

## THE ARTIST/DEALER GALLERY

### 1. Relationship

Too often, artists abrogate their professional responsibility by leaving everything to the judgment, honesty and business wizardry of the dealer/gallery. This chapter isolates five types of dealer/gallery and provides cautionary guidelines for the artists who use them. Many specimen contracts are provided, including: a standard contract for the consignment of artworks; a standard exhibition contract, and a standard long-term artist-gallery contract.

One of the most important relationships in the life of an artist is that shared with his or her dealer/gallery. At best, the artist can expect that partner to love, honour and obey; at worst, it can be expected to act like any other small retailer, with callous self-interest. It is a relationship of mutual assistance: the artist is relieved of many commercial distractions and can devote more time to creating; the dealer can make a living and gain huge satisfaction by promoting and protecting the artist. Without the dealer/gallery, most artists would not survive. Without the artist, the dealer/gallery would not exist. Thus it is a marriage of considerable convenience. It is also a commercial relationship. The basis of the much-idealised relationship between artist and gallery is, quite simply, money. Neither artist nor gallery owner should be fooled by the patina of gentility. A gallery is just another retail business. If it is not treated as such by its owner it will not remain a gallery for long.

Few artists discuss with their gallery the mechanics of their relationship. For most, it is sufficient that their work will be exhibited. Moreover, many artists consider they are in such a precarious bargaining position that they dare not appear difficult.

It must be said that this suits the galleries. It is to their advantage to keep their relationships with artists as unstructured as possible for this permits them optimum commercial flexibility. Unfortunately, in some instances, this latitude has revealed an inherent potential for ethical flexibility.

Artist and gallery must discuss, at the outset, the basis of their relationship. If they do not, and instead adopt a cavalier trust, they will inevitably maintain a number of unrevealed misunderstandings and potential sources of acrimony. The mechanics must be fully discussed, negotiated and, when agreement is reached, should be reduced to writing.

The written agreement is standard business practice in almost all commercial relationships except the visual arts. In recent years, the other branches of the arts have realised that some contractual formality is advantageous; novel writers, script writers, performing and recording musicians, actors of stage and screen, all now normally enjoy the protection of written agreements. It is becoming an established business practice.

The basis of the artist-gallery relationship is contractual. In most instances the contracts are oral, but they are nevertheless valid enforceable contracts.

Most dealers refuse to enter written contracts. To demand such formality is somehow considered an affront to the integrity of the dealer. But such sensitivity is misplaced. The owner of one Melbourne gallery echoed the words of many other dealers when he said, "The relationship is one of trust. Without trust, the contract isn't worth the paper it's written on." It is undoubtedly true that trust is fundamental to the artist-gallery relationship. But there is no reason to equate written agreements with the absence of trust.

All the contract does is spell out the mutual obligations and duties of the parties. Each knows what they must do and what they can expect the other to do. It is explicit. This clarity of expectation avoids those innocent misunderstandings that can be so destructive of the relationship and assists both artist and gallery in the maintenance of an amicable and mutually supportive bond. Rather than indicating an absence of trust, a fair and even-handed contract enhances the development of trust.

Furthermore, if there is a breakdown in the relationship -- something that is surely difficult to foresee at the outset -- mere "trust" is valueless. The parties will be at loggerheads, each maintaining that their memory of the agreement and that their understanding of the facts is the correct one. When this happens there are only a limited number of possibilities: the parties can amicably settle their dispute; they can resort to expensive and bitter legal battle; or the artist and dealer can simply sever the relationship, leaving the loss to lie where it falls. A gallery is a business and, like it or not, both artist and gallery-owner are business people. Thus, in the event of a breakdown of that mutual trust, both parties will be grateful to have a written contract setting out their respective responsibilities. A written contract provides at least a modicum of mutual protection.

## 2. TYPES OF DEALER/GALLERY

There are five basic types of dealer/gallery:

1. There are those that merely lease out their premises to artists who wish to mount an exhibition. This sort of gallery is not a representative of the artist, rather a landlord. These are sometimes known as "vanity galleries".
2. There is another species of non-representative gallery in which the proprietor buys and resells most merchandise on his or her own account but accepts some work on consignment (sale or return).
3. In contrast, some galleries mount solo or group shows that are one-off. These are usually small galleries that act as representatives or agents, only for the duration of the show, and only with regard to the works on exhibition.
4. There are the major exhibiting galleries that have long-term relationships with their artists. Such galleries usually act as general agents for their artists and take responsibility for the long-term promotion and placement of an artist's work. Some of these galleries buy work outright for their "backroom" to supplement the work held on consignment.
5. Finally there are the private dealers who act as agents for artists but who have no gallery premises.

Most galleries combine two or more of these functions; the representative gallery does some dealing on its own account; the vanity gallery becomes a representative gallery for a few weeks a year, and so on. Consequently, the nature of the legal relationship between an artist and any particular gallery should not be assumed to be the same as that enjoyed by other artists exhibiting at the same gallery. Before entering an arrangement with any gallery, an artist should ask: "What do I expect the gallery to do on my behalf?" "How much responsibility am I prepared to allow the gallery?" "What limits will I impose on the relationship?" "What do I expect to have achieved by the time the relationship has ended?"

The answer to these sorts of questions will assist in determining which type of gallery is appropriate. Then, assuming that the gallery considers the work of the artist to be appropriate, the artist must set out to protect his or her aspirations as fully as possible.

The following are aspects of the relationship that should be discussed, negotiated and made explicit.

### 3. GALLERY LEASING

If artists choose to hire a space in which to exhibit their work, there are several matters which should be considered:

- (a) cost of the lease;
- (b) duration of the lease;
- (c) who is responsible for other expenses such as electricity, and phone;
- (d) days and times at which the gallery will open;
- (e) what are the arrangements for the hanging and removal of works;
- (f) insurance -- is there any public liability cover, should a viewer be injured? are the artworks covered whilst in the building?
- (g) what are the arrangements for supervising the exhibition and for accepting and collecting the money from sales;
- (h) ensure that it is clear that the ownership of the works remains with the artist until actual sale -- lest any creditors of the gallery seize the artworks.

Such galleries are little different from any other landlords. They are not agents for the artist. Thus, any artist considering such a venue should insist on a written agreement, just as one would insist on a written lease for a flat. It will take a little time, it must be carefully formulated, and must provide the protection sought. But this care and time, spent at the outset, can save a lot of later upset. The owners of such galleries often have little professional reputation and even less money so if anything goes wrong they have little to lose.

### 4. RELATIONSHIPS WITH NON-REPRESENTATIVE DEALER/GALLERIES

Such galleries do not purport to be the agent or representative of the artist of craftsman whose work they sell. The relationship is usually a simple one. Most such dealers either buy the work outright and resell it in their own time and at their own price, or take a small amount of work on consignment (sale or return) in which case, upon sale, they pay the artist either an agreed sum (over and above which the dealer keeps as profit), or an agreed percentage of the actual sale price.

#### 4.12 Outright Sales

If an outright sale is contemplated, the parties should fill out a simple contract of sale (see specimen, p. 11). It is a brief and even-handed document that no reputable dealer will refuse to sign.

Craftpersons, in particular, sometimes enter into wholesaling agreements with galleries or shops. This relationship involves several points that need to be clearly understood by both parties, from the outset. The following standard form will illustrate one way in which these matters may be covered.

## NON-REPRESENTATIVE DEALER GALLERIES WHOLESALE AGREEMENT

This is an agreement of sale between

..... of .....(the seller)

and

..... of ..... (the Purchaser)

1. Packing of high standard will be arranged and paid for by the seller. Delivery transport and insurance will be arranged and paid for by the seller/purchaser.
2. The seller guarantees that all goods will be carefully inspected prior to shipment and that they will be packed in good condition.
3. The buyer agrees to notify the seller of damaged goods within five days of delivery.
4. The seller agrees that the objects delivered will conform with the quality design and character of the samples shown to the buyer at time of order, except that allowance shall be made for the variations inherent in hand made work.

Number of items .....

Description .....

Price per item .....

Total amount .....

Payment terms .....

Means of transport .....

Date of delivery .....

Signed by .....

(the Craftsperson) (the Purchaser)

.....(date)

### 4.13 Consignment

Leaving work with galleries for the purpose of sale is a commonplace feature of artists' lives, but few take any measures to safeguard either their work or their professional interests. Many artists do not even ask for a receipt for their works. This is an attitude that will inevitably eventually result in the artist suffering loss.

At the very least, artists should get a written receipt for any consigned. At best, artist and gallery should enter a simple agreement which will set out the conditions of the consignment. This is a more complex document than the contract of sale, reflecting the increased complexity of the relationship between the parties.

#### 4.14 Additional Clauses

No standard form contract can cover all matters that individual parties and situations may require. For example, the artist may wish to include a term specifying the gallery's obligation to exhibit the work in a particular manner or place. Furthermore, if the gallery wishes to maintain an archive of the artist's work, the conditions governing that activity should be spelled out. The contract must be made to fit the needs of its parties. Three examples of clauses that might be added, illustrate this flexibility. (They are reproduced with permission from Mellon and Crawford, "The Artist-Gallery Partnership", American Council for the Arts, 1981.)

