

CHAPTER TWENTY ONE: PUBLIC PROGRAMS¹

1. Introduction

Most public collecting institutions administer programs that seek to educate and engage the community. Central to these programs is the provision of public access, as access, whether physical or digital, is a pre-condition to intellectual engagement. In the old days, this required physical access but these days, access to public programs is just as likely to be off-site and digital. How we meet, engage, stimulate and educate our public, is still evolving.

There is no one area of law that is of special importance to those who administer public programs: those working in this section need to have an all-round knowledge of legal issues and risk-management. For example, in drafting the application form to be used for people wanting to join a program, particular thought has to be given to the contractual issues: what is the point in drafting a document that is legally ineffective? It can be simple and “non-scary” and still have legal meaning and force. To do so, however, requires some knowledge: it is a skill, not an intuitive attribute.

Further, if an activity involves any kind of physical risk, the documentation may require some consideration of occupiers’ liability, negligence law, occupational health and safety regulation, volunteer and employment law, Australian consumer law and exclusion for liability. These things are easy for the bush-lawyer to get wrong. (*“But, heavens above, it’s just a simple little document. Surely, I can just write something common sense? I’ll just adapt the one used at my colleague’s institution”*). And in so doing, they fail to apply the same rigorous standards to the legal documentation as they apply to other parts of their professional work.)

As soon as members of the public come onto the grounds to attend lectures or other events, there are public liability issues. These are real risks. People do hurt themselves, sometimes in very predictable ways; at other times in ways that are hard to believe. They are all legal matters and those organising any program in which the public is going to be physically present, must take into account the legal duties that they owe to their visitors.

The relationship between the organisation and those that it invites to present lectures, tours and workshops is often given insufficient attention. What is the legal relationship between the organisation and its guides; its guest lecturers; the group of musicians that play in the vestibule on Sunday afternoons; the sound or lighting technicians associated with a performance? Is it different if the visitor is paying for the lecture series or if it is free? The list goes on.

Even the content of the programs can itself cause problems. What are the copyright requirements when the lecturer wants to show images during the presentation? What if the presentation or event includes music? What is

¹ This chapter was first published on 10 July 2013 and was revised by Shane Simpson and Ian McDonald in January 2018. The panel of experts for the first edition was comprised of Simon Elliott, then Assistant Director at the National Gallery of Australia and Peter Naumann, then Head, Education and Public Programs, also at the National Gallery of Australia.

the position if the lecturer says something that is defamatory in the course of the lecture? Or does or show something obscene or otherwise not suitable for children?

What obligation does the institution have in respect of vetting those who are given the care of children who come to participate in public programs?

Yes, of course, there are rules about all these issues and they can be taken to ridiculous lengths – but you must know what they are and how they work. Without this basic knowledge you are not administering a public education program: you are running a lottery.

2. Other chapters relevant to public programs

Rather than regurgitate material already set out in this book, let me point out the chapters that we believe are particularly important to those administering public programs:

- collection management;
- permissions and acknowledgements;
- restrictions on freedom of expression;
- copyright;
- sponsorship;
- philanthropy;
- consultancies;
- duty of care – general principles;
- duty of care to the public and lenders;
- duty of care to staff (Occupational Health & Safety);
- contracting employees & consultants;
- volunteers;
- ethics, conduct & conflicts of interest; and
- insurance and indemnification.

It's a long list, but manageable. Let's put it another way: exhibitions may be seen as the public face of the collecting institution. And of course they are just that – the public face. A more intimate face of a collecting institution is reserved for those who participate in its public programs.

3. Contracts

As the area of public programs is so sprawling, it uses many different types of contract.

3.1 Live performances

It is quite common for a collecting institution to contract performers. Sometimes these performances are to create a general ambience for visitors; other performances are directly linked to exhibitions or particular collection material.

It is usually most practical to create a standard form for these kinds of contract. Such contracts need to contain all the performance-specific terms that vary from deal to deal as well as all of the legal terms that will rarely change. You want the contract to read easily and be simple to negotiate and administer. This is best achieved by using a "front-loaded" structure: put the schedule of variables at the front and the legal terms and conditions (that are largely immovable and – at least initially – non-negotiable), at the back. With this format, when you prepare a

performance contract you only have to fill in the front section and the complex stuff remains untouched unless and until it is specifically negotiated.

The following is a checklist of things that should be considered when contracting performers. It is divided into two sections: The things that should be in the schedule (that is, the things that change from contract to contract) and the things that should be in the standard conditions that accompany the schedule (that is, the legal conditions that are unlikely to change).

