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Legal issues for Australian Archives, Galleries, Libraries and Museums

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PART C COLLECTIONS

Chapter 7: Acquisition of Collection Items

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7. ACQUISITION OF COLLECTION ITEMS

7.1 Introduction

Whenever a museum acquires an object it undertakes a bundle of obligations including storage, maintenance, conservation, insurance, security, and documentation. Each of these adds to the demand on the museum's resources and it accordingly essential that the museum develop acquisition procedures that are considered and carefully articulated. Attention given to acquisition procedures is essential to good governance of the collection.

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

7.1.1 Basic methods

The basic methods of acquisition are: purchase, donation¹, bequest, exchange, field collection and legal deposit (for specified libraries). The first three of these are legal transactions. The fourth and fifth have legal ramifications. The sixth is a legal obligation. All of them have the effect of acquiring the title in the object for the museum.

7.2.1 Considerations

Irrespective of the method of acquisition one must consider:

1. Relevance of the item to the institution's mission statement and acquisition policy,
2. Ethics of the acquisition, and
3. Assurance as to title and provenance.²

Where the acquisition is by means of purchase, gift, bequest or exchange, the narrow legal issue is whether the parties have concluded a clear and enforceable transaction that reflects their unambiguous intentions. The primary intention of the participants is that ownership should pass from the present owner to the museum. That may be attended by many other consequent

¹ Whether under the Cultural Gifts Program, or otherwise.

² See discussion at section 3.

intentions whether they be commercial terms or idiosyncratic conditions,³ but the root of the transaction is the passing of ownership to the museum.

7.2 Due diligence

7.2.1 Introduction

Whenever a museum acquires an object for the purpose of accessioning,⁴ it undertakes a bundle of obligations including storage, maintenance, conservation, insurance, security and documentation. Each of these adds to the demand on the museum's resources. So, the museum must develop acquisition procedures that are considered and carefully articulated. Such attention is essential to good governance of the collection. As the collection is the core of any museum, so those responsible for the acquisition of material must ensure that the methods of acquisition adopted, protect the widest interests of the museum.

Irrespective of the method of acquisition one must consider:

- the relevance of the item to the institution's collection policy;
- the ethics of the acquisition; and
- assurance as to title and provenance.

Once it has been determined that the material is appropriate, the issue is how to achieve that end.

Where the acquisition is by means of purchase, gift (including bequest), exchange, the narrow legal issue is whether the parties have concluded a clear, unambiguous and enforceable agreement.

The technical legal issues are sometimes the easier to satisfy than the ethical ones. For example, whether or not the museum owns the human remains in its collection may be answered quite easily from the legal perspective but whether or not it should own them, may be a more difficult matter.

Often, proving legal title to an item is quite difficult. Given that provenance is so often imperfect, there is inevitably an element of risk in acquiring collection

³ Conditions attached to gifts and bequests are discussed at 9.7.10.

⁴ Note that this discussion is focused on material to be accessioned into the permanent collection. Large museums acquire many non-collection objects such as props and education collections. The due diligence issues are often minimal, or quite irrelevant, with such acquisitions.

material. These matters can come back to haunt one's successors.⁵ It is a risk that must be considered. It is a matter of judgement. Given the nature of some collection material, if some risks were not undertaken, much important material would be lost.

For example, the chain of provenance is often not well documented for archival materials offered to libraries but the library would take this risk. Further, since these materials have a typically low financial value compared with say artworks, the risk of a challenge to the library's ownership is slight. This is simply good risk management: know the legal position; gauge the likelihood of claim; consider the true financial risks and balance them against the collection value of the material. These are professional judgement decisions – and there is always some risk involved in judgement.

Sometimes the issue is not who is the owner but what can be done with the item. How do you overcome the difficulty of disposing of an object that has been lent to the museum and whose owners (or heirs) cannot be found? In such cases, the museum has only the right to possess the material, not to dispose of it (for to do so can only be done by an owner, not a mere bailee.) Many museums are stuck holding material in their storerooms that they would rather divest but lack either a contractual or a statutory right to do so. This is one of the reasons that long-term loans are discouraged. It is also one of the reasons that museums established by statute should always contain a provision in their Act, which empowers them to dispose of such material after a certain length of time and after certain enquiries have been made.⁶

These problems are exacerbated where the acquisition is as a result of field collection. The laws as to ownership of apparently abandoned goods; shipwrecks, fauna, flora and specimens found on private, leasehold, public or other lands; and items taken contrary to statute, regulation or licence all raise complexities as to the legal title that can be claimed for material collected in the field. In almost all cases, illegality has a detrimental effect on the enforceability of title. The professional need to record and publish the time, place and

⁵ For example, every major art gallery in Australia has had to review its collection in light of the international proliferation of claims made by descendants of the owners of works stolen by the Germans during World War II.

circumstances of the field collection also provides concrete evidence of the illegality surrounding the acquisition.

7.2.2 Acquisition documentation

In undertaking any 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, the lawyers representing the interests of the claimants will subject them to detailed and aggressive scrutiny. What does one do when faced with a patron's heir who says that the valuable collection verbally given to the museum was really only a long-term loan? Or when the work turns out to be a fake or to have been misattributed? What if it is alleged that the source of the item did not have the right to sell or donate it? What if the museum has failed to comply with the necessary formalities because a non-expert drafted its forms?

Claims relating to collection items never take into account the fact that the staff were overworked and underresourced; nor that they were acting in good faith; nor that what was done was in accordance with the common practice of the museum. Each case is determined by its own merits and circumstances. Each document is subjected to critical analysis. It either works or it doesn't.

Too many collecting organisations have collection material in which, if tested, they could not prove ownership. Indeed, the truth is troubling. Over the years, particularly before the emergence of professional collection managers, many institutions have even entered such material in their acquisition register as though they owned it. That registration is not supported by sufficient or appropriate documentation. It is a liability that is completely hidden from the public and the auditors – but it is a liability nevertheless. Indeed, in the course of research for this book, it was evident that many major collections organisations claimed ownership of material in which they had never obtained legal title: Sometimes the documentation on the file is poorly drafted, confusing, ambiguous or simply absent.

How do you prove that a transaction was a gift and not a loan if there is no deed of gift on the file? (Long-term loans or uncollected loans can never become the property of the borrower merely by the passing of time.) In many cases there is just a letter thanking the 'donor' for the gift: such a letter is just one piece of evidence that is rebuttable by other evidence. It is **evidence** but it is not **proof** of ownership.

While these omissions or weaknesses do give rise to potential liability, it is important that it be kept in perspective. With every year that passes without claim, the risk diminishes. Not only do the number of potential claimants lessen with the passing of the years, it may well be that potential claims will be frustrated by Statutes of Limitation⁷ or equitable principle of *laches*.⁸

Collections will always contain material for which the collections organisation cannot absolutely prove ownership: For a governance perspective it is important to have a policy that acknowledges this potential liability and makes a commitment to deal with any such claims promptly and openly. Of course, the other important governance initiative is to make best effort to reduce the likelihood that such problems will arise in respect of future acquisitions.⁹

The basic documentation that is essential to a prudent acquisition procedure is as follows:

- An acquisition register in which all material acquired by the organisation is formally noted and described;
- The documentation file that contains (either the original or copies of) all of the documentation supporting the decision to acquire the material. This would include provenance due diligence enquiries, information and materials; the internal assessments as to the compliance of the material with the organisation's acquisition policy; and
- The contract, deed or other documentation that evidences the manner and the terms by which the acquisition was achieved.¹⁰

So what is it that acquisition documentation must establish?

⁷ Each jurisdiction has laws which oblige claimants to bring their case within certain time periods. If the limitation period expires it does not mean that the title defect is cured, merely that a particular claimant is prevented from claiming that its title is better.

⁸ A principle of the Law of Equity by which the court holds that the claimant has so delayed the making or prosecution of its claim that the defendant would be improperly and unfairly disadvantaged in its defence.

⁹ See extensive discussion of this topic in chapter 15 (h), Loans for Exhibition, 'The Scary Cupboard: Old and unclaimed loans'.

¹⁰ To assist the organisation should have a series of carefully drafted standard forms. At the very least it should have a standard Deed of Gift form and a standard Purchase Agreement. Examples of these are set out later.

7.2.3 Establishing provenance and title

When you acquire an item, what you are acquiring is 'title'. In this context, title means the ability to prove ownership of the item.¹¹ The ability to prove title should be one of the key determinants in any decision to acquire collection material. Unless good title is established, the transaction is fatally flawed. This is not just a legal issue; it is one of good governance, risk management and prudent allocation of resources.

When making the acquisition decision, curators focus on the 'provenance' of the item. They will look at the hands through which it has passed with a view to establishing the history of the item. This may provide a social, cultural and ethical basis for the acquisition decision – but it does not provide a legal basis for it.

Lawyers look at the same information but have a different focus. They take the provenance and examine what evidence there is to establish that those in the provenance chain actually had the rights of ownership that they purported to have. Their task is to establish the 'chain of title'. The chain of title is only as strong as its weakest link.¹² An example of difference between establishing a provenance and establishing a chain of title is clearly demonstrated by the works of art appropriated by the Nazis: the provenance shows the hands through which the artwork passed; the chain of title establishes whether those whose hands the work passed through can be shown actually have the rights of ownership that they claim. Provenance establishes the identity of those who possessed the item and a possessory time line, whereas the chain of title shows the path of ownership.

7.2.4 Provenance and authenticity

If the museum is purchasing an item it is obviously important that it is, in fact, what it is supposed to be. The difference in the financial and cultural value between the real thing and a copy can be enormous.

¹¹ This is to be distinguished from loans (even so-called permanent loans) in which the museum gets the right to possess the item but the right of ownership remains with the lender.)

¹² This is always subject to statutory intervention.

7.2.4.1 Representations by the seller as to authenticity

The line of cases that deals with warranties as to authenticity is far from clear. In the early case of *Jendwine v Slade*,¹³ paintings described in a sale catalogue as being by Claude Lorraine and Teniers, were found to be copies. In an extraordinary decision, the court held that because the artists were long dead, the question of authorship was merely one of opinion, not a warranty. Thus the purchaser lost out.

A little later in *Power v Barham*,¹⁴ the defendant sold four pictures purported to be by Canaletto. They were not. Here the purchaser won. One judge distinguished the earlier case on the ground that Canaletto was a more modern painter and that therefore one could be expected to actually ascertain the work's authenticity and not merely give an opinion! The importance of the case was that the judges decided that the proper approach was to look to the ordinary meaning of the words used at the time of the transaction to see whether, in all the circumstances, they implied a warranty of genuineness or whether they conveyed only a description or expression of opinion.

It should also be noted that words written on the receipt are not, in themselves, sufficient. One must look to the words used at the time of the transaction together with the receipt, to see if a warranty as to authenticity has been given.¹⁵

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 Fabergé. 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.

7.2.4.2 Certificate of Authenticity

Where the purchase does not involve a full contract or even a particularly descriptive receipt, it may be appropriate to require of the vendor a Certificate of Authenticity. These are commonly given by vendors of fine art, multiples and fine prints and take the form of a document that certifies such matters as

¹³ (1797) 2 Esp 572.

¹⁴ (1836) 4 Ad & E 473.

¹⁵ *Hyslop v Shirlaw* (1905) 42 Scot L R.668.

authorship, genuineness, title, size, process, relevant dates, signature, and so on. By issuing a document that sets out the basic features of the object and signing as to the truth and accuracy of those details, the vendor promises that the item is what it is purposed to be. It doesn't make the details any truer than they inherently are. Rather, the certificate becomes a contractual term of the transaction and, accordingly provides the purchaser with evidentiary proof of the intentions of the parties should it prove necessary.¹⁶

Certificates are not necessary when you have a full contract documenting the transaction, as you would include the matters detailed in the certificate in the contract. However they remain useful for smaller transactions in which a full contract may be seen as overkill.