##### (a) Print documentation

The gallery may wish the maker of limited edition prints to add:

The Artist shall provide the Gallery with a warranty concerning each multiple Artwork, detailing the total number of copies in the edition, number of Artist's and printer's proofs, restrikes, and other relevant information.

##### (b) Time-payment sales

The standard contract makes no allowance for time-payment sales. Some galleries demand this facility and so will wish to arrange a schedule for payment to the artist that reflects the schedule of payments from the purchaser. In this situation the following clause might be added:

On instalment sales, the Gallery shall pay the Artist in the following manner:

..... In any such transactions, the Artist shall be paid the entire balance remaining within ..... days of that sale. The Gallery assumes full risk for the failure to pay on the part of any purchaser to whom it has sold an Artwork.

##### (c) Conditions upon the ownership of works

The artist may wish to place conditions upon the ownership of the work. Obviously only a few artists can command sufficient power in the market-place to insist that the purchasers of their work agree to restrictive conditions of sale and enforcement is always difficult. Nevertheless, sometimes such provisions are important, even if only as a matter of principle. In such a case the artist might add into the consignment agreement a clause specifying that the gallery "shall include on the bill of sale the following provision(s): ....."

For example, if the artist has created a work in multiple parts it may be crucial to the piece that it be displayed as one unit. In such a case, artist and gallery may wish the purchaser to promise not to separate the parts. This may be accomplished by using a contract of sale which includes the following clause:

"The Purchaser acknowledges that the Work is a single Artwork consisting of ..... parts, and agrees to exhibit, sell or otherwise transfer the Work only in its entirety as a single work."

Similarly the artist may include clauses relating to the protection of the work from mutilation, alteration and destruction

#### 4.15 An Alternative Specimen

The specimen that follows is based on a model drawn up by the Artist/Craftsmen's Information Service of Washington D.C. It is the result of concerted liaison between artists, craftworkers, galleries and lawyers. It is an even-handed document and will provide the artist with a degree of protection that would only rarely be obtained by a handshake.

### STANDARD AGREEMENT FOR THE CONSIGNMENT OF ARTWORKS

This is an agreement between

..... of ..... (the Artist)

and

..... of ..... (the Gallery)

1. Scope of Agency. The Artist appoints the Gallery as his/her agent for the purpose of exhibition and sale of the consigned Works listed in the attached Schedule of Artworks. The Gallery shall not permit the Artworks to be used for any other purpose, without the written consent of the Artist. This appointment applies only to Works consigned and does not make the Gallery a general agent for any works not so consigned.

2. Delivery. The responsibility for and cost of packing, insurance and transport to the venue will be borne by the Gallery/Artist\* and from the venue will be borne by the Gallery/Artist.\*

- Type of Packing .....

- Type of Transport .....

- Type of Insurance..... Insurance for transport shall be for an adequate specified amount agreed to by both parties. Packing and delivery of Works sold at the exhibition will be the responsibility of the Gallery.

3. Duration of Consignment. The Artist and the Gallery agree that the initial term of the consignment shall be ..... Thereafter, the consignment shall continue until the Artist requests the return of any or all of the Artworks or the Gallery requests that the Artist take back any or all of the Artworks, with which request the other party shall promptly comply.

4. Pricing; Gallery's Commission; Terms of payment. The Gallery shall sell the Artwork only at the Retail Price specified on the Inventory Sheet. The Gallery and the Artist agree that the Gallery's commission is to be ..... per cent of the Retail Price of the Artwork. Any change in the retail price, or in the Gallery's commission, must be agreed to in advance by the Artist and the Gallery. Payment to the Artist shall be made by the Gallery within ..... days after the date of sale of any of the Artworks. The Gallery assumes full risk for the failure to pay on the part of any purchaser to whom it has sold an Artwork.

5. Accounting. A written statement of account for all sales of Artwork shall be furnished by the Gallery to the Artist every 3 months. The Artist shall have the right of inventory over his/her Artworks in the Gallery and to inspect any books and records pertaining to sales of the Artworks.

6. Fiduciary Responsibilities. Title to each of the Artworks remains in the Artist until the Artist has been paid the full amount owing him or her for the Artworks; title then passes directly to the purchaser. All proceeds from the sale of the Artworks shall be held in trust for the Artist. The Gallery shall pay all amounts due the Artist before any proceeds of sales can be made available to creditors of the Gallery.

7. Responsibility for Loss or Damage; Insurance Cover. The Gallery shall be responsible for the safekeeping of all consigned Artworks for the period of the consignment. The Gallery shall be strictly liable to the Artist for their loss or damage (except for damage resulting from flaws inherent in the Artworks), to the full amount the Artist would have received from the Gallery if the Artworks had been sold. The Gallery shall provide the Artist with all relevant information about its insurance coverage for the Artworks if the Artist requests this information.

8. Termination of Agreement. Notwithstanding any other provision of this Agreement, this Agreement may be terminated at any time by either the Gallery or the Artist, by means of ..... days written notification of termination from either party to the other. In the event of the Artist's death, the estate of the Artist shall have the right to terminate the Agreement. Within 30 days of the notification of termination, all accounts shall be settled and all unsold Artworks shall be returned by the Gallery.

9. Procedures for Modification. Amendments to this Agreement must be signed by both Artist and Gallery and attached to this Agreement. Both parties must initial any deletions made on this form and any additional provisions written onto it. This contract may not be assigned.

10. Disputes. Should any dispute arise concerning any matter referred to in this Contract, the dispute will be referred to the informal arbitration of two arbitrators, one to be appointed by each party. In the event of the arbitrators disagreeing, the dispute will be referred to an umpire selected by the arbitrators. No action or suit will be brought or maintained by either party against the other party until an award has first been obtained from the arbitrators or umpire.

Signed by the Artist .....

Signed for and on behalf of the Gallery .....

.....Date

\* Delete whichever is inappropriate.

### Inventory sheet/Receipt for Artworks on Consignment

Inventory

Gallery

Number

Description of object

Retail price

Commission

THE GALLERY AGREES TO ACCEPT FULL RESPONSIBILITY FOR THE SAFEKEEPING OF THE ABOVE ARTWORKS WHILE THEY ARE IN ITS CUSTODY.

.....

(Signature of Artist) (Artist's Address)

Title .....

(Signature of Authorised Representative of Gallery)

.....

Date

## 5. THE ONE-OFF SHOW: THE VERY LIMITED REPRESENTATIVE RELATIONSHIP

Often a gallery will agree to show an artist's work in a solo or group show without any agreement as to future relationship. In such cases the gallery is the agent of the artist only for the duration of the show, and only in relation to the works therein exhibited. This benefits the gallery by permitting it to test the marketability of an artist's work without committing it to long-term representation. It is considered advantageous by many artists because it permits them maximum independence.

The specimen agreement which follows, draws upon earlier examples drafted by The Conference of Art Societies of Victoria (1980), M. Meszaros, Artists' Equity (U.S.A.), and Artlaw Services (U.K.). Many of its clauses are also relevant to the long-term relationship which is discussed in the next section of this chapter. Readers should also refer to that discussion.

### STANDARD ARTIST-GALLERY EXHIBITION CONTRACT FOR ONE-OFF SHOW

This is an agreement between

..... of ..... (the Artist)

and

..... of ..... (the Gallery)

by which we agree as follows:

1. Exhibition. A sole/concurrent\* exhibition of the Artist's original Works shall be held by the Gallery.
2. Dates and Venue. The exhibition will be held at ..... from ..... to .....
3. Duration of Consignment. The Artist and the Gallery agree that the initial period of the consignment shall be ..... weeks. Thereafter, the consignment shall continue until the Artist requests the return of any or all of the Artworks or the Gallery requests that the Artist take back any or all of the Artworks, with which request the other party shall promptly comply.
4. Scope of Agency. The Artist appoints the gallery as his/her agent for the purpose of exhibition and sale of the consigned Works listed in the attached Schedule of Artworks. This appointment applies only to Works consigned and does not make the gallery a general agent for any Works not so consigned.
5. Delivery. The responsibility for and cost of packing, insurance and transport to the venue will be borne by the Gallery/Artist, "and from the venue will be borne by the Gallery/Artist".
  - i. Type of Packing .....
  - ii. Type of Transport .....

iii. Type of Insurance: Insurance for transport shall be for an adequate specified amount agreed to by both parties. Packing and delivery of Works sold at the exhibition will be the responsibility of the Gallery.

6. Preparation. Frames, mounts, pedestals, hanging or supporting accessories and other aids necessary for the proper mounting of the exhibition will be supplied by ..... and paid for by ..... At the end of the exhibition such objects will be the property of .....

7. Hours of Opening, Hanging Day, Preview. The exhibition will be set up/hung on the ..... day of .....  
19..... Gallery hours will be -- (specify dates, days of week and times) The Preview will take place on ..... from.....  
to ..... (delete if no Preview).

8. Prior Sample. Where the Artist has agreed to present an exhibition of a number of Works in accordance with samples shown, the Gallery has the right to refuse to show the Works if within 5 days, it can be reasonably shown that the number, size, type, style or price do not conform to the samples shown.