SCHEDULE		
1.	<i>Specified Personnel</i>	What are the names of the key personnel? If there are particular people who are key to the performance, they need to be specified.
2.	<i>Performance Description</i>	What are the specifics of the program (details of songs/music) and also attire or costume. This is important so that the institution can be sure that the performance is appropriate for its purposes and reputation.
3.	<i>Venue</i>	Specify where is the performance to take place. Are there any particular restrictions relevant to that space?
4.	<i>Technical</i>	What sound and lighting is required? Who is to supply it?
		If it is the performer, when will access be given for set-up?
		If it is the institution, what does the performer require?
5.	<i>Rehearsal</i>	Will there be a rehearsal or sound check? (This is usual.) When? What are the access arrangements?
6.	<i>Dressing rooms</i>	Will you provide dressing rooms? Is there a locked space for their valuables, instruments and so on?
7.	<i>Catering</i>	Will the performers be given food and drink? What, and when?
8.	<i>Publicity material</i>	Does the performer have to supply publicity and promotional material for approval. If so, by when? What are the institution's obligations concerning promotion?
9.	<i>Travel and accommodation</i>	If the performer is from out of town, what are the travel and accommodation arrangements? Specify mode and class of transport. Specify whether accommodation is "room only, "b&b " or whether a "per diem" will be paid, and who will be arranging this, and so on.
10.	<i>Payment</i>	What is the fee? Are there payment milestones? Some acts require a deposit (10% is common); specify the time within which payment will be made and any formalities you require (ABN, tax invoice etc.) As electronic payment is usually preferred, this is the place to get the performer's bank details.
11.	<i>Recording</i>	Is the organisation permitted to photograph, film or record the performance? If so, what is it allowed to do with the resulting images or footage: can it use them for web-casting (live or retrievable), promotional material and publications in connection with the organisation, archival purposes, merchandising, etc? If so, are any additional payments required?
12.	<i>Contacts</i>	Specify the institution's contact person (with contact details). Specify the performer's contact person (with contact details).

STANDARD TERMS		
1.	Specified Personnel	Where relevant, the contract should require that the services be delivered by the specified personnel.
		No deletions, additions or substitutions should be allowed without your approval.
		The organisation must have the right to request sufficient information so that it may undertake police checks.
2.	Performance Description	It is often prudent to include a clause requiring that the performance be presented in a professional manner with consideration to the status of the institution and the likely presence of children in the audience.
		Is there a specific performer promise that no part of the performance or interaction with the audience will involve language, gestures, attire or references that would be inappropriate to the audience (including children)?
3.	Dressing rooms	Is there an exclusion of liability for possessions that are stolen or damaged either in the dressing rooms or elsewhere?
4.	Cancellation	If either party wishes to cancel, what notice and what formalities are required?
		When the agreement specifies personnel making up the act, where such a person is unable to perform, the performer is usually required to immediately inform the organisation and use all reasonable endeavours to propose a suitable substitute. What happens if a suitable substitute is not agreed? Does this give the institution the right to terminate?
5.	Force Majeure	What events will be defined as "force majeure"? ² They should be specified. What is the consequence?
6.	Museum directions	It is essential that the terms require the performer to comply with all requests or directions by the institution regarding noise levels, security, safety, emergency procedures, police liaison and crowd control measures. The institution must be able to stop the performance at any time.
7.	Intellectual Property	The performer should promise to ensure that she will not infringe any third party intellectual property rights and that the performer is responsible for obtaining copyright clearances and licences where necessary. Additional care with this is necessary where the performances may be recorded, filmed or streamed.
8.	Security and Supervision	The venue usually agrees to provide appropriate security and supervision to permit the performer to undertake the performance and to ensure performer safety.
9.	Invoice and payment details	The performer will be required to provide a tax invoice. This is what triggers payment. There may be additional details required of the invoice. These may include a description of the services delivered, a reference to the institution's

² That is, circumstances beyond the control of both parties, such as earthquake, fire, terrorist events and so on.

		purchase order, the name of their contact officer, any BAS details and the amount claimed.
10.	Insurance	Specify what cover the performer has and make it clear that all other insurances are a matter for the performer. It would be unusual for the institution to provide any personal accident insurance or worker's compensation or insurance over equipment or personal effects for the performer.
11.	Variation	It is sensible to require that any variations be in writing. This can be email but there does need to be a record of any changes so that clarity of expectations is maintained.
12.	Boiler plate	Most of these agreements have clauses relating to warranties, jurisdiction, dispute management and other matters. Keep them to a minimum because they are rarely called for in contracts such as these that have such short life-spans. They are important but can be overdone.