7.4.2.3 Warranty as to authenticity

As the purchasing museum, it is usually wise to include a clause in the contract of acquisition, granting specific rights to inspect and return the work or object if it does not pass the inspection. For example:

The Buyer may have the Work/Object examined and provided that:

1. two or more experts as to 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; and

2. the Buyer provides notice to the Seller of its intention to return the Work/Object within four weeks of the date of purchase;

then the Buyer shall have the right to return the Work/Object to the Seller and to be refunded the full purchase price.

7.4.3 How to undertake due diligence prior to acquisition

'Due diligence' is a phrase that is commonly used in the corporate world. It is considered a basic part of good governance. All decisions involving a major expenditure of corporate resources are preceded by a rigorous examination of the risks and obligations that are involved in the transaction. The price, so often

¹⁶ There is no legal obligation in Australia for vendors to provide a certificate of authenticity. This is not the case in other jurisdictions. In particular many states in the USA have such legislation.

the focus of superficial enquiry, is merely one of the many matters that must be taken into consideration.

The following checklist describes some of the matters into which any institution should make enquiry when considering acquisition. Although there are important common themes, each institution should develop its own due diligence protocols in light of its own particular needs and characteristics.

ACQUISITION DUE DILIGENCE CHECKLIST

1. Compliance with acquisition policy

- Does the intended acquisition comply with statutory limitations on the institution's scope of collecting (as expressed in its governing legislation)?
- Does the intended acquisition comply with the institution's internal Acquisition Policy?

2. Relevance

- Irrespective of the beauty, rarity or value of the material, is the material within the intended scope of the collection?
- Are there other collections that are better suited?

3. Necessity and desirability

- Is the material required or desirable for the collection? Just because it is within the scope of the collection is not a good enough reason to acquire it. (Many collections are burdened by duplicates and by unnecessary examples of similar material etc.)

4. Importance

- Not all collection material acquired by institutions is 'important' in the sense that it is rare, valuable or precious. It may be all of these things but most collections will need collection material that can't make any substantial claim to importance. Sometimes it's just really useful.
- Some institutions do have rigorous requirements of 'importance' – particularly in respect of material that they are considering for accession to their permanent collection. Even then, it must be

recognised that the concept of importance is a subjective one and it is essential that the person within the institution who is recommending the acquisition be able to put in writing his or her argument as to why the material is important to the collection.

5. Quality

- Quality is not necessarily analogous to importance. A quality object is not necessarily important – it may be a wonderful example of something commonplace. It is perhaps more unusual for the truly important not to have quality. Again it is a subjective matter and it is important that the proposer of the material.

6. Condition

- The state of repair of the material is always significant but is in itself not determinative. Rarity may mean that it is important that the institution acquire an example irrespective of its condition. On the other hand, for something to be of 'museum standard' usually implies that it is the finest example available to the collection.
- Sometimes the purpose for which the material is being acquired will determine the importance of condition. An item that is being considered for acquisition for the permanent collection will have a considerably higher bar to jump than if it were being considered for a research collection or teaching collection.
- So, has a condition report been undertaken? Is it in accordance with the expectations of the institution? Is the condition of the material appropriate for the collection into which it is intended to be accessioned?
- Does the material require restoration? If so has it been costed? What other issues attach to any restoration that is required?

7. Conservation requirements

- Does the material have particular or unusual conservation requirements? These may be expensive (either in cash or other resources).

- If so does the institution have the existing systems and resources to provide these requirements?

8. Proposed use

- What is the intended use of the material?
- Some material may be appropriate for the permanent collection. Other material may be only suitable for subsidiary purposes such as the research or the teaching collection. It is important to examine how the material is going to be used within the institution for this will help determine the priority that should be accorded the acquisition. If it is for research, the acquisition of duplicate examples is not only common; it is often essential.

9. Is the acquisition financially responsible?

- What are the direct costs of the acquisition?
- Given the acquisitions budget, are the direct costs of the acquisition justifiable and, how is the acquisition going to be funded?
- Assuming that the material must be paid for and further assuming that the institution does not have the cash on hand to fund the purchase, what prudent legal mechanism can be adopted to reserve the material for the collection without entering a legally binding commitment to acquire it until the funding is in place.
- What are the indirect costs of the acquisition? Have the run-on costs such as storage, transport, insurance, personnel, restoration, documentation, been taken into account.
- Given the operations budget of the institution, are the additional run-on costs justifiable and funded?

10. Provenance

- Has the provenance of the material be satisfactorily established?
- Provenance is important for purposes of cultural history but it is also important for providing evidence that can be used to prove legal title – the right of ownership.

- Often the provenance of the item cannot be seamlessly established. This does not necessarily mean that the material should not be acquired. That will depend on the nature of the material and the effect that the flaws in the provenance may have on its value or chain of title.

11. Legal title

- Has the seller established that it has title to the material?
- Is there a full description of the current owner of the item and the means by which they became the owner?
- What proof has been provided of that ownership?
- Are there simple enquiries that might be made to test the story? (For example, if a biographer offers for sale the diary of her now-dead subject, the institution considering the acquisition should at least make enquiries of the subject's executor to establish whether this the claim of ownership is reliable.)
- Have the basic enquiries been made to check that the material has not been reported as missing or stolen. (For example, where a work of art is being purchased from other than the artist, has reference been made to the Art Loss Register?)
- Did the material originate overseas? If so, was the material legally removed and exported from its place of origin?
- Is it legally present in Australia?
- Is there anything about the answers to these questions that indicate legal niceties or ethically tortured constructions? Some great institutions, leading curators and prominent board members have been all suffered greatly when harsh light has been applied to questionable transactions. This is one area in which standards

have greatly changed in just a few years. There are now rigorous ethical standards imposed on collection transactions.¹⁷

12. Identity of the source

- Who or what is the source of the material? You cannot afford not to know.
- If the material is being purchased: 'Is the vendor of substance and of established reputation?' This is relevant to the establishment of legal title, the enforceability of warranties given by the vendor and also the ethical reputation of the institution.¹⁸
- The related (but distinct) question is to ask: 'Has the seller established that it has all the rights necessary to undertake the transaction? For example, is it selling in its own right or as an agent, executor or trustee? If the vendor is not acting in its own name, who is the actual owner?'

13. Conditions

- Are there any conditions affecting the title that the museum would usually expect to enjoy? Preconditions in the acquisition transaction can seriously affect what the institution does with the item: how it is exhibited or used; what public access is permitted and so on. These matters are always important to the acquisition decision.
- If there any conditions associated with the acquisition do they affect provenance? Title? Right or ability to exhibit?
- Does the institution have the legal power to agree to those conditions?
- Even if it does have the legal power, why should it agree to the conditions?

¹⁷ The cavalier days of the Metropolitan under Thomas Hoving now make great yarns but are very dangerous templates for modern professional standards. Indeed consider the sleep patterns enjoyed by Marion True and the chairman of the Getty since that particular scandal was revealed.

¹⁸ If an artefact is purchased from a tombarolo or from a dealer in antiquities of dubious reputation, the status of the object and the ethical reputation of the institution (and the curator) may well be tarnished.

- Do the conditions impose any additional burden or expense upon the institution? For example, does the condition affect the use that may be made of the item by the institution? Does it require the institution to do things that it would not necessarily have otherwise done?

14. Documentation

- How will the transaction be documented?
- Who is responsible for preparing that documentation?
- Should this be prepared 'in-house' or does the value or complexity of the transaction require outside counsel?

15. Copyright

- If the material is copyright, does the transaction include any assignment or licence of those rights?
- If so, has it been established that the vendor of the material also is the owner of the copyright?

16. Warranties

- Is the vendor prepared to give a warranty as to the truth of its promises and an indemnity against any loss suffered as a consequence of any breach of those warranties?
- For example when the Getty approves the purchase of an object the vendor will be required to warrant for a period of 48 months from delivery of the object that:

- (a) The object is authentic;
- (b) The vendor has good legal title to the object;
- (c) The object has been (or will be) legally exported from its country of origin; legally exported from the country of purchase and legally imported (into the USA);
- (d) All customs and patrimony laws and regulations of all countries involved in the acquisition have been met.

17. Delivery

- How will the material be delivered?
- Who is responsible for organising delivery?
- Who is responsible for paying for delivery?

18. Does the acquisition comply with the highest standards of professional ethics?

- In order to answer this, a separate due diligence enquiry must be made. The time has passed when institutions could close their eyes to issues of illegal export, holes in the chain of title and ethical dilemmas that may nevertheless affect the acquisition notwithstanding that the process is actually lawful. It is often said that there is a difference between The Law and Ethics and it is never truer than in the acquisition of collection material.
- Remember that ethics change. The collection of human remains was, at one time, commonplace enough in Australian institutions. Nowadays completely different attitudes apply.
- If the material is to be imported into Australia, what enquiries have been made to ensure that the material was or will be legally exported from its country of origin? What enquiries have been made to ensure that the material is being legally imported into Australia? Has the smell test been applied? ¹⁹
- With some types of material it is important to consider whether it was scientifically excavated. This may well determine its usefulness as a collection item and may be the first indication that there are ethical issues attaching to the acquisition that must be settled.
- Are there any circumstances attached to the acquisition that may attract accusations of conflict of interest on the part of persons connected with the institution (such as staff, board members, sponsors, donors, suppliers...)?

¹⁹ For example, if a museum is considering an Italian antiquity that is a common focus of the tombaroli – and the purchase is to be through Switzerland ...

- If there are problems found as a result of such enquiry, what is the monetary exposure of the institution?
- Does it represent a danger to the reputation of the institution either amongst the professional collection community or the public?

19. Approval procedures

- Has the approval for the acquisition been given by the appropriate persons, committees or board within the institution?

20. Announcement, Exhibition and Publication

- Is the organisation going to promptly and widely announce the acquisition to the press and make it publicly available (whether by public exhibition or otherwise). An image and description of an object on the institution's website is often a useful means of publication but scholarly publication also meets this requirement.

21. Publication of Due Diligence Checklist

- Is the organisation prepared to make publicly available the due diligence acquisition checklist of the organisation?

22. Final test

- Because we are all inclined to be kind when evaluating our own decisions, prudent institutions might implement a three-fold test:²⁰
 - (a) Have we actively questioned the item's provenance?
 - (b) Are we prepared to make conspicuously available for public inspection its complete and accurate provenance?
 - (c) Are we able to produce and publish records of each step taken throughout the acquisition process?

If the answer to any of those questions is anything other than a simple 'yes', perhaps you should resist any urge to acquire the material.

²⁰ <<http://www.savingantiquities.org/f-culher-museums.htm>>.

7.4.4 Authenticity checklist

Although the checklist set out above deals with the major due diligence issues, sometimes the principal concern is that of authenticity. If you have concerns as to authenticity it is very helpful to ask the questions set out in the following checklist. It covers paintings & drawings, fine art prints and antiques:

**QUESTIONS REGARDING AUTHENTICATION
FORMULATED BY
THE ART COMMITTEE OF THE BAR OF THE CITY OF NEW YORK**

A. Paintings and drawings

The following checklist may help elicit critical data for authentication.

1. The name of the artist and basic biographical data.
2. A description of the painting (including its title, its dimensions, the medium used, and a statement of its conditions and any special physical characteristics).
3. The date of its execution. If the painting is said to be old, have any tests been made with respect to its age?
4. Are there historical records relating to the picture, such as a chain of ownership (provenance) which traces the picture to the present owner?
5. What collateral evidence of authenticity is available (catalogues, advertisements, museum and gallery records, etc.)? What steps has the dealer taken to establish the authenticity of the painting?
6. What evidence is available to prove that the artist's signature is genuine? If the artist is alive, will he corroborate the authenticity of the painting? Will the dealer represent that the artist's signature is genuine.
7. What rights, if any, has the artist reserved in the painting, whether by copyright protection or otherwise?
8. Are there any available records of cleaning, restoration or other treatment?