9. Exhibition Costs. Costs will be allocated as follows:

- Gallery/Artist Estimated Cost
- Advertising and Public Relations ..... ..
- Postage, Gallery and Artist
- Mailing Lists ..... ..
- Printing ..... ..
- Opening Expenses and Catering ..... .. (specify)
- Catalogues ..... ..
- Photography ..... ..
- Other (specify) ..... ..

10. If postage is charged by the Gallery to the Artist, the list of names of persons to receive invitations will be provided to the Artist on request ..... days before the exhibition is due to commence. No costs shall be incurred by either party in the name of the other party without the prior written approval of the party liable to pay the costs.

11. Rental or Minimum Sales Guarantee. If a rental or guarantee is charged by the Gallery, the amount will be \$..... per week. If sales exceed \$..... for the period covered by the exhibition no rental will be charged to the Artist. \*

12. Prices. Prices of Works exhibited will be determined by mutual consent and will include Gallery commission. Prices quoted to clients for commissioned Works will include Gallery commission.

13. Sales. A deposit of not less than ..... per cent of the full price of the Work will be paid by the purchaser before a red sticker or "sold" notice is attached to the Work. No sale will be made without a deposit being paid unless the Purchaser acknowledges the sale in writing. No Work will be removed from the exhibition by either party before the close of the exhibition except by mutual agreement.

14. Commission. The commission for Works sold at the exhibition will be ..... per cent of the selling price. In the event of the Gallery securing an order for the Artist to produce a new work, the Gallery shall receive ..... per cent of the total price as commission for arranging that work. The Gallery shall consult the Artist before accepting such commissions and will confirm the order in writing. When the Artist sells work from his/her studio within 1 month of the close of the exhibition, the Artist will pay the Gallery the agreed normal commission.

15. Credit. The Gallery accepts all risks connected with the extension of credit to its clients.
16. Statements. At the conclusion of the exhibition the Gallery will provide the Artist with a written financial statement covering sales, expenses, and obligations. Names and addresses of purchasers will be supplied by the gallery to the Artist.
17. Payment of Artist. That part of the moneys received by the Gallery and due to the Artist will be paid to the Artist within 30 days of the close of the exhibition. The balance of the moneys, if any, for Works sold at the gallery will be paid by the Gallery to the Artist within 3 months of the close of the exhibition. The Gallery assumes full risk for failure to pay on the part of any purchaser to whom it has sold a Work.
18. Insurance and Liability for Loss or Damage. The Gallery shall be responsible for loss of or damage to the consigned Work from the time of delivery to the Gallery until the time of delivery to the purchaser or return to the Artist. The Gallery shall insure the consigned Works in the name of the Artist up to ..... per cent of the agreed retail price.
19. Stockroom. In the case of a solo exhibition, the Artist may instruct the Gallery to close the stockroom on the opening day and/or evening.
20. Copyright. The copyright in each Work shall remain the property of the Artist and the Gallery shall inform purchasers that the Artist is the owner of copyright in the Work. Dealings in relation to the copyright in the Work shall be made solely between the Artist and the purchaser.
21. Gallery Decor and Fittings. The Gallery will inform the Artist of any proposed major changes in the decor and/or fittings in the Gallery which may effect the presentation of the Artist's Works.
22. Other Exhibition. The Artist will not arrange an exhibition of his/her work in another Gallery within a 25-kilometre radius of the Gallery during the period of the exhibition or within 14 days before and after the exhibition without the written consent of the Gallery.
23. Disputes. Should any dispute arise concerning any matter referred to in this Contract, the dispute will be referred to the informal arbitration of two arbitrators, one to be appointed by each party. In the event of the arbitrators disagreeing, the dispute will be referred to an umpire selected by the arbitrators. No action or suit relating to this contract will be brought or maintained by either party against the other party until a decision has first been obtained from the arbitrators or umpire.
24. Contract Alterations. Any alterations to this Contract will be made only by written agreement.

Dated the ..... day of ..... 19.....

Signed by the Artist .....

Signed for and on behalf of the Gallery .....

\* Delete whichever is inappropriate.

## INVENTORY SHEET/RECEIPT FOR WORKS ON CONSIGNMENT

Inventory  
Gallery  
Number  
Description of object  
Retail price  
Commission

THE GALLERY AGREES TO ACCEPT FULL RESPONSIBILITY FOR THE SAFEKEEPING OF THE ABOVE ARTWORKS WHILE THEY ARE IN ITS CUSTODY.

.....

(Signature of Artist)(Signature of Authorised Representative of Gallery Title .....

(Artist's address) Date

## 6. THE LONG-TERM REPRESENTATIVE RELATIONSHIP

This is the most complex artist-dealer relationship of all. Because most artists are delighted to obtain such representation they frequently enter the marriage without an adequate understanding of the basis of their relationship. The following are aspects of the affair that the artist and the gallery should discuss and agree upon at the outset. The checklist was developed by the Arts Law Centre of Australia and the Australian Commercial Galleries Association so that both artist and gallery might more readily focus upon the key elements of the business aspects of their relationship, and thus better avoid those innocent but unfounded or unshared assumptions that so often cause disharmony. It is set out in the Australian Commercial Galleries membership handbook, copies of which are available free from member galleries.

### 6.12 Scope of Agency

#### (a) Exclusivity

This is one of the most common causes of disharmony between artist and gallery. Many artists insist upon maintaining the right to consign works to those various galleries that they think will most likely sell their work. On the other hand, galleries committing themselves to an artist on a long-term basis need the security of exclusivity in those areas in which their market is concentrated. This is just another example of the need to balance the reasonable expectations of the parties.

Exclusivity may be limited by time, territory and works.

#### (b) Territory

For their part, artists need to be assured that the gallery is able to fully promote and market their works throughout the territory of exclusivity. Thus, very few galleries suggest that they have world rights as agents. Some American, English and European galleries work on this basis but no Australian gallery has yet reached an eminence which would permit such claim. A few galleries purport to act as Australia-wide exclusive agents. More generally, the gallery will insist upon regional or Statewide exclusivity.

On the other hand, the gallery needs to be assured that the effort and money that is put into promoting the work of an artist may eventually be recouped. This is not likely if the artist is selling works through numerous outlets. The gallery will insist that it will be involved in all sales made within its principal market catchment area. In some cases, where an artist is represented in say, both Sydney and Melbourne, the galleries will make their own agreement as to how the commissions will be split. This provides the artist with wider representation than might otherwise have been possible and is a disincentive against doing deals behind the gallery's back.

(c) Time

The parties should agree as to the length of time for which the relationship is to continue. Of course if the relationship sours, neither the artist nor the gallery will wish to continue the representation. For this reason both should agree upon a right to terminate after giving notice. Furthermore, some artists agree to representation only because a particular individual is employed by the gallery. In such a case, the artist may wish to include a right to terminate should that person leave the employment of the gallery. Many galleries will not agree to this because it makes the goodwill of the gallery precariously dependent upon individual employees, but if it is important to the artist, that position should be clarified at the outset.

(d) Works

It is important to determine which works are intended to be covered by the relationship. Does the agreement include:

- only specific works? If so, by whom are they to be selected?
- all works completed after the agreement is entered?
- all works, whether done before or after the agreement is entered?

Further, what types of artwork does it cover? For example, some painters also make sculptures or prints. Is it intended that these art forms should also be included in the representative relationship?

(e) Function

Exhibition and sale of work are not the sole functions of a gallery. Any reputable gallery with long-term relationships with its artists will also seek to promote their artists' work generally and most will try to obtain commissions and often negotiate licences for the reproduction of the artists' work. What the gallery is empowered to do should be established from the outset. So should any limitations upon those powers. For example, the gallery should refer offers of commissions to the artist before making any commitment to the client; all terms of the commission should be fully disclosed and discussed between the artist and gallery; and the artist's decision should be final. This is standard practice in reputable galleries.

In the case of copyright permissions or licences, similar measures are advisable except that it is in the interests of both the gallery and the artist to have such licences actually signed by the artist rather than by the gallery on behalf of the artist.

## 6.13 The Exhibition

(a) Frequency

Gallery and artist should agree upon a minimum frequency of exhibition. Some artists are enormously prolific while others produce very few works. Therefore the parties should reach an understanding that both fulfils the gallery's

commercial interests and protects the artist's creative interests. For some, two shows a year might be reasonable, for others one show every two years is better.

(b) Type of show

Is the exhibition to be solo? Is the artist prepared to exhibit in-group shows? Most galleries like to be able to exhibit their solo artists in-group shows too, and few artists dissent. But artists should be careful that the exhibitions promised them are not only group shows.

(c) Costs of exhibition

The cost of designing, printing and posting the invitations to the opening and of providing warm moselle and cheddar cheese, is considerable. The gallery should pay for these as being costs expended in the earning of their commissions. If the gallery has sufficient confidence in an artist to mount an exhibition, it should back its judgment rather than expect the artist to provide this sort of insurance.

Recently some galleries have taken the imaginative step of obtaining sponsorship to defray these costs. After all it is effective promotion for a wine company to donate quality wine (and sometimes a contribution towards the printing costs) in return for acknowledgment on high quality invitations and catalogues that go into the homes and hands of affluent gallery patrons.

