

ACKNOWLEDGEMENTS

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CHAPTER 24. PUBLIC PROGRAMS

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, for 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 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, occupational health and safety regulation, volunteer and employment law, trade practices 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 themselves cause problems. What are the copyright requirements when the lecturer wants to show images in the course of the presentation? What if the presentation includes music? What is the position if the lecturer says something that is defamatory in the course of the lecture? Or does something obscene?

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 responsibility for children 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.

CHAPTERS RELEVANT TO PUBLIC PROGRAMS

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

- Collection management
- Acquisition of collection items
- Permissions and Acknowledgements
- Expression
- Copyright
- 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
- Insurance and indemnification

It's a long list but quite 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.

CONTRACTS

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

1.1 LIVE PERFORMANCE CONTRACTS

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, 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 (i.e. the things that change from contract to contract) and the things that should be in the standard conditions that accompany the schedule (i.e. the legal conditions that are unlikely to change).

LIVE PERFORMANCE CONTRACT		
SCHEDULE		
1.	Specified Personnel	What are the names of the personnel? If there are particular people who are key to the performance, they need to be specified.

2.	Performance Description	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.	Venue	Specify where is the performance to take place. Are there any particular restrictions relevant to that space?
4.	Technical	What sound and lighting is required? Who is to supply it?
		If it is the artist, when will access be given for set-up?
		If it is the institution, what does the artist require?
5.	Rehearsal	Will there be a rehearsal or sound check? (This is usual.) When? What are the access arrangements?
6.	Dressing rooms	Will you provide dressing rooms? Is there a locked space for their valuables, instruments etc?
7.	Catering	Will the artists be given food and drink? What?
8.	Publicity material	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.	Travel and accommodation	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 etc.
10.	Payment	What is the fee? Are there payment milestones? Some acts require a deposit (10% is common); specify time within which payment will be made and any formalities you require (ABN, tax invoice etc.) If electronic payment is preferred, this is the place

		to get the performer's bank details.
11.	Recording	<p>Is the organisation permitted to photograph, film or record the performance?</p> <p>If so, what is it allowed to do with them: can it use them for web-casting (live or retrievable), promotional material and publications in connection with the organisation, archival purposes, merchandising, etc?</p> <p>If so, are any additional payments required?</p>
12.	Contacts	<p>Specify the institution's contact person (with contact details).</p> <p>Specify the performer's contact person (with contact details).</p>

STANDARD TERMS

1.	Specified Personnel	Where this is 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 Museum and the inclusion of children within the audience.
		Is there a specific artist 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	<p>If either party wishes to cancel, what notice and what formalities are required?</p> <p>When the agreement specifies personnel making up the act, where such a person is unable to perform, the artist is usually required to immediately inform the organisation and use all reasonable endeavours to propose a suitable substitute. What is to happen if a suitable substitute is not agreed? Does this give the hirer the right to terminate?</p>
5.	Force Majeure	<p>What events will be defined as 'force majeure'? They should be specified. What is the consequence?</p>
6.	Museum directions	<p>It is essential that the terms require the artist to comply with all requests or directions by the collecting 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.</p>
7.	Intellectual Property	<p>The Artist should promise to ensure that they 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.</p>
8.	Security and Supervision	<p>The venue usually agrees to provide appropriate security and supervision to permit the artist to undertake the performance and to ensure artist safety.</p>
9.	Invoice and payment details	<p>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, name of their contact officer, any BAS details and the amount claimed.</p>
10.	Insurance	<p>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.</p>

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.

1.2 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 performance contracts'. 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.

1.3 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 members' magazine 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?
- 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.

1.4 OWNERSHIP

Who is to own the copyright in the commissioned piece? The Copyright Act 1968 provides that the owner of copyright in a commissioned work is generally the author.¹ If the institution commissioning the work wishes to vary the general position and be the owner of the copyright, this must be a specific term of the contract.² This can be achieved very simply by stating something along the following lines: 'Upon delivery, the (museum etc) shall be the owner of 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.

¹ s.35(1)

² s.35(2)

1.5 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 commission agreement that it includes a licence that is sufficiently broad as to cover any future uses that the institution might choose.

Similarly, the commission agreement should 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 does not give you the right to include it (or excerpts of it) on your web site. These days it makes sense to be technology neutral and inclusive.

Accordingly, the commissioning agreement might include a sentence as follows:

Although the primary purposes of this commission is to (e.g. publish the work as educational materials) we shall be entitled, in perpetuity and without further fee, to use the work for any other purpose relevant to the work of the (museum etc). To achieve these purposes, we may use any medium or technology, whether now known or yet to be invented.

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.