9. Is it possible to obtain from the artist or his representative a certificate of authenticity?

B. Prints

Against this summary of the problems in the area of prints, the following checklist may be helpful:

1. The name of the artist and basic biographical data.
2. A description of the print (including the size of the total edition, the serial number, and the condition and state of the print).
3. The date of the execution of the plate (or stone, or wood block, etc.), the date of the impression, and the date of the artist's signature.
4. The process used in making the print (woodcut, etching, lithography, silk screen, etc.)
5. Has the seller represented that the product is not a reproduction, that it meets the tests of an 'original print' as defined by the Print Council of America, and that the artist's signature is genuine?
6. How many editions of the print were made? Have editions been made in different colours? How many prints in each edition? Are there any outstanding prints, such as artist's proofs, which have not been included in any edition?
7. Was the artist also the printer? If not, was the print made under the artist's supervision? Who besides the artist participated or collaborated in the production of the plate and the print?
8. Who has possession of the plate (or stone, or wood block, etc.) from which the print was made? Has the plate been marked or cancelled to show that the original edition has been completed? Has the plate ever been substantially reworked?
9. Did the print ever serve as a book illustration or was it ever a page or an insert in a magazine?
10. What rights, if any, has the artist reserved in the print, whether by copyright protection or otherwise?

11. Is it possible to obtain from the artist or his representative a certification as to any of the foregoing items which the purchaser deemed relevant?
12. Are there historical records relating to the print to establish a provenance?
13. What collateral evidence of authenticity is available, such as catalogues, advertisements, museum and gallery records, etc.?
14. Are there any available records of cleaning, restoration or other treatment?

C. Sculpture

The following checklist for the purchaser of sculpture may help disclose factors relevant to aesthetic and monetary values:

1. The name of the artist and basic biographical data.
2. A description of the sculpture (including the title of the piece, its dimensions and its material, and the total number of casts made). If cast, the manner of its construction.
3. The date of the execution of the cast and the prototype. Has there been more than one edition of the sculpture?
4. Was the cast made by the artist or by a foundry? Who authorized the making of the cast (the artist, his heirs, a dealer, etc.)? Was the cast done posthumously? If made by a foundry, will the founder certify the total number of casts made by him?
5. Who has possession of the prototype (the artist, his heirs, a dealer, etc.)? Have extra casts been made by the possessor of the prototype? What is the condition of the prototype? Are there any limitations on its use?
6. Have enlargements or reductions of the prototype been made or authorized? Have casts been made in any other media? Have reproductions been made or authorized?
7. Has the seller represented that the artist's signature on the cast or on a certificate of authentication (see below) is genuine and

that all other data inscribed on the cast is accurate? Does the seller have any knowledge of unauthorized casts?

8. What rights, if any, has the artist reserved in the sculpture, whether by copyright protection or otherwise?
9. Will the artist furnish a certificate of authenticity (to be attached to a photograph of a sculpture) stating that the sculpture was cast under his supervision, and containing the title of the piece, its dimensions, the date it was cast, the material used, the serial number, and the total number of casts?
10. What collateral evidence of authenticity is available such as catalogues, advertisements, museums and gallery records, etc.?
11. Are there historical records relating to the sculpture to establish a provenance?
12. Are there any available records of cleaning, restoration or other treatment?

D. Antiques

1. The name of the civilisation, tribe, culture or group which produced the work.
2. The stylistic identity of the work: this may be the name of a specific region, people, or sub-culture, dynasty, or the like: 'Chou Dynasty'; 'Benin'; 'Navaho'; 'Luristan', etc.
3. A description of the work: dimensions, materials, condition, use, and other identifying characteristics.
4. The approximate date of execution.
5. Are there historical records relating to the work to establish a provenance?
6. What collateral evidence of authenticity is available, such as catalogues, advertisements, museum and gallery records, etc.?
7. Are there any available records of cleaning, restoration or other treatment?

7.5 Legal title

7.5.1 Introduction

Given that provenance is so often imperfect, there is often an element of risk in acquiring collection material. As the establishment of the provenance is the starting point for proving legal title, where the museum decides to acquire an item despite an imperfect provenance, it must realise that it is also making a decision to acquire the item without provable legal title. Is the item so crucial to the collection that you are prepared to spend the resources of the museum on an item to which it can never fully prove ownership? It is a risk that **must** be considered. It is a risk that can come back to haunt one's successors.²¹

These problems are exacerbated where the acquisition is as a result of field collection. The laws as to ownership of apparently abandoned goods; fauna, flora and specimens found on private, leasehold, public or other lands; and items taken contrary to statute, regulation or licence, all raise complexities as to the legal title that can be claimed for material collected in the field. In almost all cases, illegality has a detrimental effect on the enforceability of title and the curatorial or scientific need to record and publish the time, place and circumstances of the field collection also provides concrete evidence of the legality or illegality of the acquisition.

7.5.2 Principles

Title is the right of ownership. When one purchases a litre of milk, the money is handed over in exchange for the carton and the purchaser is then allowed to leave the shop with the carton of milk. From a legal point of view, the shopper and the shop owner have entered a contract of sale and, pursuant to that agreement, the legal title in the carton of milk changes hands. Now, the purchaser is able to exercise full rights of ownership over it. These include drinking it, destroying it, giving it away, or exhibiting it. With cartons of milk the process is so commonplace that we don't think twice about it.

The acquisition of title in a collection object is no different in principle, merely more complex and thus more difficult to effect with prudence. We don't ask ourselves whether the grocer had the right to sell the milk. The subject of

²¹ For example, every major art gallery in Australia has had to review its collection in light of the international proliferation of claims made by descendants of the owners of works stolen by the Germans during World War II. The provenance may be clearly established but the legal title revealed by that provenance may be flawed.

the transaction and the transaction itself are so commonplace that we assume that the product labelled 'milk' and found in the 'milk section', is milk, and that the grocer has the right to sell it to you. Museums are not entitled to make the same assumptions in the acquisition of collection items.

Inherent in the transfer of title there are a number of legal landmines.²² At its simplest, 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, pawn it, or do anything we like with it.

As owners, we may also give certain limited rights to others. For example, if we lend an object, the borrower has the right to possess it (and to do all the things that are compatible with that right). That right does not include the right to sell the object. Indeed there are many reasons why one may have possession of an object but not have the right to sell it.

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.²³ It is this principle that underlies the numerous claims being made throughout the world in respect of art that was looted by the Nazis during the Second World War. There are many complex issues inherent in establishing such claims but the claims are all based on the basic principle that the right of the current owners are defective because they have bought the works from vendors who did not have good title to the work.²⁴

Although the Nazi loot issue is one that primarily affects art museums, less epic but similar situations occur quite commonly in most museums. Resolving requests for the return of collection material bought by or given to the museum, is part of the business of administering collections. These disputes are time consuming, expensive and can be damaging both to the collection and to the

²² The intricacies of these were explained at length in M L Eutick & A J Cordato, *The Problem of Obtaining Proper Legal Title to Objects Acquired by Museums, Historical Societies, Art Galleries and Archives*, (c 1983)(Museums Association of Australia). It is not a simple book for it deals with a complex legal area. However, all administrators should study and understand it. The following discussion does not purport to deal with the subject in such a comprehensive fashion.

²³ There are exceptions to this general rule and these, along with many examples, are discussed in Eutick and Cordato, referred to above.

²⁴ It is perhaps the self-evident morality of many of the claims that has prompted the judiciary to adopt legal interpretations on matters such as Limitation of Actions that permit such claims to be brought.

reputation of the institution. They are best avoided by making rigorous chain of title enquiries prior to making the decision to acquire.

7.5.3 Practical approaches

Disputes as to title are largely determined on the strength of the documentary evidence. In many cases the museum's records (particularly old records when professionalism of museum administration was seen not as good governance but rather proof of scientific or cultural dwarfism,) are simply inadequate to prove that its right to the material in dispute is stronger than that of the claimants. It usually makes no difference whether the museum has acted in good faith or had no notice of the defect in title.

Because of the centrality of documentation and provenance, when it receives a claim based on title, the museum's initial reaction should be to ask for evidence supporting that claim. Then, before anything further is said, legal advice should be obtained as to the strength of any evidence supplied and whether or not any of the statutory exceptions to the general rule, may apply.

A museum employee cannot be expected to be an expert in the law of property, but must be expected to take sensible precautions to ensure that the museum is acquiring the quality of title that it requires.

How this is best achieved will always be the subject of debate and no one procedure will guarantee title however the most effective way to ensure that the institution is protected is to devise a due diligence checklist for the acquisition of material.²⁵ That said, generally, the acquisition documents should, where possible:

- state the basis of the acquisition; i.e. whether it is a gift, a bequest, an exchange or a purchase;
- contain a statement from the source of the object as to how he or she came to have it;
- contain a warranty from the source that he or she has the right to do what is being done.

7.5.4 Defective records

Despite the best efforts of current collection administrators, most collecting institutions have material in their possession for which the documentation either

²⁵ See chapter 7 (b) Due diligence.

is ambiguous, only partial, or entirely missing. Even more disturbing, is documentation that establishes or suggests that material is missing.

Each such item must be treated individually. While there are mechanisms for dealing with uncollected loans,²⁶ there is no one right approach. Where the documentation does not unambiguously establish the institution's title in the material, nothing can cure that defect except either better documentation or a court's determination.

In any event, the institution is usually reluctant to raise the issue with potential claimants. It does not want the embarrassment of having to admit that its documentation is less than perfect and that its claim to its collection material is unassailable. In taking the 'do nothing' approach it is tacitly agreeing to continue to carry all of the burdens and expenses of retaining collection material without complete assurance of ownership. This sits uncomfortably with modern understanding of good governance. A better approach is to look at each such item (either individually or as a class),²⁷ and consider the exact flaws in the title and decide what the institution wants to achieve. Once the goal has been determined, then a strategy can sensibly be formulated. Sometimes, the aim will be to expunge the material from the collection; with other items it may be to ensure that desired material will stay permanently within the collection; for still others, it may be to restore material to its rightful owner. The list goes on.

Where the institution decides that it wants to keep possession of such material, one option is to accession it in the normal way and assume the risk that, at a later date, there may be a claim. In many ways this sensible for the institution's claim to the material can only be defeated by a claimant who can prove that it has a better claim to ownership. This burden of proof (the balance of probability) is often difficult to fulfil because, particularly because the original party is often dead and the documentation available to the claimant is no better than that held by the institution.

²⁶ See chapter 15 (h), 'The Scary Cupboard: Old and Uncollected Loans'.

²⁷ If you are dealing with an individual artwork, you would undertake an individual consideration of the issues; but if it was an enormous collection of material such as an archive of a company being given to a collection, you would undertake a more wholesale approach. It is a matter of assessing the risk and balancing it against the potential benefits.

However, there are still things that can be done to reinforce the interests of the institution. For example, it may be appropriate to contact the relevant parties and discuss how they would like to be acknowledged when the material is made publicly available or exhibited. In this way, their view of the legal relationship will soon become apparent. Such enquiries can be made without making any admission as to any potential defects in the institution's documentation. This can be followed up with correspondence that makes it quite clear what the intention of the parties was and is. It doesn't have to be done in heavy legal documents – but does have to be handled with legal care so that the desired and proper outcome is achieved.

The most important advice for older, poorly documented acquisitions is, to be aware of the legal implications of a poor chain of title, and deal appropriately with any claims that arise – speedily, with sensitivity to the claimant, and with the support of professional legal advice.

7.5.5 Basis of the acquisition

It is essential that the documentation show the nature of the transaction. When it is a purchase, the circumstances are usually obvious: money has been paid and possession of the object has been transferred. Where the transaction is a gift, the matter is more difficult. When a claimant alleges that the museum acquired possession of an object by loan rather than gift, the museum's rights are primarily determined by reference to its documentation. This should state unequivocally that the transaction was a gift and that title in the object was intended to pass to the museum.