3.2 Lecturers and other public speakers

When speakers are engaged to deliver a paper, a workshop or some other public presentation, most institutions are quite informal in their arrangements. This is no bad thing as the expectations and arrangements are usually quite straightforward. One person giving a lecture is less problem-prone than putting on live musical entertainment. It's low in the risk-management scheme of things but this doesn't mean that there isn't a better way of doing it than the one you presently use.

Have a look at the previous section on "live performances". Instead of doing everything by informal letters or emails, might there be an advantage in having a set form that the organisation provides every time it books a speaker? If you adopt the structure of a front-loaded agreement that sets out in one section the details relevant to the particular engagement and in the other section the standard terms that protect the interests of the institution, would not the interests of the institution be better protected?

A standard form agreement such as this would be a short and simple document – no great legal complexities are necessary. However, if you go through the checklist above you will see that some of the issues raised would be sensible to include in a pro-forma contract for lecturers and presenters.

3.3 Commissioning contracts

An important part of many public programs is the commissioning of freelancers to provide content for articles and educational materials. These may be intended for use for training volunteers, distribution to exhibition visitors, inclusion in the institution's magazine, newsletter or website and so on. Such commissioning contracts are not complex legal creatures. Often these are done very informally through an exchange of letters or email. There is nothing wrong with such informality.

Such correspondence is usually focussed on:

- *who* – who is the author?
- *what* – what is the topic?
- *length* – how long is the piece expected to be?
- *use* – Where will it be first published? How else will it be used?
- *readership* – to whom should the piece communicate?
- *when* – when must it be delivered? and

- *fee* – is there a fee and if so, how much and what are the payment details?

Where the correspondence often falls down is that it fails to provide clarity about ownership and usage. This is where a short standard template can assist in ensuring that all relevant matters are considered.

One of the issues to which institutions should pay particular care, who is to own the copyright in the commissioned piece or (if the institution is not to own copyright) what licence the institution has to use the material?

The Copyright Act provides rules about ownership – for example, generally the owner of copyright in a commissioned work is “the author” (that is, the relevant creator).³ There are, however, different rules for “government” that can be difficult to apply in the gallery and museum sectors, so if the institution commissioning the work wishes to ensure that it owns copyright, it is always best to make sure that this is a specific term of the contract.⁴ This can be achieved very simply by stating something along the following lines: “Upon delivery, the (institution) will own copyright in the work”. It is not complex but unless the intention is clear, the author will remain the copyright owner.

This is an important consideration whenever commissioning freelancers to create work. Sometimes the institution does not need or want to own the copyright. However if it intends to reuse, edit or combine the work with other material, it may need to. Remember that the usual commissioning fees do not necessarily take into account a transfer of ownership. Where the contract includes a transfer of copyright, the contract is actually two quite separate deals rolled into one transaction. One is for the work involved in bringing the work into existence and allowing its use; the other is the transfer of intellectual property. Both should be paid for.

3.4 Usage

Commission agreements naturally specify the intended use of the work.

If the commission is stated to be for a particular purpose, it is assumed that the fee reflects that usage. If the commissioner later decides to use the work for other purposes it may well be a breach of an implied term in the contract, namely, that the use of the work is restricted to the stated purpose. Generally, if the intended use of the work is “one off” then you don’t need to own the copyright and the fee need only reflect that limited use. However if you are likely to wish to reuse the work or need to edit and combine it with other materials, you should either acquire the copyright (and pay for it) or be very clear in the commissioning agreement that the commission includes a licence that is sufficiently broad as to cover any future uses that the institution might choose.

Similarly, commissioning agreements will often specify the media in which the work may be used. If the agreement states that the work is commissioned for inclusion in the institution’s magazine, this may not give you the right to include it (or excerpts of it) on your web site if the magazine is a print publication. These days, it makes sense to be technology neutral and inclusive, and be based on the purposes for which the material may be used rather than the media.

Although this may seem overkill, it is not. If you might wish to reuse the commissioned work the easiest time to acquire the rights to do so is when entering the relationship.

³ Section 35(1) of the Copyright Act.

⁴ Sections 35(1) and 176 of the Copyright Act.