



**Australian Government**  
**Director of National Parks**

**DESIGN AGREEMENT**

between

**DIRECTOR OF NATIONAL PARKS**

and

**NAME OF ARTIST**

in relation to

**The ANBG Treehouse Gazebo Commission**

## **TABLE OF CONTENTS**

<b>1. INTERPRETATION</b>	<b>3</b>
<b>2. COMMENCEMENT AND DURATION</b>	<b>4</b>
<b>3. SCOPE</b>	<b>4</b>
<b>4. ARTIST'S WARRANTIES</b>	<b>4</b>
<b>5. CO-ORDINATION</b>	<b>4</b>
<b>6. ACCESS TO DNP PREMISES</b>	<b>4</b>
<b>7. DESIGN FEE AND OTHER EXPENSES</b>	<b>5</b>
<b>8. CHANGES TO THE DESIGN</b>	<b>5</b>
<b>9. GOODS AND SERVICES TAX (GST)</b>	<b>6</b>
<b>10. NOTIFICATION OF APPROVAL</b>	<b>6</b>
<b>11. INTENTION TO PROCEED</b>	<b>6</b>
<b>12. OWNERSHIP OF THE DESIGN</b>	<b>6</b>
<b>13. INTELLECTUAL PROPERTY RIGHTS</b>	<b>7</b>
<b>14. PUBLICITY</b>	<b>7</b>
<b>15. INSURANCE</b>	<b>8</b>
<b>16. TERMINATION</b>	<b>8</b>
<b>17. FORCE MAJEURE</b>	<b>8</b>
<b>18. INDEMNITIES</b>	<b>8</b>
<b>19. DISPUTE RESOLUTION</b>	<b>9</b>
<b>20. NOTICE</b>	<b>9</b>
<b>21. ANNEXURES</b>	<b>9</b>
<b>22. GENERAL</b>	<b>10</b>
<b>SCHEDULE 1</b>	<b>11</b>
A. Contact Details for the Artist (clause 20.1)	11
B. Contact Details for DNP's Representative (clause 20.1)	11
C. Commission Coordinator (clause 1.1)	11
D. Appointment of Independent Mediator (clause 19.3)	11
<b>EXECUTION PAGE</b>	<b>12</b>
<b>ANNEXURE 1 – DESIGN BRIEF</b>	<b>13</b>
<b>ANNEXURE 2 – DRAFT DETAILED DESIGN AGREEMENT</b>	<b>14</b>
<b>ANNEXURE 3 – DRAFT COMMISSION AGREEMENT</b>	<b>15</b>

## DATE

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

## PARTIES

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

and

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

## BACKGROUND

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- A. DNP is vested with the title to, and is responsible for the management of, the Australian National Botanic Gardens, under the *Environment Protection and Biodiversity Act 1999* (Cth).
- B. [Background details regarding eg the design/commission project/artist to be inserted].
- C. [Further background details to be inserted, if necessary.]
- D. The Artist has agreed to provide DNP with a Design in accordance with this Agreement.

## OPERATIVE PART

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### 1. *Interpretation*

1.1 In this Agreement, unless the contrary intention appears:

<b>Agreement</b>	means this document and all schedules and annexures.
<b>Commission</b>	means the ANBG Treehouse Gazebo commission.
<b>Commission Coordinator</b>	means the person or firm named in Item C of Schedule 1, or as nominated by DNP from time to time.
<b>Design</b>	means Material produced by the Artist in response to the Design Brief, and includes all additions or modifications to the Design;
<b>Design Brief</b>	means the brief as set out in Annexure 1 to this Agreement.
<b>Design Fee</b>	means the fee set out in clauses 7.1 and 7.2.
<b>Intellectual Property Rights</b>	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;
<b>Material</b>	includes information and the subject matter of any category of Intellectual Property rights;
<b>Moral Rights</b>	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 *Copyright Act 1968* (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**

2.1 This Agreement commences from [start date to be inserted] and subject to this Agreement, will terminate on [finish date to be inserted] 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 a Design that fulfills the requirements in the Design Brief and in keeping with this Agreement.