Good governance demands that the staff responsible for overseeing the transaction have access to well-drafted standard documentation and, where necessary, suitably expert legal advice. Documentation drafted by self-confident non-experts is a source of riches for litigators.

7.5.6 Basis of the transferor's rights

Persons donating or selling material to the museum, usually do so in good faith. They truly believe that they have the right to give or sell the object to the museum. All too often, museum personnel rely on that good faith and fail to ask basic questions such as, 'How did you come to own this object?' This is particularly important when the object is a family heirloom (because competing claims by relatives are common) but also is an essential part of the provenance

of the object. Simply asking the right questions frequently identifies defects in title. If the answers are not quite right, the alarm bells should ring. Further investigation will be required.

For this reason, normal enquiries as to provenance are essential. Just as the chain of ownership is important for intellectual and cultural purposes, so it is for legal purposes. When considering the provenance of an item, museum personnel should be awake to the legal ramifications of the information. A carefully considered provenance will often reveal a weakness in the chain of title that will necessarily affect the value or the desirability of an object and may even affect the validity of the transaction itself. If there is a weakness, it is better discovered before acquisition, than after.

7.5.7 Warranties

Museums frequently fail to insist on warranties in their acquisition documentation. This omission can be costly. It is not just the purchase price that is at risk: When a museum acquires an item it has to spend money. This may include the purchase sum, transport, insurance, 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. Given this, the museum is well advised to include in its acquisition documents a warranty as to title that will enable it to recover some of its losses if something goes awry.²⁸

²⁸ For example, see *Menzel v List* 267 NYS 2d 804, 49 Misc 2d 300 (1966), affirmed 28 AD 2d 516, 279 NYS 2d 608. In 1962, Mrs Menzel, the owner of a Chagall painting stolen by the Nazis in 1941, sued Mr List, the current owner of the work for return of the work. Mr List had purchased it in good faith from Mr Perls, a collector who in turn had purchased the work from a Paris dealer in 1962. The defendant argued that the Statute of Limitations had expired. The Court disagreed. It held that the limitation period did not commence until the date upon which the present 'owner' had been asked and had refused to return the work. Mrs Menzel got her Chagall back, Mr List was successful against Mr Perls, and Mr Perls was left to seek redress against the Paris dealer. It was an expensive exercise in the importance of establishing title.

The courts took a very different approach in *O'Keefe v Snyder* 170 NJ Super 75, 405 A 2d 862 (1980). In that case it held that if she were to establish her case, Georgia O'Keefe would have to show (1) that she had acted diligently to recover her paintings at the time of the alleged theft and thereafter; (2) that that the time of the alleged theft there was an effective method for her to alert the art world; and (3) that what she had done by way of registering the work with the Art Dealers Association of America (or these days, the Art Loss Register) was sufficient to put the reasonably prudent purchaser on notice that the 'someone other than the possessor was the true owner'. Ms O'Keefe failed.

For example, in sale or gift documentation one might include a clause as follows:

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 defective I agree to

- 1. 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*
- 2. indemnify the museum against any awards, expenses, costs or any other like losses incurred as a result of the defectiveness of title.*

If the item has been imported into the country it would be wise to include a clause warranting that it has been legally exported from its country of origin:²⁹

I further warrant that the export of the item 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.

Similarly it may be prudent to include a warranty that the item is not the subject of hire purchase, lease, covenant, caveat, court order or the like:

I warrant that the item is free from all orders, liens or encumbrances.

Unless the purchaser includes such warranties the courts will be loathe to imply them. There are many cases that demonstrate this unwillingness. They take the view that if the parties did not see fit to include such promises in the contract, it is not the role of the courts to second-guess their intentions.

²⁹ This is discussed at greater length in Part I: Legislative Protection Of Cultural Material.

7.5.8 Statutes that affect title

There are many statutes that affect the effectiveness of title such as those relating to the illegal export of cultural property, laws protecting shipwrecks; laws protecting flora and fauna; laws protecting historic places and property. The museum must be alert to the particular issues raised by these statutes whenever it is dealing with material that is likely to attract such protection. Again, the most effective way of limiting risk is to ask the right questions and listen critically to ensure that the answers are comprehensive and credible.³⁰

7.5.9 Contractual conditions that affect title

Some donors attempt to attach conditions to gifts. Most museums strenuously resist accepting gifts with conditions: Such conditions are too easy to breach. For example, if a donor gives an object to a museum on the condition that it be exhibited no less than once every ten years, what is the legal status of the object if the museum fails to honour the condition? It is highly likely that such failure can terminate the rights of the museum and can expose it to a claim from the owner (or his or her estate).³¹

It is wise for the museum to have a policy that prohibits the acceptance of gifts with conditions. It is also prudent that the museum have a mechanism by which that general policy may be reversed in individual and special instances. This procedure 'should state who has the power to approve exceptions and what written records must be kept to explain each exception. As a safeguard, museum policy should require that a deed of gift for a restricted gift should be

³⁰ In Australia, there is no statutory equivalent of the *Dealing in Tainted Cultural Objects (Offences) Act 2003* (UK). Introduced at a time when the sale of treasures looted from Iraqi museums was a matter of public controversy, the purpose of this Act was to inhibit illegal sales in the London art market. See <http://www.culture.gov.uk/cultural_property/illicit_trade.htm>.

³¹ How do you overcome the difficulty of disposing of an object that has been lent to the museum and whose owners (or heirs) cannot be found? In such cases the museum has only the right to possess the material, not to dispose of it for to do so can only be done by an owner, not a mere bailee. (A bailee is a person who has the right to possess something without being its owner. For example a person who borrows a book from a friend has the right to possess the book but does not become its owner.) Many museums are stuck holding material in their storerooms that they would rather divest but lack either a contractual or a statutory right to do so. This is one of the reasons that long-term loans are discouraged. It is also one of the reasons that museums established by statute should always contain a provision in their Act, which empowers them to dispose of such material after a certain length of time and after certain enquiries have been made.

counter-signed by a museum official authorised to approve exceptions and that evidence of the restriction should always be on file with the accession records.³²

7.6 Legal deposit

7.6.1 What is legal deposit?

Under the *Copyright Act 1968* (Cth), a copy of any work published in Australia must be deposited with the National Library of Australia and the appropriate State library. In New South Wales,³³ Queensland³⁴ and South Australia,³⁵ state legislation also requires that a copy must also be deposited with the relevant state library.

Legal deposit extends not only to commercial publishers but also to private individuals, clubs, churches, societies and organisations. Legal deposit of the material is the sole responsibility of the publisher or author.

7.6.2 What are the benefits of legal deposit?

The National Library and other deposit libraries assume an obligation to preserve all material lodged with them. Legal deposit ensures that the works of authors and publishers will survive for the use of future generations. The comprehensive collections of Australian publications formed in this way provide the means for research into all aspects of Australian life, history, culture, artistic, commercial, technical and scientific endeavour.

Records for legal deposit publications are available through Libraries Australia, an online, shared cataloguing system, forming the basis of the Australian National Bibliographic Database. This means that all publications are brought to the attention of potential users through author, title, subject and many sophisticated electronic search strategies. Libraries Australia is freely available to anyone at <<http://librariesaustralia.nla.gov.au>>.

In addition selected records are included on databases available online. Social sciences and humanities literature published through scholarly periodicals and conferences are indexed in the Australian Public Affairs Information Service

³² Marie C. Malero "Managing Museum Collections" (2nd ed.) 1998, at 204

³³ *Copyright Act 1879* (NSW).

³⁴ *Libraries Act 1988* (Qld) s 68.

³⁵ *Libraries Act 1982* (SA) s 35.

(APAIS). Health and medical literature published in periodicals and conferences are indexed in the Australian Medical Index (AMI).

Further help is given to publishers by the National Library's Cataloguing-in-Publication program (commonly known as CIP). The address to contact is:

Cataloguing-in-Publication
National Library of Australia
Canberra ACT 2600.
Tel: 02 6262 1458
Fax: 02 6273 4492
Internet: <http://www.nla.gov.au/services/CIP.html>

7.6.3 What are the requirements of legal deposit?

The Acts requiring deposit have a number of common features. In particular, each relevant Act, whether state or Commonwealth, defines what works are subject to the deposit obligation.

7.6.4 What must be deposited?

Each piece of legislation defines the subject matter of the deposit in different terms. It is often (mistakenly) assumed that the deposit obligation only extends to books. It is much wider than that. For example, in NSW, even though the statutory reference is to 'books' the definition section of the Act defines 'books' to include the obligation 'any volume part or division of a volume newspaper pamphlet libretto sheet of letter-press sheet of music map chart or plan separately published' (s 2).

Some states provide for the deposit of more modern material such as 'film, tape, disk or other like instrument or thing supplied to the general public and designed to reproduce visual images, sound or information...'³⁶

The wording of these provisions differs in each jurisdiction and particular care must be paid to the exact language of the relevant statute. Many of the statutes appear to have been drafted before we became truly familiar with the

³⁶ *Libraries Act 1988* (Qld) s 70. Note that the South Australian provision is in exactly the same terms except that different language is used in respect of sub-para 5: The South Australian provision includes items 'designed to store and facilitate the reproduction of visual images, sound or information' whereas in the later Queensland provision the legislators removed that part of the requirement that related to storage. One may imagine that this was to avoid the need to deposit hard discs.

digital capture, storage and reproduction of information.³⁷ They need updating and it would make considerable sense if this process was undertaken collaboratively so that the legal deposit provisions, state and federal, were drafted in uniform terms.

As a starting point, all jurisdictions might look to the Victorian legislation³⁸. It is neat, modern and technology agnostic.

7.6.4.1 When has material been 'published'?

A work is deemed to have been published if reproductions of the work or edition have been made available (whether by sale or otherwise) to the public. (This is the standard definition of 'publication' provided by the *Copyright Act 1968* (Cth).)

7.6.4.2 Best copy

The copy of the material must be a copy of the whole material and must be the best copy of that material as published. For example, if both a hard cover bound edition and a paperback edition are published, one copy of the hard cover edition must be deposited.

7.6.4.3 Second and subsequent editions

A copy of a second or later edition in which copyright subsists does not have to be deposited unless it contains additions or alterations to the text or the illustrations. If a second or later edition does contain such additions or alterations then the best copy of that edition must also be deposited. If a book is reprinted with a change to the title, or any part of the content, or by a different publisher, it is considered a new edition.

7.6.4.4 Claiming

When a legal deposit library finds that it has not received a published item on legal deposit it claims the publication from the publisher. This ensures that the collecting of currently published Australiana is as complete as possible, and at the same time, reminds publishers of the requirements of legal deposit.

³⁷ For example the Tasmanian definition is troublesome in that under any strict interpretation, it would be compulsory to deposit equipment such as projectors, cameras and the like, for they are certainly a 'thing whereby words, sounds, or images are recorded or reproduced.' This is clearly not the intended purpose of the provision.

³⁸ *Libraries Act 1988* (Vic) s 49.

7.6.7 Particular requirements of each deposit library

7.6.7.1 National Library of Australia

Section 201 (1) of the *Copyright Act 1968* (Cth) provides that 'the publisher of any library material that is published in Australia and in which copyright subsists under this Act shall, within one month after the publication, cause a copy of the material to be delivered at his or her own expense to the National Library.' Note the use of the term 'library material'. This term is defined as meaning 'a book, periodical, newspaper, pamphlet, sheet of letter-press, sheet of music, map, plan, chart or table, being a literary, dramatic, musical or artistic work or an edition of such a work, but does not include a second or later edition of any material unless that edition contains additions or alterations in the letter-press or in the illustrations.'³⁹

It does not include films, tapes, disks and the like. Although the NLA has an extensive program of capturing and preserving digital material, it does not do this pursuant to the legal deposit legislation.

