



Australian Government
Director of National Parks

COMMISSION AGREEMENT

between

DIRECTOR OF NATIONAL PARKS

and

NAME OF ARTIST [insert]

in relation to

THE ANBG TREEHOUSE GAZEBO COMMISSION

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DATE

This Agreement is made on the [insert number day of month, 20xx].

PARTIES

DIRECTOR OF NATIONAL PARKS, ABN 13 051 694 963 (**DNP**)

and

NAME OF ARTIST, ABN XXXX (if applicable), Address (**Artist**)

BACKGROUND

- A. DNP has approved the design provided by the Artist under a Design Agreement dated xxxx (**Design**).
- B. The Artist has further produced a developed design under a Detailed Design Agreement dated xxxx (**Detailed Design**).
- C. DNP has approved the Detailed Design and wishes to commission the Artist to produce the ultimate completed work (**The Work**).
- D. [insert further background details if required]
- E. The Artist has agreed to provide DNP with The Work, including services relating to fabrication and installation if part of the specified scope of work, in accordance with this Agreement.

OPERATIVE PART

1. *Interpretation*

1.1 In this Agreement, unless the contrary intention appears:

Agreement	means this document and all schedules and annexures.
Commission Brief	means the brief as set out in Annexure 1 to this Agreement.
Commission Coordinator	means the person or firm named in Item C of Schedule 1, or as nominated by DNP from time to time.
Commission Fee	means the fee set out in clauses 7.1 and 7.2.
Commissioned Submissions	means the documents listed in clause 3.2.
The Work	means the ultimate completed work, the ANBG Treehouse Gazebo, to be detailed, fabricated and installed by the Artist where included in the specified scope of work in response to the Commission Brief;
Intellectual Property Rights	includes all copyright (including rights in relation to phonograms and broadcasts), all rights in relation to inventions (including patent rights), plant varieties, registered and unregistered trademarks (including service marks), designs, and circuit layouts, and all other rights resulting from intellectual activity in the industrial, scientific, literary or artistic fields but does not include

	Moral Rights, the rights of performers or rights in relation to Confidential Information;
Material	includes information and the subject matter of any category of Intellectual Property rights;
Moral Rights	the right of integrity of authorship (that is, not to have a work subjected to derogatory treatment), the right of attribution of authorship of a work, and the right not to have authorship of a work falsely attributed, as defined in the <i>Copyright Act 1968</i> (Cth).
Personnel	mean a party's staff, contractors, volunteers and agents. A reference to a party includes that party's Personnel (unless the context provides otherwise) but DNP Personnel does not include the Artist's Personnel.

2. Commencement and Duration

- 3.1 This Agreement commences from [insert start date] and subject to this Agreement, will terminate on [insert finish date] and by which date the Artist has met clauses 3 and 8 to DNP's satisfaction.

3. Scope

- 3.1 The Artist agrees to produce The Work that fulfills the requirements in the Commission Brief and in keeping with this Agreement.
- 3.2 As part of the requirements of the Commission Brief, the Artist will submit to DNP the following (**Commissioned Submissions**):
- (a) the maintenance manual setting out how The Work shall be maintained;
 - (b) an interpretive statement that briefly outlines the Artist's intentions as to the meaning or interpretation to be given to The Work.
- 3.3 The Artist will complete The Work in accordance with the timetable specified in the Commission Brief.
- 3.4 The Artist also agrees to provide such services as specified in the Commission Brief and is solely responsible for engaging any Personnel required to providing such services.

4. Artist's Warranties

- 4.1 The Artist warrants to DNP that:
- (a) the Artist is the sole author and owner of The Work and the Commissioned Submissions;
 - (b) The Work will be produced to a high standard and will use high quality Materials.
 - (c) the Artist is not infringing any intellectual property rights; and
 - (d) where there are other authors to The Work and Commissioned Submissions, the Artist has obtained written consent from each author to perform the obligations under this Agreement and the Artist will provide evidence of such consent to DNP.
 - (e) the Artist is not prevented by any indigenous law, cultural tradition or practices from entering into this Agreement with DNP.