3.2 The Artist will complete the Design in accordance with the timetable specified in the Design Brief.

3.3 The Artist also agrees to provide such services as specified in the Design Brief and is solely responsible for engaging any Personnel required to provide 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 Design;
- (b) the Design is an original work;
- (c) the Artist is not infringing any intellectual property rights; and
- (d) where there are other authors to the Design, 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 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. Design Fee and Other Expenses**

### *Design Fee*

- 7.1 DNP agrees to pay the Artist the Design Fee specified in Section 10 of the Design Brief. No additional fees will be paid unless expressly stated in this Agreement.
- 7.2 The Design Fee is inclusive of all of the following:
- (a) cost of all Materials;
  - (b) delivery of the Design to DNP;
  - (c) all wages and other costs associated with engaging any Personnel by the Artist in producing the Design;
  - (d) insurance cover under clause 15 for the Artist and Artist's Personnel engaging in producing the Design;
  - (e) all customs, duties and any other taxes or charges payable by the Artist in connection with producing the Design or providing services under this Agreement.
- 7.3 No Design Fees will be payable by DNP for Designs that are delivered incomplete or not delivered within the time specified in the Design Brief.

### *Travel Expenses*

- 7.4 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 Design Brief.

### *Additional Materials*

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

### *Payment of Design Fees and Other Expenses*

- 7.7 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.
- 7.8 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.

## **8. Changes to the Design**

- 8.1 DNP may, by written notice to the Artist, request modifications to the Design or an additional Design.
- 8.2 Upon receiving a notice issued under clause 8.1, the Artist will not proceed with any changes but will provide DNP with a written quote of a fixed fee and delivery date for the requested change.

- 8.3 DNP, after receipt of the Artist's quote under clause 8.2, may (but is not obligated to) accept the quote and direct the Artist to proceed with the requested change. The Artist is not to proceed with any changes until receipt of DNP's written acceptance.
- 8.4 DNP agrees to pay the Artist the fee accepted under clause 8.3 within 30 days of receiving from the Artist:
- (a) delivery of the additional or modified Design in accordance with clause 8.1; and
  - (b) a tax invoice issued in accordance with clause 9.
- 8.5 DNP is entitled, in addition and without prejudice to other rights it may have, to delay payment or reduce the amount of fees until DNP is satisfied that:
- (a) the Artist has completed to the satisfaction of DNP that part of the Agreement to which the fees relates; or
  - (b) fees claimed have been calculated correctly.

## **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. Notification of Approval**

- 10.1 DNP will within 30 days of receipt of the completed Design, notify the Artist whether DNP approves the Design or otherwise.

## **11. Intention to Proceed**

- 11.1 If DNP approves the Design and requires Detailed Design, the Artist agrees to sign a Detailed Design Agreement that will be substantially the same as Annexure 2.
- 11.2 If DNP approves the Design (or the Detailed Design arising out of clause 11.1) and requires fabrication or installation, the Artist agrees to sign a Commission Agreement that will be substantially the same as Annexure 3.

## **12. Ownership of the Design**

- 12.1 The Design (including any additions or modifications) becomes the property of DNP upon DNP's payment of the Design Fee.
- 12.2 DNP has the irrevocable right to dispose of the Design at its discretion.

12.3 In the event this Agreement is terminated under clause 16, the unfinished Design and Materials created by the Artist under this Agreement become the property of the Artist.

### **13. Intellectual Property Rights**

13.1 The copyright of the Design (including any additions or modifications) remains with the Artist.

13.2 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 Design 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 Design;
  - (b) promote the Artist;
  - (c) promote the Design or the Commission;
  - (d) promote the Australian National Botanic Gardens; or
- any combination of the above..

13.3 If DNP wishes to use the Design for purposes other than clause 13.2 or for any "for-profit" publications (for example souvenirs, postcards, t-shirts etc), DNP agrees to first seek the Artist's written consent.

13.4 Where DNP offers the Artist a fee of [amount to be inserted] (including GST) for each proposed use under clause 13.3, the Artist will not unreasonably withhold consent.

13.5 DNP agrees that in exercising the rights granted by the Artist under this clause 13, DNP will:

- (a) attribute the author(s) of the Design 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; and
- (b) where no attribution is specified by the Artist, attribute the Artist as the author of the Design.

13.6 In the event of the Artist's death, DNP will continue to use the attribution under clause 13.5.

13.7 The Artist agrees that they will not use, and will not cause, permit or allow anyone else to use, the copyright in the Design for any purpose other than permitted in 14.3.

13.8 The Artist agrees not to reproduce the Design, or produce Material that is in a similar form and/or scale to the Design without first obtaining DNP's written consent.

### **14. Publicity**

14.1 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.

14.2 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 Artist's Design is or was produced for DNP.

14.3 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.

14.4 Wherever practicable, DNP will attribute the Artist in accordance with clauses 13.5 or 13.6 in any DNP publication, media release or other public communication concerning the Design.

## **15. Insurance**

15.1 The Artist will provide to DNP, within 7 days of signing this Agreement, written evidence that any insurance cover specified in Annexure "1", Design Brief has been obtained by the Artist.

## **16. Termination**

### *No Fault Termination*

- 16.1 DNP may immediately terminate this Agreement by giving written notice to the Artist at any time prior to the completion of the Design.
- 16.2 If the Artist dies prior to completing the Design, this Agreement will terminate upon the Artist's death.
- 16.3 If the Agreement is terminated under clauses 16.1, 16.2 or 17.3, DNP agrees to pay the Artist (or the Artist's estate as appropriate) the Design Fee and any other such fees and expenses incurred by the Artist under clauses 7 and 8 up to the date of termination.

### *Termination due to Breach*

- 16.4 This Agreement terminates immediately where the Artist breaches clause 4.
- 16.5 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.
- 16.5 If the Agreement is terminated under clauses 16.4 or 16.5, the Artist will not be entitled to any money payable under clauses 7, 8 and 13, and DNP will be entitled to recover any money already paid to the Artist.

## **17. Force Majeure**

- 17.1 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.
- 17.2 The Artist will immediately notify DNP of any delay, whether or not caused by an event in clause 17.1.
- 17.3 If any of the events in clause 17.1 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 16.3.

## **18. Indemnities**

- 18.1 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.

18.2 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.

18.3 It is not necessary for DNP to incur expense or make payment before enforcing a right of indemnity conferred by this Agreement.

## **19. Dispute Resolution**

19.1 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.

19.2 If the grievance is not resolved under clause 19.1 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.

19.3 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 19, except in the case of urgent interlocutory relief.

19.4 Each party will pay for their own costs incurred under clause 19.

## **20. Notice**

20.1 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.

20.2 All notices (including invoices) other than a notice under clause 19.1 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).

20.3 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.

## **21. Annexures**

21.1 The following annexures form an integral part of this Agreement:

(a) Annexure 1 – Design Brief;

(b) Annexure 2 – Proforma Detailed Design Agreement;

(c) Annexure 3 – Proforma Commission Agreement;

(d) [insert other relevant annexures, if required].

21.2 In the event of conflict or inconsistency the provisions of this document prevail over the contents of any annexure.

## **22. General**

### *A continuing binding agreement*

22.1 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*

22.2 Clauses 4, 12, 13, 14, 15 and 18 continue in effect beyond completion of the obligations under this Agreement and survive termination of this Agreement.

### *Variation or Amendment*

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

### *Waiver*

22.4 No waiver, election, renunciation or affirmation by DNP will be effective unless it is expressly stated in writing and signed by DNP.

22.5 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*

22.6 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*

22.7 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*

22.8 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*

22.9 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*

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

### *Applicable law*

22.11 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 20.1) [to be inserted]

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](mailto:craig.cosgrove@environment.gov.au)

**C. Design Phase Commission Coordinator** (clause 1.1)

Name: Ms. Pamille Berg AO

Position: Director, Pamille Berg Consulting Pty Ltd

Physical Address: 124 Blowhole Rd, Eaglehawk Neck, TAS 7179

Postal Address: same

Telephone: (03) 6250 3989

Email: [pamille@pamillebergconsulting.com](mailto:pamille@pamillebergconsulting.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.

Signed by **name of the artist**

\_\_\_\_\_  
*signature of artist*

\_\_\_\_\_  
*date*

in the presence of:

\_\_\_\_\_  
*signature of witness*

\_\_\_\_\_  
*date*

\_\_\_\_\_  
*full name of witness*

*[or, if the artist is trading as a company, use the following signature block:]*

Signed for and on behalf of the **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*

***Annexure 1 – Design Brief***



**Australian Government**  
**Director of National Parks**

**DESIGN BRIEF**

In relation to

**THE ANBG TREEHOUSE GAZEBO COMMISSION**

[Design Brief to be inserted here in the contract]

***Annexure 2 – draft Detailed Design Agreement***



**Australian Government**  
**Director of National Parks**

**DRAFT DETAILED DESIGN AGREEMENT**

In relation to

**THE DETAILED DESIGN FOR**

**The ANBG Treehouse Gazebo Commission**

[to be inserted here as Annexure “2” to the contract]

**Annexure 3 – draft Commission Agreement**



**Australian Government**  
**Director of National Parks**

**DRAFT COMMISSION AGREEMENT**

In relation to

**THE ANBG TREEHOUSE GAZEBO FABRICATION, TRANSPORT, & INSTALLATION**

[to be inserted here in the contract]