Even though state legislation may impose an obligation of legal deposit in a particular state collection, this is additional to the overarching obligation of legal deposit with the National Library.

When sending legal deposit material to the National Library one must ensure that there is a name and address attached so that the legal deposit receipt can be sent. No other forms are required.

Legal Deposit Unit
National Library of Australia
Canberra ACT 2600
Telephone: 02 6262 1312
Facsimile : 02 6273 4492
E-mail: legaldep@nla.gov.au
Internet: <<http://www.nla.gov.au/services/ldeposit.html>>.

7.6.8 New South Wales

Legal deposit is required under the *Copyright Act 1879–1952* (NSW), ss 5–7. The Act requires that a copy of every 'book' first published in New South Wales be lodged within two months of publication. 'Book' is defined in the Act as any book, newspaper, pamphlet, leaflet, music, map, chart or plan separately published and 'bound', sewed or stitched together'.

³⁹ Section 201 (5).

The language of the Act is arcane but it illustrates the historical and social roots of this obligation:

Section 5 (1): A printed copy of the whole of every book which shall be first published in this colony after the passing of this Act together with all maps prints or other engravings belonging thereto finished and coloured in the same manner as the best copies of the same shall be published and also of any second or subsequent edition which shall be so published with any additions or alterations whether the same shall be in letterpress or in the maps prints or other engravings belonging thereto and whether the first edition of such book shall have been published before or after the passing of this Act and also of any second or subsequent edition of every such book of which the first or some preceding edition shall not have been delivered for the use of the Free Public Library and the Library of the University of Sydney bound sewed or stitched together and upon the best paper on which the same shall be printed shall within two calendar months after the day on which any such book shall be first sold published or offered for sale within this colony be delivered by or on behalf of the publisher thereof at the said Libraries.⁴⁰

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| <p>Collection Services State Library of New South Wales Macquarie Street Sydney NSW 2000 Tel: 02 9273 1489 Fax: 02 9273 1246 Email: orders@sl.nsw.gov.au</p> | <p>Legal Deposit Officer University of Sydney Library University of Sydney NSW 2006 Tel: 02 9351 7268 Fax: 02 9351 7305 Email: legaldeposit@library.usyd.edu.au</p> |
| <p>Legal Deposit Officer NSW Parliamentary Library Parliament House Macquarie Street Sydney NSW 2000 Tel: 02 9230 2384</p> | |

⁴⁰ Clause 5 (2) is in similar terms and adds the requirement of legal deposit with the Parliamentary Library of New South Wales.

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| Fax: 02 9230 2640 Email: libreq@parliament.nsw.gov.au | |
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7.6.9 Northern Territory

Legal deposit is required under the *Publications (Legal Deposit) Act 2004* (NT). This Act requires documents published in the Northern Territory be deposited within two months of publication. 'Document' means any document available to the public including books, newspapers, magazines, periodicals, reports, newsletters, calendars, directories, handbooks, guides, sheet music, maps, pamphlets, audio cassettes, video cassettes, films, multimedia kits, computer magnetic tape, computer optical discs, floppy discs, compact discs, CDROMs, DVDs. The Act also includes Internet Publications including websites and PDF files.

Legal Deposit Officer
 Northern Territory Library
 GPO Box 42
 Darwin NT 0801
 Tel: 08 8999 3929
 Fax: 08 8999 6920
 Email: ntlinfo.dcdsca@nt.gov.au

7.6.10 Queensland

Legal deposit is required under the *Libraries Act 1988* (Qld), which replaces pt VIII of the *Libraries and Archives Act 1988* (Qld). The Act requires that material published in Queensland be deposited within one month of publication with the State Librarian and the Librarian of the Parliamentary Library.

Material is defined as 'every part or division of a book, periodical, piece of sheet music, map or chart, also non-print: an audio tape, film, video recording, disk, microfilm or microfiche. Material is considered to have been published if reproductions of the material or edition have been supplied (whether by sale or otherwise) to the general public.'

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| Library Deposits (Queensland) Acquisitions Branch State Library of Queensland P O Box 3488 | Parliamentary Librarian Parliamentary Library Parliament House George Street |
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|--|---|
| South Brisbane QLD 4101 Tel: 07 3840 7893 Fax: 07 3846 2421 Email: jol@slq.qld.gov.au | Brisbane QLD 4001 Tel: 07 3406 7199 Fax: 07 3210 0172 Email: Library.inquiries@parliament.qld.gov.au |
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7.6.11 South Australia

Material published in South Australia must be deposited within one month of publication: the *Libraries Act 1982 (SA)*, s 35 and *Libraries Act Amendment Act, 1989 (SA)*. 'Material' includes 'a book, or a part or division of a book: a newspaper, magazine, journal or pamphlet: a map, plan, chart or table: printed music: a record, cassette, film, video or audio tape, disk or other item made available to the public, designed to store and facilitate the reproduction of visual images, sound or information.'

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|---|---|
| Legal Deposit State Library of South Australia GPO Box 419 ADELAIDE SA 5001 telephone: +61 (0)8 8207 7261 telephone: +61 (0)8 8207 7281 facsimile: +61 (0)8 8207 7307 | Parliamentary Librarian Parliamentary Library of S.A. GPO Box 572 Adelaide SA 5001 Tel: 08 8237 9398 Fax: 08 8212 1797 |
|---|---|

7.6.12 Tasmania

Legal deposit is required under the *Libraries Act 1984 (Tas)*, s 22. A book published in Tasmania is to be deposited within one month of publication. 'Book' means 'any book, periodical, newspaper, printed matter, map, plan, music, manuscript, picture, print, motion picture, sound recording, photographic negative or print, microphotography, videorecording and any other matter or thing whereby words, sounds or images are recorded or reproduced'.⁴¹

Legal Deposit Officer
 State Library of Tasmania
 91 Murray Street

⁴¹ Section 3. The Tasmanian definition is troublesome in that under any strict interpretation, it would be compulsory to deposit equipment such as projectors, cameras and the like, for they are certainly a 'thing whereby words, sounds, or images are recorded or reproduced.' This is clearly not the intended purpose of the provision.

Hobart TAS 7000
Tel: 03 6233 7502
Fax: 03 6233 7506
Email: Heritage.Collections@education.tas.gov.au

7.6.13 Victoria

Legal deposit is required under the *Libraries Act 1988* (Vic), s 49. The Act requires the deposit within two months of every new publication published in Victoria.

The Act defines a relevant 'publication' as including:

'the whole or any part of –

(a) any printed book, periodical, newspaper, pamphlet, musical score, map, chart, plan, picture, photograph, print and any other printed matter; and

(b) any film (including a microfilm and a microfiche), negative, tape, disc, sound track and any other device in which one or more visual images, sounds or other data are embodied so as to be capable (with or without the aid of some other equipment) of being reproduced from it'.

Legal Deposit Officer
State Library of Victoria
328 Swanston Street
Melbourne VIC 3000
Tel: 03 8664 7141
Fax: 03 9663 1480
Email: MonoAcq@slv.vic.gov.au

7.6.14 Western Australia

Legal deposit was required under the *Copyright Act 1895* (WA), ss 4, 7–9. The Act required that a book published in Western Australia be deposited within two months of publication.

This Act was repealed in 1994. In this Act 'publication' meant a 'book, newspaper, magazine, journal, pamphlet, map, plan, chart or table, printed music, a film, tape, disc or other device, and anything prescribed to be a publication for the purposes of this definition'.

Until legal deposit legislation is reinstated the State Library of Western Australia hopes that publishers will abide by the spirit of legal deposit. Deposit material is housed in the JS Battye Library of Western Australian History.

Legal Deposit
Battye Library
State Library of Western Australia
Alexander Library Building
Perth Cultural Centre
Perth WA 6000
Tel: 08 9427 3107 Fax: 08 9427 3276
Email: battref@mail.liswa.wa.gov.au

7.7 Donations

7.7.1 Introduction

Many museums are brought into existence by generous collectors who have decided to give their private collections to the community. This is not the case in Australia where all of the most important museums are federal, state or local government institutions. However, some of these would never have come into being had it not been for the generosity of private philanthropists.⁴² More commonly, Australian museums look to philanthropists to enhance their collections. At a time in which acquisition funds are limited, many museums have to develop their donor programs if their collections are to grow in size and quality.

In spite of the importance of donations, many administrators do not go about the acceptance of donations in a legally safe manner. As discussed above, there are three matters that should be considered:

- the power to accept donations;
- the means used to secure legal ownership of the material.
- whether the museum really wants the gift.

The first of these considerations is essentially a curatorial matter – tempered by the priorities of the museum as articulated in its acquisition policy. The

⁴² For example the Orange Regional Gallery in NSW was hugely indebted to Mary Turner who donated many of the key works of the museum's collection.

following material focuses on the museum's power to accept the gift and how best to secure the gift, for these are legal matters.

7.7.2 Power to accept gifts

The museum only has the power to do things permitted by the instrument that governs it. For example a museum established by a State or Federal government will have its own, individual legislation. That statute (or its attendant regulations) will invariably provide a specific power to accept or refuse gifts.⁴³ Usually, the statutory provision that provides the power to accept gifts will specify that any gift must be accepted in pursuance of the museum's objects.⁴⁴ Thus a natural sciences museum may not have the legal power to accept the gift of a vintage motorcycle, even if it were inclined to accept it.

By contrast, museums established by local governments do not have the benefit of having their own individual legislation and are established pursuant to more general powers provided by the legislation that establishes and governs the operation of the relevant council. While the *Local Government Act* of the relevant jurisdiction grants the local council the power to establish a museum it never provides specific powers such as that to accept gifts. Such powers are implicit for they are essential to the operation of the permitted function. Accordingly, any restrictions as to the power to accept gifts may be found in the statute. Indeed they provide little more than the general provide specific and they vary so much from instance to instance that the best advice is to contact the relevant local government authority, in writing and ask it to advise of any such restrictions.

Museums that are non-profit companies or incorporated associations will have to examine their articles or constitutions and ensure that they have the power to accept donations.⁴⁵

⁴³ For example the power provided to the National Maritime Museum by s.7(f) of the *Australian National Maritime Museum Act 1990* (Cth) states that one of its powers is: "to accept gifts, devises, bequests or assignments made to the Museum, whether on trust or otherwise, and whether unconditionally or subject to a condition and, if a gift, devise, bequest or assignment is accepted by the Museum on trust or subject to a condition, to act as trustee or to comply with the condition, as the case may be".

⁴⁴ These objects are also specified in the statute.

⁴⁵ If this reveals that the museum has been accepting gifts without having the legal power to do so, the board should immediately amend the powers to include such a power and then ratify their earlier decisions.

7.7.3 Approval of gifts

One of the day-to-day difficulties for curators is that kindly, generous or powerful people, who wish to donate material to the museum, frequently approach them. The pressure to accept unwanted donations can be enormous. For this reason it is essential that every museum have a protocol for dealing with such offers.

A common approach is for all offers of gifts to be channelled through the registrar or the director. They will prepare a recommendation for the board. No staff member should indicate that a gift might be accepted until the director and the board have considered it.

The board **must** approve all gifts to the museum. In this, the board will be advised by the director but the final word must lie with the board.

Each institution must develop an approval mechanism that is appropriate to its size. In a major institution, gifts may require the sign-off from the head curator of the relevant section, the administrative director (or finance controller) and the director, before going to the Board for approval. In a small museum where there is only one (or perhaps even no) full time staff member, such luxuries are impossible. In such cases the approval function may require sign-off from the director and an acquisitions sub-committee. Such a sub-committee may have the benefit of outside consultants and experts, either as members of the committee or advisers to it.

Whatever the process, the principle is clear. Every museum needs a clearly articulated mechanism by which gifts may be accepted or refused. It should provide a means of ensuring that:

- the gift complies with the accessioning policy of the organisation;
- the decision is made according to an ethical procedure free of duress and conflict of interest;
- the decision makers are appropriately informed and expert;
- the acquisition is prudent given the finances and other resources of the museum.