Framing is often a contentious issue. Who pays for it? And to whom do the frames belong after the show? It is common practice that the gallery arranges for framing and the artist pays for it out of sales. Sometimes the artist has already framed the works and the gallery chooses to reframe them. This usually causes ill feeling -- the artist alleging that the gallery is trying to squeeze extra money from the artist, and the gallery alleging that the artist is unappreciative of the importance of framing in the psychology of selling. To avoid such recriminations the parties should discuss the matter; the gallery could be shown specimens of the artist's framing. The gallery can then either agree to have the artist frame the work, agree to have the artist frame the work using different frames, or insist that it be left to the gallery's tradesmen. At least then, the parties will have a common expectation.

If the gallery does reframe paintings in house and charge the artist for doing so, the cost of the frame should be deducted from the sale price of each work before commission is calculated. Otherwise the gallery is receiving commission on the value of the frame for which it has already once been paid.

(d) Right to make reproductions

Many galleries use invitations featuring a reproduction of an example of the artist's work. This makes the invitation more striking and may whet the invitee's acquisitional whistle. However, the artist controls the right to authorise such reproductions and permission must be sought and granted before such usage is made of the work.

(e) Crating and freight charges

Obviously, these costs will vary according to the size and medium of the work and the distance from studio to gallery. Who is to be responsible for these expenses (including insurance), should be determined before the work ever leaves the studio.

## 6.14 Studio Sales

Studio sales are a frequent cause of disharmony between artist and gallery. Such sales arise in numerous ways and perhaps not all should be treated in the same way.

Often, dealers take their collector clients to the studio of an artist and show them works that are displayed, stored, or in preparation there. This is particularly common when the pieces are large or bulky. Undoubtedly, in these circumstances a commission should be paid to the gallery because it has been responsible for the sale.

Frequently the collector thus introduced to the artist will seek to buy further work, privately and minus any gallery commission. The artist gets cash in the back pocket, the collector gets a hefty discount, and the gallery who brought the parties together, gets nothing. This is inequitable. In the long run such a practice will cost the artist because the gallery will hesitate to introduce future clients to the artist.

But what if the gallery played no part in the transaction? For example, the artist may pay the studio rent with a painting, trade artworks for accounting, medical or legal services, or wish to sell a work to an admiring friend or relative. Should such occasions be revealed to the gallery and a fair market price be allocated to the works and a commission be paid thereon?

When an artist enters a representative relationship with a gallery the parties must have a common understanding as to the circumstances in which the commission will be payable. In its handbook, the Australian Commercial Galleries Association states as follows:

“All sales are subject to payment of commission; sales made during an exhibition, from stock and elsewhere -- even sales out of the studio to oldest friends, close family etc. Where he or she is represented by several galleries, the artist may sometimes have to decide which gallery should receive commission but work should not change hands for money without the artist-gallery system benefiting.”

Whilst this policy is largely justifiable, it is dangerous to accept it as an immutable code of expectation. Three points must be made:

- (a) Whether or not commission is payable on studio sales, and if so, how much, is a matter for negotiation between the parties. Such a matter will become a term in the contract of agency that (like it or not, written or verbal) will exist between artist and dealer. However it will only be included (and therefore be enforceable) if it is explicitly agreed to by both parties. No court would imply such an important term into the contract.
- (b) One of the keystones of the galleries' argument is that the “gallery's representation of an artist is usually continuing and not confined to the three or four weeks of the artist's exhibitions”. However, the experience of some artists is that their galleries do little, if anything, to promote their sales between exhibitions. Certainly, reliance upon the accumulated reputation of the gallery is hardly grounds to claim commission on all sales. But if the gallery is actively promoting the artist's work then it undoubtedly deserves its reward.

With this in mind some American artists include in their gallery agreements a term by which their gallery's efforts can be objectively judged. Thus, in consultation with the gallery, they set a figure which is the value of expected annual sales; if the gallery does not generate the expected level of sales and the artist receives an accordingly lower income, the artist may choose to terminate the sole agency, make independent studio sales, and even move (partially or wholly) to a gallery which works harder for its artists. Whilst it is not necessarily suggested that such an arrangement would be suitable to Australian conditions, it does illustrate the point that galleries deserve to share the profit from sales if they are actively promoting an artist -- but not otherwise. It is not sufficient that "the gallery brings to its representation the reputation it has built up through all its years of exhibiting work". It has a duty of active promotion.

- (c) The position adopted by the Commercial Galleries Association seems too inflexible and few artists would live within its constraints. There are alternatives, and these should be discussed by artist and gallery.

- Commission is payable on all sales or trades whatsoever of the artist's work, for the duration of the representation.
- Commission is payable on all sales and trades made to persons introduced by the gallery.
- The artist may sell a previously determined number of works from the studio each year without paying commission, but anything over that amount attracts a full commission.
- Commission is payable on all work, but that sold by the artist from the studio attracts a lesser commission percentage.

Artists are often heard to criticise a gallery because it demanded a commission and "didn't do a damn thing to earn it". For their part, galleries often complain that their artists expect professional representation yet continually endanger the whole basis of the relationship by acting as their own dealer when it suits them. It is an important problem, and it is vital that the artist and gallery work out a mutually acceptable, equitable, solution.

## 6.15 Commission

The lifeblood of any exhibiting gallery is the flow of commissions from sales. The percentage of the sale price so consumed, varies from about 25 to 40 per cent, depending upon which gallery is dealing with what artist, and whether the work is in a group or solo show. The agreed percentage should be subject to periodic review. Both artists and galleries recognise that this commission is vital to the business of art, and further admit that one of the most common grounds of discontent is the deduction of commission and other expenses. Thus, the parties must fully discuss these matters. Each must understand their financial rights and duties. This is a mutual interest.

The following is a list of points that should be considered:

- (a) What percentage commission is payable to the gallery?
- (b) Is that percentage to be the same for all media?
- (c) Is commission payable on any prizes or awards granted?
- (d) Is commission payable on purchase prizes? If so, how is it to be calculated?
- (e) Is commission payable on all works sold from the studio? Or only those where the purchaser was introduced by the gallery? If so, what percentage?

- (f) Does the gallery expect a commission on royalties, on the sale of reproductions, or on commercial assignments?
- (g) Is it clear that in the case of forms that have substantial production costs, those costs are deducted before calculating commission?
- (h) Is commission payable on all creative commissions obtained? Or only those obtained by the gallery?

## 6.16 Net Price Agreements

Some galleries do not use commissions but prefer instead to pay their artists an agreed price upon sale, regardless of the price realised at sale. This is disadvantageous to the artist in that it is akin to permitting the gallery to "buy in" and resell on their own terms, without having to give the artist a cent until the work has been resold. Further, the artist obtains no benefit from any increases in value that may occur whilst the work is awaiting sale. The gallery gains a potential to make higher profits without incurring additional expense, but the artist gains nothing.

## 6.17 Sale Prices

The price of the work should be agreed to by both artist and gallery. Some galleries prefer to work within a range of prices as this allows them a little more flexibility. Whichever mode is used, the gallery will know the market value of the work and artists would usually be wise to be guided by this. But, one should ensure that a price or range is determined for each work, and these should be recorded.

Galleries should not sell below the agreed price unless it is for a discount already agreed to by the artist. It is a custom of some galleries to give discounts to public art galleries, certain important collectors, and sometimes architects and interior designers. Indeed, the artist's reputation could be greatly enhanced by the careful placement of work and a discount is but a small price to pay for such an advantage. But discounts should be the exception rather than the expected, so artists should discuss the subject with their gallery and work out the types of institutions and people that should receive a discount.

## 6.18 Purchases by the Representative Gallery

Some exhibiting galleries buy certain of their artists' work for backroom stock. This is advantageous to the artist in that he or she obtains the benefit of an immediate, albeit discounted, sale. It also means that the gallery has an even greater incentive to promote the artist's work.

The disadvantage is that if a large number of such purchases are made, the backroom stock may create a conflict between the interests of the gallery and those of its artists, for galleries may be tempted to sell their own examples of the artist's work rather than that which is merely on consignment. For this reason, artists may consider limiting the number of works that the gallery may buy for the stockroom.

## 6.19 Advances

Some artists receive a stipend or "advance" from their gallery. It is important to determine whether these advances are returnable or non-returnable. That is, will the artist have to return to the gallery any difference between the advance and the end-of-year sales value? With some galleries, if the advance was in excess of actual sales, the artist does not have to refund the difference. It is essential that this is made clear at the outset, for if it is "returnable" the artist may face considerable difficulties at year's end.

One fair way of overcoming this problem is to agree with the gallery that any excess can be paid for in paintings.

## 6.20 Payment After Sale

It is important that the artist and gallery enjoy a mutual understanding about the terms and procedures of payment.

Most galleries agree to pay the artist within 30 days of receiving the purchaser's money. Unfortunately, one or two prominent galleries have developed reputations for holding on to their artists' money for some months. This may be unethical but it provides them with interest free capital that can be used either to pay pressing creditors or invested on a short-term money market at high rates of interest. The commercial benefit to the gallery is short lived for eventually the artists tire of asking and waiting for their money and leave the stable.

Similarly, if the sale is on the basis of a dollar down and a dollar a week, the artist should receive a percentage share of each instalment within 30 days of each payment. It is unethical for a gallery to collect the whole of its commission before giving the artist a share -- the economic disadvantages of the time-payment system should be equally shared between gallery and artist.

## 6.21 Statements of Account

Normal business practice demands that a gallery provide its artists with regular and full statements of account. These should include a list of paintings sold, their list price, the actual sale price and the amount payable to the artist. Further, the statement should list the unsold paintings remaining in the possession of the gallery. Only this sort of detail provides the artist with a full picture of his or her financial affairs.

This reckoning should occur at least twice a year.

### RUSKIN GALLERIES

#### STATEMENT OF ACCOUNT

Artist: J. Whistler

Period: 1/1/99-31/3/99

SALES NETT DUE

TITLE

PRICE

COMMISSION

ARTIST

1. Coxcomb in Grey \$900 \$300 \$600
2. Impudence on Ice \$300 \$100 \$200
- 3.
- 4.

5.

Advances Paid to Artist

Jan. 1st 1999                    \$200

Feb. 1st 1999                    \$200

Mar. 1st 1999        \$200

Total for quarter \$600 \$600

Net Due Artist \$200

Unsold Works in Custody of Gallery

List Price

1. The Cockney Butterfly \$1000

2.

3.

6.22      Receipt

One of the most commonplace causes of dispute between gallery and artist is the allegation that although certain works were delivered to the gallery, they were neither sold nor returned. Similar problems arise with private purchasers who take a piece home "to see how it looks". Usually there is nothing to prove that the work ever existed.

As a standard procedure many artists very sensibly take a photograph of any artwork before it leaves the studio. This has two advantages; the photograph may later be used to make reproductions of the work (see The Principles of Copyright), and provides a means by which, in the event of dispute, the artist can prove the existence of the work and show investigators of any loss what the work looked like.

Furthermore, whenever a work leaves the studio and is left in some one else's possession, artists must ensure that they obtain a receipt for the work. Thus, before delivering works to a purchaser or gallery the artist should prepare the receipt, detailing the works being delivered, so that when the works are handed over they can be simply checked against that record and the receipt signed. This is an illustration of the way that artists can simply protect their own interests. It is simple to complete yet offers wide protection. All artists should keep a number of these at hand and complete them as a matter of course. (It should be noted that at the bottom of the specimen receipt, the form provides a space for the signature of the "dealer/agent of gallery". In some cases the person into whose possession the work is given will not be a dealer or gallery agent. In such cases the form should be amended accordingly.)

6.23      Two Specimen Long-Term Artist-Gallery Contracts

The contracts which follow incorporate many of the matters that have been discussed above. As with any standard form contract, they should be used as the basis of discussion and amended where necessary so as to reflect the expectations of both the artist and the gallery.

### ARTIST EQUITY STANDARD RECEIPT FORM

Reprinted by permission of Artists Equity (U.S.A.)

Received from .....

Received from Name of Artist

Address ..... Phone .....

Selling Percent

Title/Medium/Size/Price/Commission

1. ....

2. ....

3. ....

etc.

Use additional sheets if necessary for (purpose: e.g., sale, exhibition, inspection, etc.) to be held from ..... (date) to ..... (date).

Until the Works listed above are returned to the possession of the Artist, each will be fully insured against loss or damage for the benefit of the Artist in an amount not less than the selling price less commission. None may be consigned, sent out on approval or removed during the period of the exhibition except as agreed in writing. All of the above Works are to be returned to the Artist on demand. Reproduction rights reserved by Artist.

Date.....

Signature of dealer/agent of gallery

Consent is hereby given to send work out on approval:

Date.....

Signature of Artist

As with any standard form contract, they should be used as the basis of discussion and amended where necessary so as to reflect the expectations of both the artist and the gallery.

### LONG-TERM ARTIST-GALLERY CONTRACT EXAMPLE ONE

This is an agreement between

..... of .....(the Artist)

and

..... of .....(the Gallery)

by which we agree as follows:

1. Scope. The Artist appoints the Gallery sole agent for the exhibition and sale of ..... (specify whether all Artworks or just paintings, etchings, or sculptures, etc.) in the following geographical area .....(specify city, state, or country).

2. Duration. This agreement is for a period of ..... provided that each party has the right to terminate the agreement at any time upon ..... weeks written notice. The agreement will automatically terminate
- (a) upon the death of the Artist; or
  - (b) the death or termination of employment of ..... with the Gallery; (Use this provision if a special person is the reason for going to the Gallery); or
  - (c) if the Gallery moves outside the area of .....; or
  - (d) if the Gallery becomes bankrupt or insolvent.

On termination, all Works consigned hereunder shall be immediately returned to the Artist.

3. Exhibitions. During the term of this agreement the Gallery shall hold at least one solo exhibition of the Artist's work every ..... months. The Artist shall have artistic control over the exhibition of the Works and the quality of reproduction of such Works for promotional or advertising purposes. Failure by the Gallery to hold the agreed number of exhibitions or to exercise all reasonable efforts to promote and sell the Artist's work shall entitle the Artist to terminate this agreement upon thirty (30) days' written notice given the Gallery at the above address.

4. Delivery. The responsibility for and the cost of packing, insurance and transport to the venue will be borne by the Gallery/Artist, and from the venue will be borne by the Gallery/Artist.

Type of Packing .....

Type of Transport .....

Type of Insurance .....

Insurance for transport shall be for an adequate specified amount agreed to by both parties. Packing and delivery of Works sold at the exhibition will be the responsibility of the Gallery.

5. Preparation. Frames, mounts, pedestals, hanging or supporting accessories and other aids necessary for the proper mounting of the exhibition will be supplied by ..... and paid for by ..... At the end of the exhibition such objects will be the property of .....

6. Exhibition Costs. Costs will be allocated as follows:

Artist/Gallery Budget

Advertising and Public Relations ..... ..

Postage, Gallery and Artist

Mailing Lists ..... ..

Printing ..... ..

Opening Expenses and Catering ..... .. (specify)

Catalogues ..... ..

Photography ..... ..

Other (specify) ..... ..

If postage is charged by the Gallery to the Artist, the list of names of persons to receive invitations will be provided to the Artist on request ..... days before the exhibition is due to commence. No costs shall be incurred by either party in the name of the other party without the prior written approval of the party liable to pay the costs.

7. Rental or Minimum Sales Guarantee. If a rental or guarantee is charged by the Gallery, the amount will be \$..... per week. If sales exceed \$..... for the period covered by the exhibition no rental will be charged to the Artist.
8. Prices. Prices of Works exhibited will be determined by mutual consent and will include Gallery commission. Prices quoted to clients for commissioned Works will include Gallery commission.
9. Sales. A deposit of no less than ..... per cent of the full price of the Work will be paid by the purchaser before a red sticker or "sold" notice is attached to the Work. No sale will be made without a deposit being paid unless the purchaser acknowledges the sale in writing. No Work will be removed from the exhibition by either party before the close of the exhibition except by mutual agreement.
10. Commissions.
  - (a) The Gallery shall receive ..... per cent of all sales made on its premises.
  - (b) The Gallery shall receive ..... per cent of any commissions it gets for the Artist and ..... per cent of any other commissions awarded to the Artist during the period of the contract.
  - (c) The Gallery shall receive a commission on purchase prizes awarded to the Artist. That commission shall be calculated at ..... per cent of the regular Gallery list price.
  - (d) The Gallery shall not receive any commissions on royalties, sale of reproduction rights or commercial assignments attained by the Artist, unless they have been arranged by the Gallery. In such case, the commission shall be ..... per cent.
11. Studio Sales. The Artist may sell ..... (number of) Works by his/her own efforts each year without the payment of any commission to the Gallery. Studio sales in excess of this number will attract a Gallery commission of ..... per cent.\*  
\*Delete if inapplicable.
12. Payment on Gallery's Sales.
  - (a) On outright sales: Gallery shall pay Artist the balance of sale price after its commission within thirty (30) days of purchaser's payment to Gallery;
  - (b) If purchaser pays in instalments: All moneys received by Gallery from purchaser shall be distributed pro rata to Artist and Gallery in accordance with their respective percentage shares of the total sale price, and Artist's share shall be paid to him/her within thirty (30) days of Gallery's receipt of any instalment payment until Artist's share is paid in full.

It is expressly agreed that any default of a purchaser from Gallery shall be borne solely by Gallery and Gallery shall, notwithstanding such default, pay Artist his/her percentage share of sale price within ninety (90) days of such default.

13. Payment on Artist's Sales. With respect to sales made under paragraph 11:
  - (a) On outright sales: Artist shall pay Gallery its sales commission within thirty (30) days of purchaser's payment to Artist;

(b) If purchaser pays in instalments: Artist shall pay Gallery its percentage share of each payment by purchaser to Artist within thirty (30) days of Artist's receipt of any instalment payments.

14. Statements of Account. The Gallery shall furnish the Artist with a quarterly accounting, the first such accounting to be given on the..... day of ..... 19..... Each accounting shall state for each Work sold during the accounting period the following information: the title of the Work, the date of sale, the sale price, the name and address of the purchaser, the amounts due the Artist and the Gallery. Further, it shall describe the location of all Works consigned to the Gallery that have not been sold.
15. Inspection of Books. The Gallery shall maintain accurate books and documentation with respect to all transactions entered into with and on behalf of the Artist. On the Artist's written request, the Gallery will permit the Artist or the Artist's authorised representative to examine these books and documentation during the normal business hours of the Gallery. Where there is established any discrepancy in favour of the Artist, the Gallery shall pay the costs of the examination and shall pay the Artist the deficit amount.
16. Loss or Damage. The Gallery shall be responsible for loss or damage to any consigned Artwork from the time of delivery to the Gallery until the Work is returned to the Artist or delivered to a purchaser. In the event of loss or damage that cannot be restored, the Artist shall receive the same amount as if the Work had been sold at the retail price listed in the Record of Consignment. If restoration is undertaken, the Artist shall have the power of veto over the choice of the restorer, which power is not to be exercised unreasonably.
17. Insurance. The Gallery shall insure the Work against theft, damage and loss for not less than ..... per cent of the retail price shown in the Record of Consignment. In the event of such theft damage or other loss, the Gallery shall either reimburse the Artist for that loss, or make the insurance claim without delay and assist in the processing thereof.
18. Copyright. The copyright in each Work shall remain the property of the Artist and the Gallery shall inform purchasers that the Artist is the owner of copyright in the Work. The Gallery may/may not sell or licence the reproduction rights of the Artist's Work. No such transactions may be made without the prior written consent of the Artist.
19. Assignability. This agreement shall not be assigned by either party without the written consent of the other.
20. Modification. This agreement constitutes the entire understanding of the parties. Its terms cannot be modified except by an instrument in writing signed by both parties.
21. Waiver. A waiver of any breach of any of the provisions of this agreement shall not be construed as a continuing waiver of other breaches of the same kind or other breaches hereof.

Dated the ..... day of ..... 19.....

Signed by the Artist .....

Signed for and on behalf of the Gallery .....

The following example was prepared by the Arts Law Centre of Australia and a major commercial gallery. It provides an alternative approach to some of the matters raised in the preceding example.

## LONG-TERM ARTIST-GALLERY CONTRACT EXAMPLE TWO

This is an agreement of sale between

..... of ..... Tel: .....(the Artist)

and

..... of ..... Tel: .....(the Gallery)

By which both parties agree that they are committed to carrying out all arrangements concerning this contract in a spirit of co-operation and trust and on the following specific terms:

### Agency.

- (a) Exhibition and promotion: The Artist appoints the Gallery exclusive Agent for the exhibition and promotion of all work in Australia except that the Artist may show in a public gallery or in a thematic exhibition, subject to notifying the Gallery.
- (b) Sale: The Gallery has exclusive agency for sale of work to any public gallery in Australia and private buyers in New South Wales, and non-exclusive rights to sell to others.
- (c) Commissions: Other than the Artist retaining a personal right, the Gallery has the exclusive right to seek commissions for new Works. No commission agreement will be entered into by the Gallery, on behalf of the Artist, without the prior written approval of the Artist.
- (d) Copyright: The Gallery is not the agent for, and may not deal with, any aspect of the Artist's copyright without the prior written approval of the Artist.

### Exhibitions.

- (a) Frequency: During the term of this agreement the Gallery shall, if required by the Artist, hold at least one solo exhibition of the Artist's work every 24 months, in either the upstairs or the downstairs exhibition area. A plan of the Gallery, showing the two "solo" exhibition areas, is attached. The Gallery will have the final decision as to which area is used.
- (b) Delivery: The responsibility for and cost of packing, insurance and transport to and from the venue will be borne by the Artist except that transport from the venue to buyers will be borne by the Gallery. Work must arrive three to four days prior to the exhibition opening and all Works not kept in stock by the Gallery must be removed within two days of the close of the exhibition.
- (c) Costs: As per copy of "Standard Exhibition Policy" attached, standard exhibition costs are borne by the Gallery. Additions to the standard format must be discussed with the Gallery and any extra costs are borne by the Artist.

- (d) Cancellation: The exhibition may be cancelled by either party providing at least 60 days written notice to the other.
- (e) Installation: The Artist agrees to assist the Gallery with installation/hanging and demounting the exhibition. The Artist also agrees to restore the Gallery if any modifications to it are made by the Artist.
- (f) Stock: At the close of the exhibition, the Gallery will advise the Artist which Work(s) it wishes to keep in stock.
- (g) Stockroom: The stockroom will be closed on the opening day and/or evening of all exhibitions.
- (h) Curatorial: The Gallery has the right to withdraw Work from an exhibition, upon giving the Artist written reasons, if the Work is obscene, defamatory or discriminatory, or involves a breach of copyright or other rights.
- (i) Presentation. The artist shall be responsible for, and shall pay for, the framing (or other presentation) of the Work.
- (j) Prices. The price of works will be determined by the Artist, with the Gallery's advice, and will include Gallery commission.
- (k) Information. The Artist agrees to provide the following information to the Gallery at the commencement of this Agreement but in any case at least six months prior to an exhibition:
  - (i) old catalogues from previous shows;
  - (ii) biographical and bibliographical information;
  - (iii) slides of major works;
  - (iv) 8 x 10 black and white photographs of major works;
  - (v) any publicity or reviews received.
  - (vi) The Artist agrees to update this information when necessary.

#### **Gallery commission.**

- (a) Sale of Works: The Gallery shall receive . . . . . per cent commission on all sales.
- (b) Commissions: The Gallery shall receive . . . . . per cent of the Artist's fee for any commission it obtains for the Artist, except that where the Artist obtains the commission, in which case the Gallery shall take no fee. If the Artist obtains a commission but asks the Gallery to negotiate it, the Gallery shall be entitled to a fee of . . . . . per cent. Where the production cost of the Work is unusually high commission will be calculated after deducting the material and fabrication costs from the sale price of the Work.

- (c) Copyright: The Gallery shall not receive any commission on dealing with the Artist's copyright unless it has been arranged by the Gallery and approved by the Artist in writing. In this case, the Gallery shall receive . . . . . per cent of the Artist's fee.
- (d) Prizes within Australia:
- (e) Acquisitive prizes: . . . . . per cent of the retail value of the Work if the value of the Work is equal to or less than the value of the prize.
- (f) Purchase prizes: . . . . . per cent of the purchase price, except that where a commission on the sale is payable to a third party (e.g. the exhibition organisers), the Gallery commission will be the residual, if any, between the amount paid to the third party and the amount that would otherwise have been payable to the Gallery.

## Gallery sales.

- (a) Except as outlined in 7(c), no contract for sale of Works will be made unless either
- (b) the full purchase price is paid, or
- (c) the contract is in writing, or
- (d) a deposit of 10 per cent is given.

No "sold" notice (e.g. red sticker) will be attached to a Work unless a contract for sale has been made.

- (e) The Gallery may make instalment or credit sales. A minimum deposit of 10 per cent shall be received. The Artist's written approval must be sought before a buyer is given time to pay which exceeds 90 days. The Work will not be given to the buyer unless full payment has been made.
- (f) Telephone "sales" and options shall be allowed to public galleries only. A half sticker will be attached to indicate an option, which will be for one week only. The Gallery will be fully responsible for defaults on any other telephone sales.
- (g) No Work will be removed prior to the end of the exhibition.

## Payment on Gallery's Sales.

- (a) On outright sales: The Gallery shall pay the Artist the balance of the sale price after its commission as soon as possible but in any case, within 60 days of purchaser's payment to Gallery.
- (b) On credit or instalment sales: All money received by the Gallery from the purchaser shall be distributed pro rata to the Artist and the Gallery in accordance with their respective percentage shares of the total sale price. The Artist's share shall be paid within 60 days of the Gallery's receipt of any instalment. If the buyer has received the Work, the Artist's share shall be paid in full by the Gallery within 90 days of delivery, whether or not the Gallery has received the full amount from the purchaser. Where the buyer has not received the work, if there is any default by a purchaser the Work will be returned to the Artist and any payment(s) made distributed pro rata.

## Payment on Artist's Sales.

- (a) On outright sales: The Artist shall pay the Gallery its sales commission as soon as possible but in any case within 60 days of the purchaser's payment to the Artist.
- (b) On credit or instalment sales: All moneys received by the Artist from the purchaser shall be distributed pro rata to the Gallery and the Artist in accordance with their respective percentage shares of the total sale price. The Gallery's share shall be paid within 60 days of the Artist's receipt of any instalment payment. If the buyer has received the Work, the Gallery's share shall be paid in full by the Artist within 90 days of delivery, whether or not the Artist has received the full amount from the purchaser. Where the buyer has not received the Work, if there is any default by a purchaser the Work will be returned to the Artist and any payment(s) made distributed pro rata.