- 4.2 The Artist guarantees the Materials (except where the Material is procured and supplied by DNP), skill and labour in The Work for the period of 12 months from the date of completion.
- 4.3 The Artist will indemnify DNP against loss, injury or damage (including any legal costs or expenses properly incurred) occasioned to DNP in consequence of any breach by the Artist of the warranties in clause 4.1.

5. Co-ordination

- 5.1 The Commission Coordinator will, on behalf of DNP, liaise and co-ordinate with the Artist regarding the performance of this Agreement.
- 5.2 The Artist agrees to consult and co-operate with the Commission Coordinator to resolve and manage all issues arising under this Agreement.

6. Access to DNP Premises

- 6.1 Where in the performance of this Agreement, the Artist or any Artist's Personnel enters DNP premises, the Artist and all Artist's Personnel will comply with any requirements relating to access to areas, dress code, behaviour, health and safety, and other reasonable directions from DNP.

7. Commission Fee and Other Expenses

Commission Fee

- 7.1 DNP agrees to pay the Artist the Commission Fee specified in [insert clause X] of the Commission Brief.
- 7.2 The Commission Fee is inclusive of all of the following:
- (a) cost of all Materials;
 - (b) delivery of the Final Work and Commissioned Submissions to DNP;
 - (c) all wages and other costs associated with engaging any Personnel by the Artist in producing The Work and Commissioned Submissions;
 - (d) insurance cover under clause 19 for the Artist and Artist's Personnel engaging in producing The Work and Commissioned Submissions;
 - (e) all customs, duties and any other taxes or charges payable by the Artist in connection with producing The Work, Commissioned Submissions or providing services under this Agreement.

Travel Expenses

- 7.3 DNP agrees to pay or reimburse the Artist for travel and accommodation expenses incurred by the Artist, but only in relation to the travel and at the rates specified in the Commission Brief.

Additional Materials

- 7.4 DNP agrees to pay or reimburse the Artist for the cost of additional Materials not specified in the Commission Brief, only if DNP had in advance requested the additional Material in writing.
- 7.5 Except with prior approval by DNP in writing, all other expenses will be at the cost of the Artist.

Payment of Commission Fees and Other Expenses

- 7.6 All amounts payable to the Artist under this clause 7 will be paid by DNP within 30 days of receiving from the Artist a tax invoice issued in accordance with clause 9.

- 7.7 DNP is entitled, in addition and without prejudice to other rights it may have, to delay payment or reduce the amount of money payable until DNP is satisfied that:
- (a) the Artist has completed to the satisfaction of DNP that part of the Agreement to which the fee or expenses relate; or
 - (b) the fee or expenses claimed have been calculated correctly; or
 - (c) the expenses that are reimbursable by DNP have been paid by the Artist.
- 7.8 No additional fees or expenses will be payable by DNP unless expressly stated in this Agreement.

8. Changes to The Work

- 8.1 Changes to The Work as set out in the Commission Brief and the Detailed Design are to be made only with written consent of the parties.
- 8.2 If one party reasonably believes that the completion of The Work, as set out in the Commission Brief and the Detailed Design, is not possible due to complications such as unavailability of Materials or unforeseen fabrication problems, the other party will not unreasonably withhold consent to any necessary changes.
- 8.3 If the parties are unable to reach agreement on the appropriate changes to The Work within 14 days, then either party may formally request the dispute to be resolved in accordance with clause 23.

9. Goods and Services Tax (GST)

- 9.1 In this clause, a word or expression defined in the *A New Tax System (Goods and Services Tax) Act 1999* (Cth) has the meaning given to it by the Act.
- 9.2 If GST is levied or imposed on or in respect of any supply made by a person (**supplier**) under or in accordance with this Agreement, GST is payable by the recipient of the supply (**recipient**) to the supplier at the rate levied or imposed, in addition to the consideration payable under this Agreement.
- 9.3 The supplier must provide the recipient with a valid tax invoice before the recipient is required to make any payment under this Agreement relating to the taxable supply. Invoices to DNP will include:
- (a) the Artist's name and ABN (if applicable);
 - (b) amount of any taxable supplies;
 - (c) amount of GST payable; and
 - (d) a brief description of the fee or expense to which the invoice relates.