7.7.4 Ordinary gifts

Unless otherwise specified, the legal title in a gift passes upon its delivery. It is usually not difficult to show that the possession was given to the museum; the difficulty more usually arises from having to prove that the transaction was in the nature of a gift.

Briefly, for a gift to be legally effective one must be able to show that:

- there was a clear intention to make a gift;
- the object was delivered; and
- the gift was accepted.

The most difficult of these to prove is the intention to make a gift. For example, in the absence of appropriate documentation, it is difficult to prove that a transaction was a gift and not a loan. For example, in 1987 the Museum of Contemporary Art in Madrid announced that it had to return 61 works by Picasso that had been allegedly donated to the museum by the artist's widow, because of the absence of documentary proof of her intention. One may imagine that when dealing with works of that importance and value, the documentation would have been immaculate: apparently not so. To overcome this surprisingly commonplace sort of problem, all museums should develop standard procedures that will protect their perceived rights in such items.

A Deed of Gift provides the most powerful proof of ownership. Although not essential for the legal efficacy of a gift, the deed form is undoubtedly the safest way to record the museum's ownership of the gifted item. Because a deed is somewhat formal and needs witnessing by a person who is not party to the deed, many administrations choose to limit their use of the deed form to gifts of over a certain value, or where possession of the item is not handed over at the time of gift.

Following, are three standard forms: the first, where there is no intellectual property being gifted;⁴⁶ the second where the donor is giving the museum the item and the copyright in it; and the third, where the donor is giving the item, retaining the copyright granting the museum a licence to use the copyright.

⁴⁶ Either (a) because there is no copyright in the gifted object or (b) because the donor is not the owner of the copyright or (c) because the donor wishes to retain the copyright.

7.7.5 Deed of gift where no copyright involved

This is a deed of gift that may be used where the gift is of material in which there is no copyright⁴⁷ or in which the copyright has expired.⁴⁸

DEED OF GIFT – NO COPYRIGHT

THIS DEED OF GIFT is made the _____ day of _____ 200 .

BY: _____ (the 'Donor')

TO: ## Museum of Australia, a body corporate established by the # Museum Act ## ('Museum').

RECITAL:

The Donor wishes to donate to the Museum the object(s) described in the Schedule ('Object(s)').

THIS DEED PROVIDES as follows:

1. RIGHTS

The Donor is the owner of the Object(s).

2. GIFT OF OBJECT

The Donor hereby donates the Object(s) to the Museum.

As from the date of this Deed the Object(s) is the unconditional and absolute property of the Museum.

3. WARRANTIES

The Donor warrants that he/she/it is entitled to give the Object(s) to the Museum.

4. APPLICABLE LAW

This Deed shall be governed and construed by law in force from time to time in the Australian Capital Territory.

THE SCHEDULE

Description of Object(s):

1.

2.

⁴⁷ These may include flora, fauna, mineral samples etc.

⁴⁸ These may include drawings, paintings, photographs, sculptures, three-dimension objects of craft or design such as clothing or furniture, print music, books, photographs, recordings, films etc.

EXECUTED AS A DEED on the date written above.

SIGNED SEALED AND DELIVERED by/for and on behalf of

.....
(Name of Donor)

in the presence of

.....
(Name of Witness)

)
)
)
)

.....
(signature)

THE COMMON SEAL of the ## MUSEUM was duly affixed in the presence of:

.....
(Name of Witness)

)
)
)

.....

3.2 This licence permits the Museum to exploit the Intellectual Property for all purposes as set out in section 6 of the ## Museum # Act 19## including, without limitation, the taking of photographs of the Objects for inclusion in exhibition catalogues, on postcards and in other merchandise sold by the Museum and for record keeping for the purposes of the Museum, but without any obligation on the Museum to do so.

3.3 This licence is irrevocable, royalty free and in perpetuity. It includes the right to sub-license,

3.4 In sub-clause 3.1, 'exploit' includes registration, copying, making, using, exercising, vending, publishing, broadcasting, transmission, storage, communication, licensing, sale and any other exploitation whatsoever, irrespective of media or technology, whether now known or yet to be invented.

4. WARRANTIES

4.1 The Donor warrants as follows:

4.2 The Donor is entitled to give the Object(s) to the Museum;

4.3 The Donor is the owner of the Intellectual Property in the Object(s) and has full right power and authority to license it to the Museum.

5. APPLICABLE LAW

5.1 This Deed shall be governed and construed by law in force from time to time in the (jurisdiction).

THE SCHEDULE

Description of Object(s):

1.

2.

3.

EXECUTED AS A DEED on the date written above.

SIGNED SEALED AND DELIVERED by/for and on behalf of

.....

(Name of Donor)

in the presence of

.....

(Name of Witness)

)
)
)
)

.....

(signature)

THE COMMON SEAL of the ## MUSEUM

was duly affixed in the presence of:

.....

(Name of Witness)

)
)
)

3. WARRANTIES

3.1 The Donor warrants as follows:

3.2 The Donor is entitled to give the Object(s) to the Museum;

3.3 The Donor is the owner of the Intellectual Property in the Object(s) and has full right power and authority to assign it to the Museum.

4. APPLICABLE LAW

4.1 This Deed shall be governed and construed by law in force from time to time in the Australian Capital Territory.

THE SCHEDULE

Description of Object(s):

- 1.
- 2.
- 3.

EXECUTED AS A DEED on the date written above.

SIGNED SEALED AND DELIVERED by/for and on behalf of

.....
(name of Donor)

in the presence of

.....
(Name of Witness)

)
)
)
)

.....
(signature)

THE COMMON SEAL of the ## MUSEUM

was duly affixed in the presence of:

.....
(Name of Witness)

)
)
)

7.7.8 Deed of gift with commentary

| Clause | Contract Text | Commentary |
|------------------------|---|--|
| | <p><i>THIS DEED OF GIFT is made the</i></p> <p><i>BY:</i></p> <p><i>TO: ## Museum, a body corporate established by the ## Museum Act 19## ('Museum')</i></p> | |
| <p>RECITAL:</p> | <p><i>The Donor wishes to donate to the Museum the object(s) described in the Schedule ('Object(s)') and the intellectual property in it/them.</i></p> <p><i>THIS DEED PROVIDES as follows:</i></p> | <p>This makes it clear that the nature of the transaction is that of Gift. It is not a loan.</p> |
| <p>RIGHTS</p> | <p><i>1.1 The Donor is the owner of the Object(s).</i></p> | <p>Although it seems obvious, it is very important that the name of the donor is absolutely correct – it must be the person or entity that actually owns the subject of the gift. The donor must be the owner.</p> |
| | <p><i>1.2 The Donor is the owner of all Intellectual Property rights in the Object(s).</i></p> <p><i>1.3 For the purposes of this Deed, the term 'Intellectual Property' means all rights in copyright, patents, registered and unregistered trademarks, registered designs, trade secrets, know-how, rights in relation to circuit layouts and all other intellectual property as defined in Article 2 of the Convention Establishing the World Intellectual Property Organisation of July</i></p> | <p>This sample is used where the donor also owns the copyright in the gift. It should never be assumed that the donor understands copyright. Many wrongly assume that because they own the 'thing', they also own the copyright in it. Such donors will say that they won copyright and are prepared to give it to the museum, in complete good faith: It's just wrong and such mistakes can be very</p> |

| | | |
|------------|---|--|
| | <i>1967, including all reversions and extensions thereof.</i> | expensive for the museum. If donors say that they own copyright, ask how that ownership came about. If they inherited it, you need to see the will. If they bought it, you need to see the document evidencing it. Remember, no-one can acquire copyright from another unless the transfer is in writing. |
| GIFT | <i>2.1 The Donor hereby donates the Object(s) to the Museum.</i> | This is the statement of Gift. It is the heart of the transaction. |
| | <i>2.2 The Donor hereby assigns to the Museum all Intellectual Property in the Objects throughout the world and in perpetuity.</i> | This is the clause that passes ownership of the copyright from the donor to the museum. There are other models to use when (i) the museum is only obtaining a licence to use the donor's copyright and (ii) where the donor doesn't own the copyright and therefore cannot grant any rights in it. |
| | <i>2.3 As from the date of this Deed the Object(s) and the Intellectual Property therein, shall be the absolute property of the Museum.</i> | This makes it clear that the donor is intending to pass possession to the museum. There are no conditions. The museum's ownership is absolute. |
| WARRANTIES | <i>3.1 The Donor warrants as follows: (a) The Donor is entitled to give the Object(s) to the Museum;</i> | Where donors allege that they have greater rights than they really have, the museum will suffer unnecessary and |

| | | |
|---|---|---|
| | <p><i>(b) The Donor is the owner of the Intellectual Property in the Object(s) and has full right power and authority to assign it to the Museum.</i></p> | <p>considerable expense.</p> <p>As a general rule, the donor cannot pass on to the museum, greater rights than are enjoyed by the donor in the first place. If someone has borrowed something, he cannot give it away. If someone has a life interest in something, she cannot give it away. In both cases, the person has a right to the possession of the thing but is not actually the owner of all rights in it.</p> <p>It is essential risk management on the part of the museum (let alone good curatorial and registration practice) to be clear that the person making the gift has the requisite power to do so.</p> |
| <p>APPLICABLE LAW</p> | <p><i>4. This Deed shall be governed and construed by law in force from time to time in (specify State or Territory).</i></p> | |
| <p>THE SCHEDULE</p> <p>Description of Object(s):</p> <ol style="list-style-type: none"> 1. 2. 3. | | <p>Describe the objects to be donated, with maximum detail and clarity. The museum must be able to establish clear proof that the item given pursuant to the gift is in fact the collection item in dispute. Careful registration practices are essential in</p> |

| | |
|--|--------------|
| | this regard. |
| <i>EXECUTED AS A DEED on the date written above.</i> <i>SIGNED SEALED AND DELIVERED etc</i> | |

If a deed is not used, it is essential that the museum use an 'Acknowledgement of Donation'. This is not a legal term. It merely provides evidence of the parties' intentions. As this is contemporaneous with the gift, provided that it is properly drafted, later contestants will find it hard to contradict.

This form must make it absolutely clear that the donor intends that the museum is to receive full legal ownership so that the rights of the museum are unquestionable. The form should contain the following words:

The museum accepts your unconditional gift of the items in the attached Schedule. The museum hereby acknowledges in accordance with your expressed intention that it now has full title to, and responsibility for, the said items.

Once the gift is complete, it cannot be revoked.

7.7.9 Future gifts

A promise to make a gift is unenforceable unless it is in the form of a deed (if the gift is to take place while the patron is still alive), or in a will (if it is to happen upon death).⁴⁹

It is not uncommon for a patron to seek to leave material with a museum on the understanding that it will be later given or bequeathed to the museum.⁵⁰ Then the patron has a change of mind, or dies without giving the necessary instructions in the will, and the museum is asked to return the material that it has expected to keep. This is not merely a matter of disappointment; the museum will have expended resources on the object that it may not have been prepared to apply, had it known that its possession was to be only temporary.

⁴⁹ For bequests, see section (vi) below.

⁵⁰ A controversial example of this was the housing of the Sackler collection of Oriental art at the Metropolitan Museum for many years prior to the gift being made. In retrospect the museum benefited by keeping close to its potential benefactor – but it was a risk.

Moreover, public museums are established for public purposes and it is questionable whether it is proper to apply those resources for private purposes.

A deed that records an intention to pass the physical possession of the gift at a later date should be registered. Non-registration does not affect the validity of the gift as regards the museum and the donor, but it is risky for until it is registered, it may be defeated: In particular, an unregistered deed of gift may be voided by any creditors of the donor.

7.7.10 Conditional gifts

7.7.10.1 The condition must be legal

To be valid, the condition must be possible to fulfil and must not be illegal or against public policy.