## Gallery Costs.

From time to time the Gallery may incur costs on behalf of the Artist for such matters as transport, storage, documentation. Before any cost over \$50 is incurred the Gallery shall obtain the Artist's written approval. Any amounts owed by the Artist to the Gallery shall be repaid on termination of this agreement.

## Statements of Account.

The Gallery shall furnish the Artist with an exhibition account within 60 days of an exhibition and an annual accounting. Each accounting shall state the following information concerning each Work sold during the accounting period:

The title of the Work, the date of sale, the sale price, the name and address or phone number of the purchaser and the amounts due to the Artist and the Gallery. Further, it shall note the date of consignment and the location of all Works consigned to the Gallery that have not been sold, and any money owed by the Artist to the Gallery for costs borne by the Gallery.

If the Gallery desires the Artist to reclaim any Work this will be noted at the time of the accounting.

The Artist shall furnish the Gallery with an annual accounting, the first such accounting to be given on the [day] of [month] [year]. Each accounting shall state the following information concerning each Work sold by the Artist in the Gallery's area of exclusive agency:

The title of the Work, the date of sale, the sale price; and the amounts due to the Gallery and the Artist.

## Inspection of Books.

The Gallery shall maintain accurate books and records with respect to all transactions entered into with and on behalf of the Artist. On the Artist's written request, the Gallery will permit the Artist or the Artist's authorised representative to examine these books and documentation during the normal business hours of the Gallery. Where there is established any discrepancy in favour of the Artist, the Gallery shall pay the costs of the examination and shall pay the Artist the deficit amount. Where there is a discrepancy in favour of the Gallery, the Artist shall remit the amount of the discrepancy to the Gallery.

## Responsibility for Work.

- (a) The Gallery shall be responsible for loss or damage to any Artwork kept in stock until the Work is returned to the Artist or delivered to a purchaser, up to a maximum amount of \$. In the event of loss or damage that cannot be restored, the Artist shall receive the same amount (up to a maximum of \$) as if the Work had been sold at the retail price. If restoration is undertaken, the Artist shall have:
  - (i) the right to repair or restore the Work for a proper fee up to a maximum of \$; or
  - (ii) the power of veto over the choice of the restorer, which power is not to be exercised unreasonably.
  
- (b) The Gallery shall not be responsible for any loss or damage, howsoever caused, to Work left at the Gallery by the Artist which the Gallery has not requested for stock, or Work which the Gallery has desired the Artist to reclaim, either under clause 11 or by other written request.

## Termination.

- (a) Each party has the right to terminate the agreement at any time upon 60 days written notice. If during the notice period an exhibition would have commenced, termination will take effect from the close of that exhibition, should it go ahead.
  
- (b) The agreement will automatically terminate:
  - (i) upon the death of the Artist; or
  - (ii) the death or termination of employment of .....
  - (iii) with the Gallery;
  - (iv) if the Gallery moves outside Australia; or
  - (v) if the Gallery becomes bankrupt or insolvent.
  
- (c) On termination all works shall be immediately returned to the Artist, and all accounts settled as soon as possible but within 60 days.

## Copyright.

The Artist gives the Gallery a limited licence to reproduce for the purpose of promotion only. The copyright in each Work shall remain the property of the Artist and the Gallery shall inform purchasers that the Artist is the owner of copyright in the Work.

## The Archive.

The Artist agrees that the Gallery may record the Work on transparencies for archival purposes. The purpose of such archive is to provide:

- (i) A record of the exhibition history of the Gallery.
- (ii) A non-lending reference and research resource.

The Gallery promises that it will:

- (i) Return all such material to the Artist in the event that the archive is disassembled or the Gallery goes into liquidation.
- (ii) Not use nor intentionally permit others to use the archival material for any purpose other than those listed above, without prior written approval from the Artist.
- (iii) Properly maintain the archive.

## Assignment.

Neither party will assign its rights under this agreement to a third party.

## Modification.

This agreement constitutes the entire understanding of the parties. Any changes must be in writing and signed by both parties.

## Disputes.

Should any dispute arise concerning any matter referred to in this contract, the dispute will be referred to the arbitration of two arbitrators, one to be appointed by each party. In the event of the arbitrators disagreeing, the dispute will be referred to an umpire selected by the arbitrators.

Dated the ..... day of ..... 19 .....

Signed by the Artist .....

Signed for and on behalf of the Gallery .....

## CONCLUSION

Contracts must reflect the particular needs of their parties, and when considering the specimens that have been presented in this chapter readers must be aware that any clause, phrase or word that is unsuitable to their circumstances may be altered or deleted. The real value of such specimen contracts is not that they dictate what must be done, but rather, suggest what might be done.

The preparedness of both artist and gallery to enter a written agreement is indicative of their good intentions. Both must discuss their mutual expectations and make them explicit. The specimen contract provides a framework for these discussions and a model which the parties can adopt or adapt according to their individual requirements.

Some galleries have already developed their own standard agreements. Normally, these will have been drawn up by a lawyer whose duty is to his or her client, the gallery. Artists should consider the extent to which their interests are protected by such a contract. If in doubt, follow the example of the gallery: consult a lawyer.

## AGENTS AND CONSULTANTS

Practitioners who use agents do so either because they are so famous that they do not need traditional gallery representation, are so little appreciated that no such gallery will accept them, or simply because, say in the case of designers, that is the way that that part of the business operates. Agents work by word of mouth, using their sometimes extensive contacts to place the artist's work. Because they maintain no permanent exhibition premises their overheads are low and consequently most charge a commission that is lower than those charged by the dealer galleries.

Some of those who act as agents do not have established reputations for acumen or honesty. It is surprising how many artists will give valuable works to virtual strangers on the basis of little more than coffee and promises. There are several unscrupulous agents and care should be taken. One should always take the trouble of asking who else they have acted for and then contacting those people for their view.

Many agents now call themselves "consultants". Perhaps it has a more prestigious ring to it than "agent" but of course the term "consultant" is often merely a self-promotional tag which neither adequately describes the function of such persons nor changes the legal duties owed to or by such persons. For example, the consultant may be simply a traditional agent, acting on behalf of the artist; may be retained solely by their corporate clients and have no legal or financial relationship with the artists whose work they buy; or may even be an employee of a dealer gallery who advises collectors and corporations on their art needs. In the last example a fee (usually 20 per cent) may be charged to the client and a commission obtained from the artist (33.3 per cent to 40 per cent). In such cases the conflict of interests is obvious.

When an artist considers entering a business relationship with a private dealer or agent, the factors that should be considered are very similar to those discussed in earlier sections of this chapter. If the relationship is to be that of private dealer and artist, most of the dealings will be in the nature of consignment sales. The parties should enter a consignment agreement, detailing their mutual responsibilities. Further, no work should leave the studio unless the artist obtains a receipt for it.

### Agent -- Artist Check List

If the artist intends retaining an agent it may help to use the following checklist:

- (a) Will it be a sole agency? What geographical area will it cover?
- (b) What artworks will the agency cover?
- (c) What activities will the agency cover? To sell work? To arrange commissions? To arrange exhibitions? To arrange lectures or media appearances?
- (d) Should the agent have the right to sell or licence the reproduction rights on behalf of the artist?  
Should the artist retain control of the purposes for which such sales or licences are entered?

- (e) What commission is payable? Is it payable on studio sales?
- (f) What other fees will the artist be charged?
- (g) How will the artist be paid? How is the agent to be paid?
- (h) What books should the agent keep? What access should the artist enjoy? How often should the agent provide statements of account? Will the agent provide the artist with a list of names and addresses of all purchasers?
- (i) When the agency ends, will the artist be permitted to sell works to persons introduced by the agent? Will commission be payable on such sales?
- (j) Who will set the retail prices? Are discounts permitted? If so, in what circumstances?
- (k) How long is the relationship to last? How can either party terminate at an earlier date?

No artist should enter an agency deal without considering the above matters and then formalising the understandings in writing. The agent can build and maintain the reputation of an artist or absolutely ruin it. Enormous caution should be exercised. Preferably, the artist should have an agency agreement drawn up by a lawyer. The following agreements incorporate many of the matters that have been discussed above. The Long Form Agency Agreement (see below) provides a more comprehensive treatment of the artist-agent relationship.

## SHORT FORM AGENCY AGREEMENT

This is an agreement between

..... of .....(the Artist)

and

..... of .....(the Agent)

by which the Agent confirms receipt of the following Works:

Title/Medium/Size/Retail price/Commission

1. ....
2. ....
3. ....
4. ....
5. ....

(attach additional sheets if necessary)

and by which the parties agree that the Agent shall act as the agent of the Artist for the sale of the above-listed Works on the following terms:

1. Sale. The Agent shall offer each Work for sale at the stated retail price.
2. Payment. The Agent shall send to the Artist the stated retail price of each Work less the stated commission, within 14 days of receiving payment.
3. Other Costs. The Artist shall not be liable to pay the Agent any sum, other than the stated commission on actual sales.
4. Return. The Agent shall return all unsold Works immediately upon the Artist's written request.
5. Damages. If a Work is lost, stolen, damaged or destroyed during the currency of this agreement, the Agent shall notify the Artist immediately and shall be liable to pay the Artist the stated retail price less the stated commission.

Dated the ..... day of ..... 19 .....

Signed by

.....

(the Artist) (the Agent)

## LONG FORM AGENCY AGREEMENT

This deed is made the day of ..... 19 .....

### Parties

The parties to this Deed are those persons or corporations set forth in the First Schedule hereto.

### Interpretation

In this Deed unless the context otherwise requires or indicates the following words and expressions shall have the respective meanings attributed to them as follows:

- (a) "The Agent" means the party named in paragraph 1.1 of the first Schedule hereto and includes his executors, administrators and assigns or, if a corporation, it's assigns.
- (b) "The Artist" means that person or corporation referred to in paragraph 1.2 of the First Schedule hereto and includes his executors, administrators and assigns or if a corporation it's assigns.

Through this Deed except where the context otherwise requires or indicates the following additional provisions in relation to the construction of the Deed shall apply:

- (a) a reference to singular number includes a reference to the plural number and vice versa;
- (b) a reference to any statutory provision shall be construed as a reference to that provision as respectively amended or re-enacted either before or after the date of the Deed from time to time;
- (c) a reference to any gender includes a reference to the other genders and each of them;
- (d) every covenant expressed or implied in this Deed and by which more persons than one covenant shall bind such persons and any two or greater number of them jointly and each of them severally; and
- (e) any schedule to this Deed shall form part of this Deed.

### Preamble

The Artist wishes to appoint the Agent as his exclusive agent for the sale and promotion of the Artworks created by the Artist upon the terms and conditions hereinafter set forth.

## Creation of Agency

The Artist hereby appoints the Agent to be the sole Agent of the Artist in relation to those Artworks created by the Artist and referred to in the Second Schedule hereto (hereinafter called "Artworks") for the purposes set forth in Part Five hereof.

The Agency created pursuant to clause 4.1 hereof shall continue for the period set forth in the Third Schedule hereto and after the expiration of that period the agency will continue until terminated by three (3) months notice in writing given by one party to the other.

The agency granted by clause 4.1 hereof shall be in respect of Artworks which are to be displayed, exhibited, promoted, distributed or otherwise dealt with in the geographical area set forth in the Fourth Schedule hereto (hereinafter called "the Territory").

## Activities Covered by the Agency

The scope of the agency created pursuant to clause 4.1 hereof shall be extended to the following activities:

The sale within the Territory of such of the Artworks as shall be selected by the Agent at such prices as shall be mutually determined by the Artist and the Agent.

The licensing for such fee as the Agent and the Artist mutually determine of the rights to reproduce any of the Artworks within the Territory.

The arranging of exhibitions within the Territory of such of the Artworks as shall be selected by the Agent in consultation with the Artist.

The obtaining on behalf of the Artist of commissions from within the Territory for the production of new Artworks at such prices as shall from time to time be agreed upon between the Artist and the Agent at the time of the acceptance by the Artist of any such commission.

The arranging of lectures or media appearances to be given or made by the Artist within the Territory at such times as shall be agreeable to the Artist.

The general promotion and creation of public interest in the Artworks within the Territory.

In consideration of the grant of exclusive agency pursuant to clause 4.1 hereof the Agent will use his best endeavours to

- (a) promote the sale of the Artworks within the Territory;
- (b) arrange for exhibition and promotion of the Artworks within the Territory;
- (c) obtain commissions from within the Territory for production of new Artworks; and
- (d) licence the right to reproduce the Artworks within the Territory

During the currency of this deed the Artist will not authorise or allow any person or corporation to act on behalf of the Artist in relation to the Activities set forth in clause 5.1 hereof.

## Payment of Commission

The Agent shall be entitled to and the Artist shall pay to the Agent a commission upon all sales of the Artworks negotiated by the Agent with purchasers within the Territory.

The commission payable by the Artist to the Agent in respect of such sales of Artworks shall be a percentage of the gross sale price of such Artworks excluding the cost if any of framing such Artworks.

The percentage referred to in the preceding sub-clause shall be that percentage as appears in the Fifth Schedule hereto.

The Agent shall be entitled to and the Artist shall pay to the Agent a commission in respect of any new Artworks for which the Agent obtains commissions from within the Territory.

The commission payable to the Agent in relation to any such new Artworks shall be a percentage of the gross sale price of such Artworks PROVIDED THAT such gross sale price shall be agreed upon between the Artist and the agent at the time of the acceptance of the commission for such new Artworks.

The percentage referred to in the preceding sub-clause shall be that percentage as appears in the Sixth Schedule hereto.

The Agent shall be entitled to and the Artist shall pay to the Agent a commission for the licensing of the rights to reproduce any of the Artworks within the Territory.

The commission payable to the Agent in respect of agreements for the licensing of the right to reproduce any of the Artworks shall be a percentage of the licensing fee invoiced by the Agent to the licensee from time to time, provided that the commission is payable only on moneys actually received.

The percentage referred to in the preceding sub-clause shall be that percentage as appears in the Seventh Schedule hereto.

The Artist shall supply to the Agent full particulars of any studio sales of Artworks made direct by the Artist and particulars of any agreements made by the Artist for the licensing of the right to reproduce any of the Artworks.

The Artist will furnish to the Agent such particulars within thirty (30) days of any such studio sale or within thirty (30) days of the signing of any such agreement for licensing.

In relation to any such studio sale and any such agreements for licensing the Agent shall be entitled to and the Artist shall pay to the Agent the percentage which appears in the Eighth Schedule hereto.

## Prices of Artworks

The Agent and the Artist shall agree as to the retail prices for Artworks sold by the Agent on behalf of the Artist pursuant to the agency hereby granted. Furthermore, subject to the consent of the Artist as to the final terms, the agent shall have the sole right to negotiate the terms (including the fees payable thereunder) of any agreement for

the licensing of the right to reproduce the Artworks, negotiated by the Agent pursuant to the terms of the agency hereby granted.

### **Fees Payable by the Artist**

The Agent and the Artist shall agree as to whether any of the Artworks shall be framed in order to promote the sale thereof and in the event of such agreement the Agent shall be entitled to arrange for the framing of any such Artworks.

In the event that any of the Artworks are framed pursuant to the preceding paragraph hereof then unless the Agency charges any Purchaser with the cost of such framing the Artist shall be responsible for and shall indemnify the Agent against the cost of framing such Artworks.

Without limiting the indemnity expressed in the preceding paragraph the Agent shall be entitled to reimburse himself for the cost of the framing of any Artworks from moneys held by him from time to time on behalf of the Artist or licensing of the right to reproduce the Artwork pursuant to this Deed.

### **Obligations of the Artist**

All Artworks obtained by the Agent from the Artist pursuant to the Agency created hereby shall be at risk of the Agent from the time such Artworks leave the Artist's studio or premises and the Agent shall keep such Artwork insured with a reputable insurance company for at least the minimum insurable value thereof PROVIDED THAT the Artist shall supply to the Agent a written statement of the minimum insurable value of such Artworks at the time of delivery of such Artworks by the Artist to the Agent.

The Agent shall be responsible for and shall pay all fees incurred in relation to any exhibition of the Artworks pursuant to the agency hereby created and shall indemnify the Artist against any such fees.

### **Payment of Moneys**

The Agent shall be entitled to deduct from any moneys received by him on behalf of the Artist pursuant to this Deed, any commission due to the Artist pursuant to this Deed, any commission due to the Agent pursuant to the preceding provisions of this Deed and the Agent will account to the Artist for the balance of any moneys received by the Agent on behalf of the Artist, after deduction of such commission, within thirty (30) days of the receipt by the Agent of any such moneys.

Any commission payable by the Artist to the Agent in respect of sales or agreements referred to in clause 6.4.3 of this Deed shall be paid by the Artist to the Agent within thirty (30) days of receipt by the Artist of moneys in respect of any such sale or agreement and the Artist shall make available to the Agent all such receipt books, invoice books, statements and other records as may be necessary to disclose particulars of any such sales or agreements.

### **Books of Accounts**

The Agent shall maintain receipt books, records of sales and acquisitions, records of loans and exhibitions, and sales invoices relating to the Artworks together with such other records as may be required in order to determine

the value of any sales of Artwork and the value of any licence fees relating to the right to reproduce any of the Artworks.

The Agent shall make access to the aforementioned records available to the Artist at all reasonable times subject to the Artist giving at least twenty four (24) hours notice requiring such access.

The Agent shall forward to the Artist at least once in every period of three (3) months from the date of commencement of this deed a full statement of any sales or licences negotiated by the Agent pursuant to the Agency hereby granted and all moneys received and commissions due and expenses incurred in relation thereto.

In witness whereof the parties have hereunto set their hands and seals on the day and year first hereinbefore written.

The Schedules hereinbefore referred to:

The First Schedule

The Parties

1.1.The "Agent"

1.2.The "Artist"

The Second Schedule

The Artworks .....

.....

.....

The Third Schedule

The Period of Agency: .....

The Fourth Schedule

Territory .....

The Fifth Schedule

commission payable on ordinary sales .....

The Sixth Schedule

commission payable on studio sales .....

The Seventh Schedule

commission payable on reproduction rights .....

The Eighth Schedule

commission payable on commissions .....