist with full access to the Site to complete the Work.

If there are access issues with the Site, for example if it is at a busy location that can only be accessed outside normal business hours, the agreement must address that issue. The impact of access problems should be taken into account when determining the Timeline and overall budget of the Work.

STAGE 3: INSTALLATION OF THE WORK

SITE (CLAUSE 10)

Under the agreement, the Commissioner is responsible for preparing the Site for the installation of the Work. The parties should discuss this to ensure that any specific requirements are met on time.

DELIVERY AND INSTALLATION (CLAUSE 11)

It is important to agree who will take responsibility for the safe transport and installation of the Work.

The parties can share these responsibilities. For example, the Commissioner may pay for transport and the Artist for the installation. It must be clear who is responsible and paying for each stage of the process. If the Artist is paying for the installation, this will almost certainly affect the Commission Fee.

COMMON PROVISIONS

DELAY (CLAUSE 12)

While both parties want to avoid delays, they are often an unavoidable occurrence. Therefore, it is wise to anticipate them and specify what will happen in the event of delay. If an unavoidable delay continues beyond a certain time, clause 12.3 allows either party to terminate the agreement. Clause 24.5 determines the consequences of a termination under clause 12.3.

PAYMENT (CLAUSE 13)

The agreement involves progress payments at different stages of the process (specified in the Schedule). 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.

GOODS AND SERVICES TAX (CLAUSE 14)

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 14 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.

TITLE AND COPYRIGHT (CLAUSE 15)

Title in an object is the ownership of the actual physical object itself. It is appropriate that title in the Design and the Work belongs to the Commissioner when the Commissioner has accepted the Work and paid the full Commission Fee.

Title is separate from copyright in the Work. Arts Law recommends that the Artist retain ownership of copyright in any material submitted to the Commissioner, in particular the Design and the Work.

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 and Arts Law recommends that the parties seek advice if they wish to vary the copyright arrangement.

Clause 15 contains a warranty (i.e. promise) that the Design and the Work are the Artist's original work 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 Design and the Work to the public. Communicate includes making copies or images of the Work 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 artistic work such as taking a photograph, making a drawing or including it in a film.

Clauses 15.3 and 15.4 prevent the Commissioner from reproducing (eg. by way of photograph) any of the material submitted by the Artist, including the Design and the Work without the Artist's consent. If the parties have agreed that the Commissioner will have rights to reproduce images of the Work for certain purposes this clause may need amendment. Alternatively that could be dealt with in a separate copyright licence such as Arts Law's sample [Image Reproduction Agreement for a Publication](#) or [Copyright Licensing Agreement](#).

DEATH OR INCAPACITY OF THE ARTIST (CLAUSE 16)

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

The agreement provides for a pro-rata compensation of costs based on work already performed, or expenses incurred, up to the date of death or incapacity. The purpose of clause 16.3 is to ensure that the Artist or the Artist's estate recovers all of expenses incurred in relation to the work.

Once any payment under clause 16.2 has been made, the Commissioner will own the Work, and may engage other artists to complete it, in consultation with the Artist or the Artist's estate.

Copyright in the Work will be owned jointly by the Artist or his/her estate and the other artists who complete the Work.

Alternatively, clause 16 should be amended if the Artist does not wish his/her Work to be completed by another artist or crafts person under any circumstances.

RISK OF LOSS OR DAMAGE (CLAUSE 17)

The parties need to decide who will bear the risk of the Work being lost or damaged until it is installed. A rough guide to who should bear the risk is who has the greatest level of control over the Work at each stage of the process. It is appropriate that the Commissioner bears the risk after installation. As a result, the parties need to choose between two options and amend the agreement accordingly:

1. Option 1: the Work is created at the Commissioner's premises; or
2. Option 2: the Work 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 Work.

INSURANCE (CLAUSE 18)

Public liability insurance covers the insured for damages incurred as the result of the insured's legal liability to third parties for bodily injury or property damages, including the liability of the owner of premises or tenants of leased premises for injury caused as a result of the state of the building or its surrounds.

The agreement provides that the Artist will be responsible for acquiring public liability insurance with respect to any work performed on his/her own premises. The responsibility of public liability insurance for the Site rests with the Commissioner.

The Artist should not bear any responsibility for public liability insurance once the Work is installed.

DEFECTS LIABILITY (CLAUSE 19)

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

Clause 19 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.

The rights under clause 19 are in addition to any legal right the Commissioner may have, for example under the Australian Consumer Law contained in Schedule 2 of the *Competition and Consumer Act 2010* (Cth).

MORAL RIGHTS (CLAUSES 20-23)

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 Australian Consumer Law contained in Schedule 2 of the *Competition and Consumer Act 2010* (Cth) and similar State legislation. A moral rights' infringement 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. For example, the artist may consent to not being

attributed or to the Commissioner altering the Work in some way (eg. clause 16.5.b). You should always carefully consider any consent and seek advice if you are uncertain of the terms of the consent.

ATTRIBUTION (CLAUSE 20)

As mentioned above, the right to be attributed is one of the moral rights artists have under the *Copyright Act*. This requires that the artist be acknowledged as the creator of the Work. Clause 20 implements the right of attribution, by providing an avenue in which the Artist is able to specify the way he/she would like to be attributed.

Clause 20.2 includes the option for an Indigenous community to be attributed if any Indigenous Cultural Intellectual Property (ICIP) has been used in creating the Work. Please refer to the introduction with regard to ICIP.

REPAIRS, RESTORATION, ALTERATION, RELOCATION AND RESALE (CLAUSES 22 AND 23)

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

Clause 22 requires the Commissioner to give the Artist the first option of repairing the Work. If someone else makes the repairs, the Artist may request that his/her name be removed from the Work.

Clause 23 deals with the relocation or sale of the Work. The *Copyright Act* places certain obligations on people who wish to destroy, remove or relocate works. These obligations include giving the artist an opportunity to make a record of the work (eg. take photographs).

Resale royalty

Arts Law supports the rationale that artists have a right to share in the returns of the resale of their artworks in the form of a resale royalty. Such a royalty will provide an additional income stream to some artists (and their families) as well as recognise the value of artists to Australian society.

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. Clause 23.5 provides for contractual resale royalties should an artist's resale royalty scheme not be implemented under Australian law.

TERMINATION (CLAUSE 24)

The Artist may terminate (i.e. end) the agreement upon 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 Work or if an unavoidable delay lasts beyond a certain period.

Clause 24.5 sets out what happens in the event of termination.

DISPUTES (CLAUSE 25)

It is almost never worth going to court to resolve a dispute, but not every problem can be solved easily. Clause 25 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 26)

Clause 26.1 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 26.2 specifies how notices under the agreement can be given, and when they are considered to be served (i.e. given).

Clause 26.3 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 26.4 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 26.5 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 26.6 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 26.7 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 26.8 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 25. 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.