A donor can impose conditions on a gift that are either precedent or subsequent:

- Conditions precedent must be fulfilled before the passing of legal title in the gift can be complete.⁵¹
- Conditions subsequent are those that bind the donee after the gift is complete.⁵²

If a condition precedent is breached, title never passes and the donor remains the owner. If a condition subsequent is breached, subject to any contrary intention expressed in the deed, the gift is at an end and, thereafter, the museum will only hold the item as a trustee for the donor. Such conditions can be very onerous on the museum and they are frequently honoured largely in the breach. This is very dangerous if the museum is not to be exposed to later claims for the return of the gift.

7.7.10.2 The museum must have the power to accept

Careful consideration must be given to the statute or rules that govern the museum to ensure that the power to accept such gifts is present, and if so, the procedure that must be adopted.

In most statutory museums the decision to accept a conditional gift is one that only the board or trustees can make. Some have delegated this to the director, but in no case should the decision be made at curatorial level. The

⁵¹ For example, 'I will give you this collection if you name the new wing of the museum after my grandmother'.

⁵² For example, a condition requiring that the item be on permanent display.

obligations imposed by such conditions can haunt an administration long after the curator has gone to greener pastures.

7.7.10.3 Tax deductibility as a condition

Museums are sometimes offered gifts on the condition that the donor will obtain a tax deduction under the Cultural Gifts Program. These are somewhat difficult under the Program, for property in the item must have already passed to the museum before the deduction can be claimed. Of course, the gift may be subject to the condition that, if a deduction is refused, the gift will fail and the item shall be returned to the would-be donor. However this will be unattractive to most donors because all conditions attaching to gifts under the Program must be disclosed to the Commissioner of Taxation who may then take the condition into account when determining value of the gift and thus the amount of the deduction.

It is much simpler to have a rule that the museum will not accept such a condition and that potential donors must rely on their own taxation advice as to the likelihood of any deduction.

7.7.10.4 Detailing the conditions

Whether the Deed of Gift or a mere Acknowledgement of Gift is used, any conditions that are agreed to should be carefully spelled out on the form. These conditions must be narrow and explicit. They should be professionally drafted.

It is often a good idea to put a time restriction of the conditions so that after an agreed length of time, the museum has absolute ownership of the gift, free from all conditions.

7.7.10.5 Filing

Although this is hardly a legal matter, it is sensible to keep all deeds of gift and acknowledgements of gift recorded securely in a special file or have them bound from time to time. In this way a permanent and easily accessible record is always available.

7.8 Exchange

Exchange is one way that institutions can acquire collection material without an acquisition budget.

7.8.1 Exchange between public museums

For the most part, exchanges occur between public museums. It is not particularly uncommon, particularly where one museum has material that is surplus to its needs but which would be useful to recipient institution.

Exchange is more common between natural history museums and social history museums because their collections contain large amounts of non-unique material. It is far more uncommon between art museums because of the unique nature of most art works. It is this characteristic that that is at the heart of the deaccessioning debate and it is why that debate has been focused principally on art museums.⁵³

For the museum disposing of the material in this way, it is a reasonably safe way to dispose of deaccessioned items: If there is any discrepancy between the market values of the items at least the difference remains in the public system. Any such discrepancy will be a matter to the board to consider, for it has a duty to its institution, its public, its patrons and its staff.

7.8.2 Exchange between public museum and dealers

Where the exchange is between a museum and a private dealer, warning bells ring. No matter how restricted the accession budget may be, exchanging material with the private sector gives rise to possible accusations of professional misbehaviour. Like all questions of ethics, the issue is not whether there has been misbehaviour: The question is whether a cynical observer might query the appropriateness of the transaction. Curators have an obligation to maintain a professional distance with the dealers and private collectors with whom they must relate in the course of their work. Given that the relationships are often personal as well as professional, no museum professional can risk the accusation that he or she has allowed public collections material to pass into private hands on an exchange basis. At the very least, if there were any suggestion that there was inequality of value or there is a personal relationship between any of the players, there would be grounds for investigation for corruption.

No museum can afford the odour of scandal, whether established or merely alleged. All sources of funding, whether governments, patrons or sponsors, are sensitive to such matters and in attempting to save money by acquitting

⁵³ See chapter 8, Deaccessioning.

material by exchange, is likely to be massively outweighed by any public controversy.

7.8.3 Procedure

The procedure that must be adopted where an exchange is contemplated, should be no less rigorous than that adopted for any other acquisition. The intended acquisition must be subjected to the collection policy: simply because the transaction will not cost any money must not influence the decision.

Once the material has been identified as appropriate for acquisition, each museum should undertake valuation due diligence. Each should value not only its own exchange material but also that of the other. This is a process that should not usually be undertaken internally. Even if there is a reluctance to introduce valuers from the commercial sector (albeit that it may be a sensible precaution), the institution should at least obtain the opinion of another suitably experienced museum professional to provide an opinion as to respective values. It is a brave board that would approve an exchange without exposing the transaction to the rigor of independent opinion.

7.8.4 Formalities

So that the intention of the parties is absolutely clear, it is important that the transaction is properly documented. In legal terms, the transaction is a contract – not a gift: owner A is passing ownership of object A to owner B and, in return, owner B is passing ownership of object B to owner A. Each party is providing consideration to the other.

Sometimes these transactions are done by way of exchange of letters but these are frequently flawed because the informality of the form tends to result in a certain casualness as to content. To ensure that the transaction is properly documented it is best to draft a simple but formal contract so that each party can be assured that all the necessary elements have been dealt with:

1. A description by owner A of object A);
2. A statement that a condition report on object A has been annexed to and forms part of the contract;
3. A warranty by owner A that the description of object A is correct and that upon delivery, the condition of the object will conform with that described in the annexed condition report;

4. A promise by owner A that it is the owner of all rights in, and title to, object A;
5. A promise by owner A that it knows of no adverse claim in respect of the object A;
6. A statement that it intends to pass all rights in and title to object A to owner B;
7. Mirror description and promises by owner B concerning object B;
8. A statement as to any agreed arrangements concerning delivery;
9. A statement that makes it clear exactly when the titles will pass. (For example it may state that title will not pass until each party confirms in writing that it has gained possession of the other's object and that the object conforms with the condition report;
10. A mechanism by which the parties can undo the deal in the event that one party does not get its item – either at all, or in the condition described in the condition report annexed to the agreement. For example, what will happen if one of the items is destroyed during transit? One party gets a new collection item and the other gets nothing. To avoid this it may be prudent to include a term by which the parties promise that:

'In the event that the party A fails to deliver its object to party B (either at all or in the condition described in the condition report annexed to the agreement), then party B may terminate the agreement by giving written notice to party A. Where the agreement is so terminated, and party A has already taken possession of the object of party B, Party A shall promptly return that object to party B at its own expense, and all right and title in the returned object shall revert to party B without the need for further formality.'

7.9 Bequests

7.9.1 Introduction

If a patron offers to give an item to a museum upon his or her death, the usual way of securing this future gift is by inclusion in the owner's will.

Bequests have had an archaic form of terminology all of their own. One did not 'give', rather, one 'devised' real estate and 'bequeathed' chattels. This distinction is still used by many lawyers although there is now authority that says that the word 'give' is now sufficient to cover both situations. The following clause may be provided to persons who indicate that they intend to leave a bequest to the museum.

I GIVE to the (name of museum), for its general purposes, (sum of money, description of property etc.). The receipt of the director or other proper officer of the museum shall be a full and sufficient discharge to my Executor(s) or Trustee(s).

7.9.2 Commonly occurring problems

Bequests are a curate's egg. They are an essential means by which museums are able to expand their collections. They can also lead to embarrassment, frustration, loss and expense unless they are administered effectively.

7.9.2.1 Inadequate or inaccurate description

Problems frequently arise where donors insufficiently or inaccurately describe their intended gift in the will. Understandably, the other beneficiaries of the will have an interest in challenging such gifts if there is any chance of avoiding the bequest. To overcome this, if the museum is notified by the patron of the intended bequest it should ask to inspect the item and offer to provide the donor with a description that will accurately identify the piece for inclusion in the will.

7.9.2.2 Unsuitable gifts

When notified of a bequest, the museum should ask for a copy of the will (or the sections which affect the bequest) so that it can verify the title that is being passed and any conditions that may attend the gift.

It should also request the opportunity to examine the objects to determine condition and authenticity before accepting the bequest. At the very least it would require photographs and relevant documentation.

It can cause considerable embarrassment when objects bequeathed to the museum are not suitable for accessioning.

It must be clearly stated that there is no obligation on the museum to accept an unwanted bequest. If the bequest does not comply with the institution's accessioning policy and procedures, it should be refused.

This may create difficulties with patrons and their families but it is better to be strict in the acceptance of bequests than having to either keep unwanted material in the collection or to later have to explain to the relatives that the object should be deaccessioned.

If there are some objects in the bequest that the museum does want to accept, but not others, it has the right to choose. In some cases, the deceased has made it a condition of the bequest that the museum must take all or nothing. Such situations are a matter for soul searching and it is understandable that the museum may not wish to lose the chance to acquire an important object at the expense of having to take the residue. Such decisions will always be a matter of balancing the costs against the benefits. Sometimes such issues can be resolved through negotiation with the executor but may require the sanction of the court.

7.9.3 Dealing with living patrons

Where possible, when a patron informs the museum that he or she intends to leave a bequest to the museum, it is important that the director views the intended gift and discusses the situation with the patron. With a modicum of diplomacy, many problems can be averted: Unwanted bequests are best headed off early. The patron must be made to feel appreciated but the museum must seek only to acquire objects that are within its accessioning policy, without any attendant detritus that would otherwise cause expense, inconvenience and even scandal.⁵⁴

One of the techniques often used by directors with their patrons is to explain that while a particular object is not required by the museum, it may be

⁵⁴ Deaccessioning the unwanted material at a later date is not an answer for it is likely to undermine the trust of the institution amongst its other patrons. No museum can afford to have a scandal that may affect its relationship with its numerous potential benefactors. They are horses that are easily spooked. See chapter 8, Deaccessioning.

appropriate and desirable to another institution. Assistance in making that referral may be all that is required to save the day.

7.9.4 Deeds that take effect on death

Perhaps the most effective way of making sure that the patron does not change his or her mind between the making of their will and the time of their death, is to have the patron make an irrevocable commitment while still alive. To do this one uses a Deed of Gift. The deed ensures that the gift is actually going to be made and that no intervention (short of immortality) can interfere with the museum's certainty of eventually acquiring the item.

Deeds of Gift may be varied to suit the needs and desires of donor and institution. The two basic options are as follows:

7.9.5 Completion of gift dependent on condition subsequent

With this type, the item is gifted to the museum but the gift does not actually mature (and thus ownership pass to the museum) until the death of the patron⁵⁵. In other words for the gift to be complete, the patron must die. The transaction is final (in that it cannot be reversed) but its completion is contingent upon and its timing determined by, the occurrence of the later event.

With this option, the possession of the object may either:

- stay with the patron until death, or
- may immediately pass to the institution, which then holds it on trust until the patron's death. Thereupon, the legal basis upon which the institution holds the object changes from that of bailee to that of owner.

7.9.6 Immediate gift but delayed possession

Here, the gift is completed during the life of the patron except that it is a term of the gift that the patron retains possession of the item until his or her death. With this option, ownership passes before death. It is possession, not ownership, which is delayed.

Whichever option is adopted, the institution will need to ask: 'What are the consequences of the decision for the museum?' Perhaps the most important consideration is the duty of care to the intended collection item. When the museum becomes the owner of the item, irrespective of whether it has

⁵⁵ In other words, death is a precondition of completion of the gift.

possession of it, it assumes the obligations of ownership and has a duty of care towards the item.⁵⁶ Accordingly, if the gift is to be present but possession is to be delayed, the parties must negotiate a protocol for the care of the item. Those conditions should be included in the Deed of Gift.⁵⁷

In both options, the trigger is death: that is the event that perfects the gift – either by completing the precondition to the gift or by triggering the handover of physical possession.