10. Inspection

- 10.1 The Artist will, subject to DNP giving the Artist reasonable notice, facilitate periodic inspections of The Work by DNP representatives through the fabrication of The Work:
- (a) at any time during this Agreement at DNP's request, and
 - (b) upon completion of The Work and prior to transporting The Work for installation.

11. Storage

- 11.1 The Artist is responsible for the storage of The Work up until The Work is delivered to DNP for installation.

- 11.2 If, as a result of a delay caused by DNP to the delivery of The Work to DNP for installation, the Artist incurs additional storage costs, DNP agrees to reimburse the Artist in accordance with clause 7.6.

12. Delivery

- 12.1 The Artist is responsible for arranging The Work to be delivered to DNP in a safe and timely manner.
- 12.2 The Artist will submit to DNP 3 quotes from transport contractors that are acceptable to the Artist for delivering The Work. Each quote must include the cost of full insurance of The Work during the delivery.
- 12.3 By taking delivery of The Work, DNP will not be deemed to have accepted The Work or to have released the Artist from his/her obligations under this Agreement.
- 12.4 The risk of loss or damage to The Work (except where the loss or damage is caused by the Artist) passes to DNP upon delivery.

13. Installation

- 13.1 DNP, in discussions with the Commission Coordinator, will nominate an installation contractor to install The Work.
- 13.2 The costs of the installation contractor will be paid by DNP.
- 13.3 Leading up to and during installation, the Artist will
- (a) collaborate with DNP and the installation contractor to determine the methods and procedures for installing The Work in accordance with the Commission Brief, and
 - (b) provide such advice and assistance to DNP and the installation contractor as reasonably necessary.

14. Ownership of The Work

- 14.1 The Work and Commissioned Submissions (including any additions or modifications) become the property of DNP upon DNP's payment of the Commission Fee.
- 14.2 In the event this Agreement is terminated under clauses 20.1, 20.7 or 20.8, the unfinished The Work and Materials created by the Artist under this Agreement become the property of the Artist.

15. Intellectual Property Rights

- 15.1 The copyright of The Work (including any additions or modifications) remains with the Artist.
- 15.2 The Artist gives DNP an exclusive, irrevocable, royalty free, worldwide, transferrable licence (including the right to sub-licence) to exhibit, communicate, use and publish The Work and Commissioned Submissions to the public, either as a stand-alone piece or as part of any not-for-profit Material intended to:
- (a) promote DNP's role and/or purpose in relation to The Work;
 - (b) promote the Artist;
 - (c) promote The Work or the Commission;
 - (d) promote the Australian National Botanic Gardens; or
 - (e) any combination of the above;

and consents to DNP reproducing The Work or Commissioned Submissions in formats or layouts that are not prejudicial to the Artist's honour or reputation.

- 15.3 If DNP wishes to use The Work or Commissioned Submission for purposes other than clause 15.2 or for any "for-profit" publications (for example souvenirs, postcards, t-shirts etc), DNP agrees to first seek the Artist's written consent.
- 15.4 Where DNP offers the Artist a fee of [insert \$amount] (including GST) for each proposed use under clause 15.3, the Artist will not unreasonably withhold consent.
- 15.5 DNP agrees that in exercising the rights granted by the Artist under this clause 15, DNP will:
- (a) attribute the author(s) of The Work and Commissioned Submissions using the attribution specified by the Artist. If requested by DNP, the Artist will work with DNP to agree on the precise form of attribution; or
 - (b) where no attribution is specified by the Artist, attribute the Artist as the author of The Work; and
 - (c) display a notice showing the name of the Artist with The Work. The notice will be unobtrusive and not interfere with the integrity of The Work.
- 15.6 In the event of the Artist's death, DNP will continue to use the attribution under clause 15.5;
- 15.7 The Artist agrees that they will not use, and will not cause, permit or allow anyone else to use, the copyright in The Work and Commissioned Submissions for any purpose other than permitted in 16.3.
- 15.8 The Artist agrees not to reproduce The Work and Commissioned Submissions, or create Material that is substantially similar to The Work, without first obtaining DNP's written consent.

16. *Publicity*

- 16.1 The Artist will not communicate any information relating to the Commission to any person except as authorised by DNP. The Artist will direct all media enquiries concerning the Commission to the Commission Coordinator.
- 16.2 Where the Artist has prior written authorisation from DNP to communicate such information, the Artist will take all reasonable steps to ensure that all references in the media to the Commission include a statement that the The Work is or was produced for DNP.
- 16.3 This Agreement does not prevent the Artist referring to and reproducing an image of the Commission in the Artist's resume, curriculum vitae or business brochures.
- 16.4 Wherever practicable, DNP will attribute the Artist in accordance with clauses 15.5 or 15.6 and include where appropriate the interpretive statement provided by the Artist under clause 3.2 in any DNP publication, media release or other public communication concerning The Work and Commissioned Submissions.

17. *Maintenance and Repair*

- 17.1 DNP will use all reasonable endeavours to maintain The Work in accordance with the maintenance manual provided by the Artist under clause 3.2.
- 17.2 If The Work is damaged, DNP will make reasonable attempts to contact the Artist and provide the Artist with the first opportunity to repair or restore The Work at a reasonable fee.

18. Non-Destruction, Alteration or Relocation

- 18.1 DNP agrees not to intentionally destroy, damage, alter or modify The Work in any way whatsoever. DNP will have the irrevocable right to dispose of The Work at its discretion with, and after notification and reasonable time to respond, the consent of the Artist, whose consent will not be unreasonably withheld.
- 18.2 Upon removal of The Work from the Installation Site, DNP may either:
- (a) display The Work at another location agreed by the Artist;
 - (b) sell or donate The Work to a third party agreed by the Artist;
- PROVIDED THAT:
- (c) The Artist will not act unreasonably in withholding agreement under either (a) or (b) above; and
 - (d) If the Artist cannot be contacted after DNP has made reasonable efforts to do so, DNP may display The Work at another location or sell or donate The Work to another owner without obtaining the Artist's agreement.
- 18.3 If DNP and the Artist cannot agree to clauses 18.2(a) or 18.2(b), DNP and the Artist will either:
- Destroy or dispose of The Work in accordance with the Artist's reasonable directions; or
 - Return The Work to the Artist, subject to the Artist's agreement that The Work is not to be sold or displayed.

19. Insurance

- 19.1 The Artist will provide to DNP, within 7 days of signing this Agreement, written evidence that the insurance cover specified in [insert clause "x"] of the Commission Brief has been obtained by the Artist.

20. Termination

No Fault Termination

- 20.1 DNP may immediately terminate this Agreement by giving written notice to the Artist at any time prior to the completion of The Work.
- 20.2 If the Agreement is terminated under clause 20.1, DNP agrees to pay the Artist such fees and expenses incurred by the Artist under clauses 7 and 11 up to the date of termination. The Artist shall also be paid a proportion of the final instalment(s) which would have been due had The Work been completed, based on the stage of completion of The Work which has been reached at the time of termination.

Termination due to Death or Incapacity of Artist

- 20.3 If prior to completing The Work the Artist dies or suffers such injury or illness leaving the Artist incapable of meeting their obligations under this Agreement, the Agreement will terminate upon the Artist's death or incapacity.
- 20.4 If the Agreement is terminated under clause 20.3, DNP agrees to pay the Artist (or the Artist's estate as appropriate) such fees and expenses incurred by the Artist under clauses 7 and 11 up to the date of termination.
- 20.5 DNP may elect to arrange for The Work to be completed by artist(s) acceptable to the Artist (or the Artist's estate as appropriate) and DNP. The Artist (or the Artist's estate as appropriate) will provide DNP with such assistance and documents as is necessary for DNP to have The Work completed.

