

## The Loan of Work for Public Exhibition

All art museums develop standard loan agreement forms. These tend to be a confusing mix of administrative machinery and truly contractual matters, poorly laid out and inadequate in content. If a contract is not simple to read and understand and is not even-handed, it cannot play a positive role between the parties. It neither acts as an outward manifestation of trust nor provides an effective and equitable machinery to prevent or resolve disputes.

### 1. A Checklist for Loan Agreements

The following matters should be dealt with in the loan agreement.

#### (a) Parties

Who is lending the work? This is not always as easy as it seems. The piece may be the property of a company or a family trust, in which case the museum will wish to be assured that the person offering the loan has the power to do so.

#### (b) Subject

What is the subject of the loan? The work should be fully described in the loan document. Careful registration procedures usually see to this.

#### (c) Purpose

What is the purpose of the loan? The loan may be for a very limited purpose such as for research or display in a particular exhibition or simply a general loan. Is it to be static or will it be able to tour?

#### (d) Period

How long will the museum have control of the work? It is surprising how many museums neglect to even include this question on their standard loan form. This simple piece of information is important to both parties.

Most museums try to avoid so-called "permanent loans". There is no such thing as a permanent loan; it is still subject to withdrawal at virtually any time, either by the original lender, or that person's heirs. This has caused problems for several museums which have chosen not to collect material because they already had strong holdings in that area on permanent loan. However, years later, when the owners decide to take back their material, the museum has been left with an unfortunate gap that is often difficult and expensive to fill. Moreover the museum resources spent on such material are usually better spent on items owned by the museum and not subject to reclamation.

#### (e) Fees

Are any fees payable to the lender? The proposition that artists should receive payment for the public exhibition of their works is contentious. Artists argue that they have the right to be compensated for such use of their products and exhibition organisers respond that they cannot afford the additional expense. Certainly, the overseas experience indicates that the payment of exhibition fees to artists is becoming commonplace and exhibition

organisers have been able to cope with the small additional costs involved. Such problems can usually be overcome so long as the fees are budgeted for during the planning stages of the exhibition.

(f) Expenses

Are there any expenses associated with the loan? If there are, what are they and who will pay them? For example, if the presentation of the work involves the hire of material or equipment (such as scaffolding or electrical equipment) it is reasonable to expect such costs to be met by the exhibition organisers.

(g) Delivery

What are the collection or delivery arrangements? When, where, how, who pays? It is important to determine when a work will be ready for transport, who is responsible for the transportation and who should bear the costs of it.

(h) Return

What are the arrangements for the return of the work? When, where, how, who pays?

(i) Maintenance

It is clearly of concern to any owner that the subject of the loan will be treated with care. Are there any special requirements? (It is totally inadequate to promise a lender that the museum will "exercise the same care in respect of loans as it does in the safekeeping of comparable property of its own".)

It is reasonable to expect that the organisers will be responsible for the maintenance of the work and reasonable that in the event of any deterioration the artist should be notified, given the opportunity to carry out the necessary work and be paid a reasonable fee for that labour.

If the work is constructed of non-durable materials, or if change or decay are in any way the essence of the work, the museum should not be obliged (and perhaps not permitted) to attempt to prevent any deterioration or make good any damage which is attributable to that characteristic.

(j) Storage

How will the work be stored? Where? Are there any unusual features in the medium/materials that demand a particular method of storage?

(k) Presentation

Is the work to be presented in a particular way? Is it framed or mounted? May perspex be substituted for glass?

(l) Restoration

Does the work need restoration or conservation? If so may such work be carried out? If so, in what circumstances?

(m) Insurance

Will the museum insure the work for the period of the loan? What are the details of that cover? What is the insurance value of the work? Is it "wall to wall" insurance or does it exclude transport? Does it cover loss, theft, damage and destruction? Are there any important exceptions of which the lender should be aware?

Museums must remember that insurance policies are only contracts and, as such, are negotiable with the insurance company. Although the museum's insurance policy is primarily designed to protect the potential liability of the institution, it is important that it also protect the interests of the artist and the lender. The terms of the policy must be read with pedantic care before entering the agreement. Those that do not satisfy the museum's needs must be renegotiated.

#### (n) Copyright

Is the work subject to copyright? If it is, who is the copyright owner? This will be important if the museum intends reproducing the work, say, in an exhibition catalogue or for publicity of the exhibition. All loan contracts should provide for these uses.

Care must be taken with this information for many persons filling in the loan agreement will not have the faintest idea of the laws of copyright. Many will wrongly assume that as owners of the material they are automatically owners of the copyright in it. As is explained in Chapter 6 on "Copyright", this assumption is often wrong. Relying on such erroneous assumptions can cost the museum considerable inconvenience and money.

#### (o) Archival use

Some museums try to make a reproduction of works on loan, for archival purposes. Where this is so, the museum must obtain permission from the copyright owner. In so doing it should ensure that the permission clause is narrowly framed. The purpose of the archive should be stated (e.g. to provide a record of the exhibition history of the borrower and to provide a non-lending reference and research resource). Further, the borrower should promise to

- \* properly maintain the archive;
- \* not use, nor intentionally permit others to use the archival material for any purposes other than those specified;
- \* return all such materials in the event that the archive is dissembled.

#### (p) Attribution

Does the lender wish to be attributed or remain anonymous? If attribution is required, what wording is appropriate? Many collectors are most careful about being identified for security reasons.

#### (q) Refusal

All exhibition organisers demand the right to refuse to exhibit an artist's work. Having the right to exhibit a work is very different from having the duty to do so. However, if this occurs, the artist should usually still receive any agreed fee and be reimbursed for expenses incurred.

#### (r) Withdrawal

Although it is contentious, the artist's right to withdraw is little more than the counterpart of the museum's right of refusal. For several years this has been specifically included in the Artspace agreement (set out on p. <FT35>xx) without causing the chaos feared by many curators. Some fear that artists would use this power capriciously; this

fails to recognise that artists live by the exhibition and public exposure of their work. They cannot afford to withdraw work for reasons that are other than important to them.

(s) Touring

If the borrower intends to tour the work, specific permission must be obtained. The conservation problems that are associated with touring must be considered. In many cases, particular consideration has to be paid to the method of transport, ultra-violet, temperature and humidity levels, security and so on.

The itinerary of the tour should be settled when the loan agreement is being settled so that these matters can be discussed with reasonable particularity.

## 2. Specimen Loan Agreements

Different museums have different needs. What works for the Australian National Gallery may not be appropriate for a small community art museum. Nevertheless small institutions should carefully consider the models developed by the larger ones. This use of precedents should not be unquestioning for contracts, like so many other things, do not necessarily get better with age. Thus, many cultural institutions in Australia which have adopted old American models do themselves little benefit.

(a) Major institution

Most major museums use a two part contract, one which is filled in and one which is an immovable feast of conditions and limitations of responsibility. (Theoretically all conditions in a standard contract are negotiable but in practice they are negotiable only when the bargaining power of the party seeking the change is great enough to lever the amendment. An obvious example of this is provided by the owners of works that are sought for a "block buster" show.)

Curators prefer forms where all the spaces which need filling are at the very front of the document, for this means that they do not have to go through the whole document with the lender. All too often, the lenders do not read the rest of the conditions of loan until a problem arises.

The loan agreement/incoming, developed and adopted by the Australian National Gallery consists of a schedule, which sets out the details of the work being loaned, and a copy of the loan agreement. It is one of the best in the country. The following comments must be viewed in that light. Its standard conditions, unlike those of some State galleries are fair, simply expressed, well spaced and printed in a clearly legible type. A few other comments should also be made about the form.

First, under the heading "Copyright owner" the form asks:

Who owns copyright in this work? Name .....

Address .....

This is a sensible clause and provides important information. All too often such forms simply ask for reproduction rights without actually checking whether the lender has the right to grant that valuable permission. However, as so many owners wrongly assume that they buy the copyright when they buy a work (indeed the now departed director of one State gallery, preached and practiced this heresy), many purport to give permissions that are not theirs to give. For this reason it may be a good idea to include a further question in this part of the form:

If the lender is not the artist but is the copyright owner, state means by which copyright was obtained .....

The answer to this question would usually reveal any misconception as to copyright that the lender may be under.

The "Reproduction" clause on page one of the contract does not only relate to copyright owners. Before making any reproduction, the museum has to seek the permission of the copyright owner for any reproduction but, as a matter of practice, will also seek the permission of the owner of the work itself. Some collectors will object most vehemently to any reproductions being made and will not lend unless the uniqueness of their possession can be protected. Where the lender is the owner of the work but not the copyright owner, it will still be necessary to obtain the permission of the latter.

Part of the same clause asks if the lender has any photographs or transparencies of the work. The prudent administrator will take care: the owner of such transparencies may have copyright in neither the original work nor the transparencies.

The "Conservation" clause may be appropriate to the national or a State museum, but few others would have the resources to even suggest that they undertake such work. Considerable liabilities may flow from the negligent performance of conservation work and most galleries would be better served by preparing careful condition reports as soon as the work is received and appending that to the agreement. In practice, if a work is damaged whilst in the possession of the gallery, no repairs will be taken before there has been full discussion with the owner.

One other aspect of the "Conservation" clause should also be noted. By clause 2(b) the museum undertakes to keep the work in good order and repair having regard to its condition when lent. That is perfectly straight forward. However in galleries still using the old Museum of Modern Art form, the promise is made to "exercise the same care in respect to loans as it does in the safekeeping of comparable property of its own". One does not have to be unduly cynical to be critical of such a promise.

## (b) Artist-run gallery

By way of comparison with the Australian National Gallery documentation, it is useful to consider the contract developed for artist-run spaces. It is used widely because, in keeping with the objects of such galleries, it allows for more negotiation between the lender and the gallery. Nevertheless, it is a comprehensive and very workable contract.

It should be noted that the contract was designed for use where the lender is also the creator of the work. For non-artist lenders some amendments would need to be made. This small point is merely illustrative of the larger one: no model contract can be expected to fulfil all needs. It should be used as a checklist to ensure that the artist and the gallery discuss all the relevant questions and provide a framework for agreement. Lenders should not hesitate to ask for clarification or seek advice. If a clause is not appropriate, it should be changed. This is in the interests of both parties.