⁵⁶ At the very least there is a duty to ensure that the item is appropriately conserved and exhibited.

⁵⁷ These issues may be dealt with by side letters but it is better to include them in the principal document because of its formality and the rigour of its drafting. The gravitas of the form makes it more likely that the patron will acknowledge the importance of such terms and thus make it more likely that they will be honoured. Further, in the highly unlikely event that they were not and the institution has to act to protect the item, enforcement will be legally, if not diplomatically, a more straightforward matter.

7.10Purchase

7.10.1 Introduction

A contract for goods or services may be wholly in writing, wholly oral, or partly in writing and partly oral. No particular formalities are necessary. Generally speaking, an oral contract is just as binding as a written one. The requirement for writing is so that the parties can achieve a degree of certainty as to the terms of the transaction.

The terms included in contracts of sale and purchase of cultural material will usually include matters such as: the right of the seller to sell the item, a detailed description of the item, the amount and manner of payment, what delivery arrangements are agreed to, when responsibility for the safekeeping and insurance of the piece will pass, and that all title in the piece will transfer to the buyer.

Conditions that attach to the item itself, should, as in the case of gifts, be treated with great caution. The museum should ensure that the contract details the subject of the sale and the manner that it will be executed, but should rarely agree to terms that will diminish their right to deal with the object after the purchase is complete.

Where those goods are objects for the collection, the museum should protect itself by including in the contract of purchase some or all of the warranties already discussed.

The following is a checklist of issues that are relevant when purchasing collection material:

7.10.2 Purchase checklist

1. Has the approval for the transaction been through all of the necessary decision-making procedures of the institution?
2. Does the item comply with the Acquisition Policy of the museum? Is it within the intended scope of the collection?
3. Is the material required or desirable?
4. Is the acquisition financially responsible?
5. Does the acquisition comply with the highest standards of professional ethics?
6. Has the provenance of the material be satisfactorily established?

7. Has the seller established that it has title to the material?
8. Has the seller established that it has all the rights necessary to undertake the transaction? (Is it selling in its own right or as an agent or a trustee?)
9. Are there any conditions affecting the title that the museum would usually expect to enjoy?

10. If the material is copyright, does the transaction include any assignment or licence of those rights? If so, has it been established that the vendor of the material also is the owner of the copyright?
11. Is the transaction to be appropriately documented? Are the people responsible for such documentation sufficiently experienced and fully briefed?
12. Is the vendor prepared to give a warranty as to the truth of its promises and an indemnity against any loss suffered as a consequence of any breach of those warranties?
13. How will the material be delivered to the museum? Who is responsible for organising delivery? Who is responsible for paying for delivery?

7.11 Collaborative acquisition methods

It is perhaps one of the features of modern museums that they are collaborative in ways that, even forty years ago, would not have been considered appropriate, or indeed have been considered at all. The benefits of collaboration have been well enumerated.⁵⁸ Examples include collaborations between:

1. Museums and other collecting organisations such as libraries
2. Museums and schools⁵⁹
3. Museums and public broadcasters⁶⁰

Collaborations at the institutional, structural and functional levels provide institutions with an opportunity to demonstrate the combination is more vital, relevant, inclusive, accessible and creative than its constituent parts. The legal negotiations and structures that under-pin such collaborations are beyond the scope of this book to discuss in detail. However, if those legal foundations are not clearly articulated, the collaboration will surely fail when subjected to pressure. Sometimes these arrangements are little more than funding arrangements,⁶¹ sometimes they are in effect joint ventures.⁶² Sometimes the

⁵⁸ David Anderson, Victoria & Albert Museum – FIND REFERENCE (STEPHEN WEIL)

⁵⁹ By way of example:

Museum with school: the NY City Museum School (See: <http://www.newyorkmetro.com/urban/articles/schools01/school4.htm>). Here, students from sixth to twelfth grade learn traditional curricula by using the resources of museums such as South Street Seaport, the Children's Museum of Manhattan, American Museum of Natural History, the Jewish Museum and the Brooklyn Museum of Art, and their professional methodologies: Students use the Museum Learning Process (observe, question, research, analyse, synthesise, present and reflect).

Museum with school and library: the Strong Museum in Rochester NY, which in traditional terms is a toy museum, also combines a museum school and a library. The Gelser Library, situated within the Strong Museum, is a branch library of the Central Library of Rochester and Monroe County. Museum guests may use a public library card to borrow children's titles, family favourites, parenting books, and volumes related to museum exhibits. Books may be returned to the museum or to any Rochester public branch library: (See <http://www.strongmuseum.org>.)

⁶⁰ See http://news.bbc.co.uk/1/hi/entertainment/tv_and_radio/3177477.stm, where Mr Greg Dyke, Director General of the BBC announced that the BBC was going to make its enormous program archives available online, free of charge. He said: 'I believe that we are about to move into a second phase of the digital revolution, a phase which will be more about public than private value; about free, not pay services; about inclusivity, not exclusion.'

⁶¹ For example, the long-lived collaboration between the State Library of NSW and the Law Foundation of NSW. The latter funds a law library within the State Library so that the public has access to legal information and tools.

collaboration involves a merger of two existing entities into one new one. These are complex transactions and it is pointless to talk about them in generalities. Each instance will have its own catalysts, drivers and imperatives.

On a more modest level, collaboration is also evident in object acquisition and collection development. Given the expense of museum-quality material, several museums have negotiated sharing relationships.⁶³ Rather than facing the difficult and lonely task of raising the money necessary to purchase a collection item, some museums are co-operating with other institutions to share both the cost and the ownership of the desired item.

Similarly, where a museum owns a part of a whole and another museum owns the other, it makes sense that both should collaborate so that the public can have the benefit of seeing the item whole.

7.11.1 Joint purchase and ownership

In 1980 the Smithsonian Institution'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.

There are several Australian examples of acquisition co-venturing. For example, John Glover's painting Mount Wellington and Hobart Town from Kangaroo Point was bought jointly by the National Gallery of Australia and the Tasmanian Museum and Art Gallery,⁶⁴ and in 1991 the manuscript of Patrick White's novel, 'The Memoirs of Many in One', was jointly purchased by the National Library of Australia and the State Library of NSW. In this latter case,

⁶² Which is where each organisation retains its own entity but where each supplies various services or facilities to the common purpose.

⁶³ At law these would be called either loan agreements or joint venture agreements.

⁶⁴ See: <<http://artsearch.nga.gov.au/Detail.cfm?IRN=141634>>.

each institution has a colour microfilm of the original for primary access, and the original moves from one library to the other as it is needed.⁶⁵

With all such deals it is essential that the parties work out an arrangement so that everyone can enjoy the fruits of the venture. By way of example, consider the problems of negotiating the deal between five museums in the State of Washington that jointly purchased a collection of American drawings and works on paper that would have been beyond the means of any one of them. The basic rules of their consortium were as follows:

- the life of the consortium is to be ninety-nine years;
- a governing committee made up of representatives from each institution, makes all decisions about purchases or sales;
- the collection is to be kept as a single unit;
- it will be exhibited in rotation amongst the members;
- each member has the right to exhibit the entire collection for four months every two years;
- the co-venturers share operating expenses;
- the collection is subject to agreed exhibition and handling standards; and
- at the end of the 99-year period, the collection will be divided amongst the members.

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

7.11.2 *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.

⁶⁵ For example, for exhibition or close examination of the original by a researcher.

Each party to such a relationship has a rightful concern that its own accessioned item is taken proper care of and that its public obligations are fulfilled. The conflicting yet commonly shared interests of the partnering museums requires a carefully articulated agreement both to harness the natural tensions and enhance the potential benefits.

The following document is a joint venture agreement designed for this purpose. It is merely an example of how the parties may deal with some of the issues; it does not purport to be a model for all such transactions. It is intended to tease out the issues in such a transaction and to show how those issues can be addressed in an agreement. Accordingly it is a long document and in many cases, where some of the issues are not relevant to a particular collaboration, some simplifications can be made.

STANDING LOAN JOINT VENTURE MODEL AGREEMENT

THIS AGREEMENT made the day of 2008

BETWEEN

X MUSEUM OF AUSTRALIA, ('XMA')

AND

MUSEUM OF ## ('##')

INTRODUCTION

- A. One of the statutory functions of the XMA is 'to exhibit, by itself or in collaboration with others, in Australia or elsewhere, material, whether in written form or in any other form and whether relating to Australia or to a foreign country';
- B. The XMA is the owner of the XMA Item tem fully described at Item 1 of the Schedule (the 'XMA Item').
- C. ## is the owner of the item fully described at Item 2 of the Schedule (the '## Item').
- D. The XMA Item and the ## Item are each portions of a [*describe whole*] (the 'Object').
- E. XMA and ## wish to enter a joint venture in relation to possession and exhibition of the Object (the 'Joint Venture').

This document articulates and evidences the terms upon which the parties will participate in the Joint Venture.

TERMS OF AGREEMENT

1. Association

XMA and ## hereby associate themselves as joint venturers.

2. Purpose of the Venture

The purpose of the Joint Venture is set out in Item 3 of the Schedule.

3. Scope

- (a) The relationship of the parties is limited to carrying out the purposes of the Joint Venture described in clause 2 above and will not encompass any other activity, similar or dissimilar, in which either party may be engaged.
- (b) Nothing contained in this Agreement is to be construed as constituting a partnership for any purpose whatsoever.

- (c) The duties, obligations and liabilities of the parties will in every case be separate or several and not joint or collective.
- (d) Except as may otherwise be specifically provided in this Agreement, a party will not have any authority to act for, or assume any responsibility or obligation on behalf of, the other party.
- (e) If a party acts on behalf of the other party without authority, such party hereby agrees and undertakes to indemnify the other party against any losses, claims, damages and liabilities arising out of any such act.
- (f) The Schedule forms part of this Agreement and the parties shall comply with all Items set out therein unless the Management Committee or the parties otherwise agree in writing.
- (g) The party borrowing the Item of the other is referred to as the 'Borrower' and the party lending an Item to the Borrower is referred to as the 'Lender'.

4. Term

- (a) The term of the Joint Venture will be for the period set out in Item 4 of the Schedule (the 'Initial Period'), commencing on the date of execution of this Agreement.
- (b) The Initial Period will automatically extend unless and until one party gives the other at least six (6) months' written notice to the other, that it elects to terminate the Joint Venture. (The Initial Period together with any extension of that period is referred to as the 'Term').
- (c) At the end of that six-month notice period, the Term will end.

5. Participating Share and Ownership of Assets

- (a) Notwithstanding any other provision or consequence of this Agreement, at all times during the Term:
 - (i) the XMA shall remain the absolute owner of all rights in and title to the XMA Item;
 - (ii) the ## shall remain the absolute owner of all rights in and title to the ## Item.
- (b) Neither party shall undertake any merchandising or other commercial exploitation of the Object ('Venture Product') without the approval of the Management Committee. The Management Committee shall determine:
 - (i) the appropriateness of the proposed Venture Product;
 - (ii) what quality controls are to be imposed on such Venture Products;
 - (iii) which party is responsible for administering the development, manufacture, distribution, sale and accounting, for the Venture Product; and

(iv) the division (if any) of the net profits derived from the Venture Product.

(d) The parties (through the Management Committee mechanism) may agree at any time to vary their proportionate share in any particular Venture Product but in the absence of such agreement to the contrary each party will own the rights to the Venture Product as tenants in common in equal shares.

6. Trade Marks

If the parties decide that any name, design trade mark, patent, licence or deed should be registered in relation to the activities of the Joint Venture or any Venture Product, the application and any registration shall be in the joint names of the parties unless otherwise agreed by both parties in writing. The parties shall meet the cost of any such application or registration in equal shares.

7. