

ACQUISITION OF COLLECTION MATERIAL

Acquisitions are usually effected by either: purchase, donation, exchange or loan. There are always two considerations of primary importance:

- (i) does the intended acquisition conform with the museum's collection policy?
- (ii) are the legal means to be used in the securing of the object, the most appropriate to, and protective of, the museum's interests?

As the collection is the core of any museum, it is essential that those responsible for the acquisition of material ensure that the methods of acquisition adopted, protect the interests of the museum.

A coherent acquisition policy is important for it assists in:

- (i) allocating the limited resources available to purchase, maintenance, conservation, storage, security and exhibition;
- (ii) deaccessioning.

FORMALITIES OF ACQUISITION

There is no substitute for carefully drafted writing.

The quality of the museum's agreements and records may not be called into issue for years, but when they are, it is often to their cost.

EXAMPLES:

- (a) What does one do when faced with a patron's heir who says that the valuable collection verbally given to the museum by the patron was really only a long term loan?
- (b) Or when the work turns out to be a fake or to have been misattributed?
- (c) Or if the source of the work did not have the right to sell or donate it?
- (d) Or if the museum has failed to comply with the necessary formalities because its forms were drafted by a non-expert?

Title

Title is the right of ownership.

From a legal point of view, what has happened is that a contract of sale has been entered and pursuant to that agreement the legal title in the object has changed hands. Now, the purchaser may exercise full rights of ownership over it.

Nevertheless, inherent in the transfer of title there are a number of legal landmines.(See: "The Problem of Obtaining Proper Legal Title to Objects Acquired by Museums, Historical Societies, Art Galleries and Archives" by Eutick and Cordato).

Ownership is a bundle of rights. When we say that we own something, we are using a shorthand way of saying that we have the right to loan it, sell it, destroy it, exhibit it, hock it, or do anything we like with it.

As owners, we may also give certain limited rights to others.

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For example: lending implies the right to possess (and to do all the things that are compatible with that right). It does not include the right to sell.

The basic rule is that a donor or vendor can pass no better title than he or she possesses. Thus the recipient takes the chattel subject to the infirmities of title.

This is a problem that arises more and more, particularly where the return of aboriginal works is concerned. In many cases the museum's records are simply inadequate to prove that their right to the material in dispute is stronger than that of the claimants. It makes no difference whether the museum has acted in good faith or had no notice of the defect in title.

CHECKLIST

Thus, the acquisition documents should where possible:

- (a) state the basis of the acquisition; i.e. whether it is a gift, a loan, a bequest or a purchase;
- (b) contain a statement from the source of the object as to how they came to have it.
- (c) contain a warranty from the source that it has the right to do what is being done.

The third requirement is commonly omitted but such an omission can be costly. When a museum acquires an item it has to spend money. This may include the purchase sum, the cost of any conservation procedures, the administrative costs of accessioning and the costs associated with simply storing and protecting the object. All of these will be wasted if the title acquired by the museum is successfully attacked. Moreover, the legal processes involved in a challenge to title are themselves expensive.

For example one may include a clause in the sale or gift documentation along the following lines:

I hereby warrant that I am the owner (or agent of the owner) of the item described in this (purchase agreement/deed of gift etc.) and have the right to enter this transaction. I also warrant that I hereby transfer full legal and equitable title in the item to the museum.

In the event that my title is judicially declared defective then I agree to:

- (a) return the purchase price plus 12% interest computed from the date of the sale, or the fair market value of the item as of the date the title's invalidity is declared, whichever is the greater, and
- (b) indemnify the museum against any awards, expenses, costs or any other like losses incurred as a result of the defectiveness of title.

If the work has been imported into the country it is also wise to include a clause warranting that it has been legally exported from its country of origin:

I further warrant that the item is free from all liens or encumbrances and that its export from any foreign country has been in conformity with the laws of such country and that its importation into Australia was in conformity with the laws of Australia.

Another important consequence of these rules concerning limitations as to title is the difficulty of disposing of material that has been lent to the museum and whose owners (or heirs) can not be found. The problem arises because as a borrower, the museum has only the right to possess the material, not to dispose of it.

This is one of the reasons that long term loans are to be discouraged.

This is also one of the reasons that statutory museums should have a power to dispose of such material after a certain length of time and after certain enquiries have been made.

Authenticity

The difficulty in providing a warranty varies from item to item. It is easy to prove that a diamond is a diamond but far harder to prove that an egg is by Faberge. On the other hand, most reputable dealers are prepared to sign such warranties because their preparedness to stand behind their word is one of the factors upon which they base their business.

The following is an example of a certificate as to authenticity:

The Seller andwho is a recognised authority on art or antiquities, certify that the Work/Object is authentic and complies in all respects with the description stated herein.

It is usually wise to include a clause which gives the purchasing museum some specific rights to inspect and return the work or object.

For example:

The Buyer may withindays/weeks have the Work/Object examined and if two or more experts on this medium and period agree that the Work/Object has been misattributed or is a forgery or counterfeit or does not comply in some other material way with its description stated herein, the Buyer shall have the option of returning the Work/Object and receiving back the full purchase price from the Seller, or keeping the Work/Object subject to the experts' opinions.

2. Co-operative Acquisition Methods

Purchase, usually provides the museum with title to the object and the absolute right of possession.

Another common method, long term loans permit possession without title.

Now, however, overseas museums are entering more joint ventures by which possession is shared. It is an example that Australian museums may follow if they are to continue to purchase works in the ever increasingly expensive world market.

Joint Ownership

In 1980 the Smithsonian Institute's National Portrait Gallery and the Boston Museum of Fine Art jointly purchased Gilbert Stuart's portraits of George and Martha Washington for \$4,875,000. Then in 1981 the Getty Museum combined with the Norton Foundation to jointly purchase Poussin's Holy Family for \$4,000,000.

None of this was particularly new: In 1973 the Louvre had combined with the Metropolitan Museum of Art to jointly purchase a medieval carved ivory comb depicting the Tree of Jesse.

This illustrates the point that international boundaries are no impediment to joint purchase.

With all such deals it is essential that the parties work out an arrangement so that everyone can enjoy the fruits of the venture.

This approach may be used to develop new collections (as above), or to keep large and expensive collections intact.

Standing Loan Joint Ventures

This technique differs from the above because each participant owns outright its portion of the individual parts. This is particularly useful where a work has been fragmented.

For example, the head of an alabaster neo-Sumerian statue had been separated from its torso. The Metropolitan owned the head and the Louvre owned the body. In 1974 the parties came to an agreement by which the work could be reunified and exhibited as a whole. Each retains ownership of its own portion, and the right to exhibit the whole work rotates every three years.

The only disadvantage of this system is that the piece has to travel more than it otherwise might.