- 20.6 If DNP elects to not to take action under clause 20.5, the unfinished The Work and Materials created by the Artist under this Agreement becomes the property of the Artist (or the Artist's estate as appropriate).

Termination due to Breach

- 20.7 This Agreement terminates immediately where the Artist breaches clause 4.
- 20.8 If the Artist is in breach of this Agreement, DNP may give written notice requiring the breach to be remedied by a specified date. If the breach is not remedied within the time specified in the notice, DNP may, by giving a second notice, immediately terminate this Agreement.
- 20.9 If the Agreement is terminated under clauses 20.7 or 20.8, the Artist will not be entitled to any money payable under clauses 7, 11 and 15, and DNP will be entitled to recover any money already paid to the Artist.

21. Force Majeure

- 21.1 A party will not be in breach for failure to carry out their obligation under this Agreement where such failure is caused by:
- (a) flood, earthquake or other natural disasters;
 - (b) war, riot, terrorist action or similar disturbances;
 - (c) strikes or other labour disputes;
 - (d) serious illness or injury suffered by the Artist.
- 21.2 The Artist will immediately notify DNP of any delay, whether or not caused by an event in clause 21.1.
- 21.3 If any of the events in clause 21.1 continues for more than 1 month, DNP may terminate this Agreement by giving 14 days' notice in writing to the Artist, and pay the Artist in accordance with clause 20.2.

22. Indemnities

- 22.1 The Artist will indemnify and keep indemnified DNP, its officers, employees and agents against all costs, damage or expenses incurred by DNP arising from:
- (a) breach by the Artist under this Agreement, or
 - (b) act or omission involving the fault of the Artist in connection with this Agreement.
- 22.2 The Artist's liability to indemnify DNP will be reduced proportionately to the extent that any act or omission involving the fault on the part of DNP contributed to the relevant liability, damage or expense.
- 22.3 It is not necessary for DNP to incur expense or make payment before enforcing a right of indemnity conferred by this Agreement.

23. Dispute Resolution

- 23.1 If one party has any grievance regarding the performance by the other party or by the Commission Coordinator under this Agreement, the first party shall submit that grievance to the other party's Representative named in Schedule 1 and the parties will negotiate in good faith to reach resolution.
- 23.2 If the grievance is not resolved under clause 23.1 to the parties' satisfaction within 14 days then either party may request a mediator to be appointed in accordance with Item D of Schedule 1 to resolve the dispute, and the parties agree to undertake such dispute resolution process the mediator may reasonably propose.

- 23.3 A party may not commence court proceedings relating to any dispute under this Agreement unless that party has followed the procedure set out in this clause 23, except in the case of urgent interlocutory relief.
- 23.4 Each party will pay for their own costs incurred under clause 23.

24. Notice

- 24.1 Notices to the Artist may be signed on behalf of DNP by the Commission Coordinator and directed to the Artist's address specified in Item A of Schedule 1.
- 24.2 All notices (including invoices) other than a notice under clause 23.1 from the Artist must be directed to the Commission Coordinator at the address specified in Item C of Schedule 1 (or, in the case of a substitute Commission Coordinator, the address specified in the notice nominating that substitute Commission Coordinator).
- 24.3 Notices given in accordance with this clause will be deemed to be received:
- (a) if delivered by hand – on the day of delivery;
 - (b) if posted – 3 business days after posting whether or not the notice is returned;
 - (c) if sent by electronic communication (as defined in the *Electronic Transactions Act 1999* (Cth)) – when the electronic communication becomes capable of being retrieved by the addressee at an electronic address designated by the addressee.

25. Annexures

- 25.1 The following annexures form an integral part of this Agreement:
- (a) Annexure 1 – Commission Brief;
 - (b) Approved Detailed Design
 - (c) [insert any other relevant annexures eg site installation drawings]
- 25.2 In the event of conflict or inconsistency the provisions of this document prevail over the contents of any annexure.

26. General

A continuing binding agreement

- 26.1 The provisions of this Agreement continue for the benefit of and are binding on the parties and their respective successors and permitted assigns.

Continuing Obligations

- 26.2 Clauses 4, 14, 15, 16, 17, 18, 19, 20 and 22 continue in effect beyond completion of the obligations under this Agreement and survive termination of this Agreement.

Variation or Amendment

- 26.3 This Agreement will only be varied in writing, signed by each of the parties.

Waiver

- 26.4 No waiver, election, renunciation or affirmation by DNP will be effective unless it is expressly stated in writing and signed by DNP.
- 26.5 All the rights of DNP in this Agreement or otherwise are cumulative. The exercise, partial exercise or non-exercise of any of DNP's rights will not preclude or prejudice the further exercise of that right or any other right, either in relation to the same event or circumstance or any other event or circumstance.

Other Agreements

26.6 This Agreement contains the entire understanding and representations between the parties as to the subject matter of this Agreement and supersedes all prior representations and understandings between the parties.

Severance

26.7 Any provision of this Agreement which is prohibited or unenforceable will be severed to the extent of the unenforceability without affecting the validity of the remaining provisions of this Agreement.

Relationship

26.8 Each party agrees that it is not, and agrees not to claim or imply that it is, a partner or agent of the other party or otherwise able to bind or represent the other party.

Counterparts

26.9 This Agreement may be executed in any number of counterparts, each of which when executed will be taken to be an original and all of which taken together will constitute the one and same instrument.

Costs

26.10 Each party will bear its own expenses in relation to the preparation of this Agreement.

Applicable law

26.11 This Agreement and the relationship between the parties are governed by the laws of the Australian Capital Territory.

SCHEDULE 1

A. Contact Details for the Artist (clause 23.1)

Name:

Business Name (if applicable):

Physical Address:

Postal Address:

Telephone:

Email:

B. Contact Details for DNP's Representative (clause 20.1)

Name: Mr. Craig Cosgrove

Position: Manager, Major Projects

Physical Address: Australian National Botanic Gardens
Clunies Ross Street
Acton, ACT 2601

Postal Address: GPO Box 1777, Canberra, ACT 2601

Telephone: (02) 6250 9522

Email: craig.cosgrove@environment.gov.au

C. Fabrication Phase Commission Coordinator (clause 1.1)

Name: Mr. Jon Burchill

Position: Director, JB Design Consultants Pty Ltd

Physical Address: 65 Leichhardt Street, Kingston, ACT 2604

Postal Address: same

Telephone: (02) 6260 6932

Email: jbdesignconsultants@bigpond.com

D. Appointment of Independent Mediator (clause 19.3)

Either the Artist or DNP may make a written request to the person(s) nominated below, and ask that they identify and appoint a mediator they regard as being acceptable and appropriate to the parties of this Agreement:

The Director of The Arts Law Centre, Sydney and the President of the
Institute of Arbitrators.

Execution Page

Executed as an Agreement.

[use this signature block if the artist is contracting as an individual.]

Signed by [insert name of the artist]

signature of artist

date

in the presence of:

signature of witness

date

full name of witness

[Or use the signature block below if the artist is trading as a company.]

Signed for and on behalf of the [insert
name of the company] by its duly
authorised officer:

signature of duly authorised officer

date

full name and position of duly authorised officer

in the presence of:

signature of witness

date

full name of witness

Signed for and on behalf of the
Director of National Parks by its duly
authorised officer:

signature of duly authorised officer

date

full name and position of duly authorised officer

in the presence of:

signature of artist

date

full name of witness



Australian Government

Director of National Parks

COMMISSION BRIEF

In relation to

THE ANBG TREEHOUSE GAZEBO COMMISSION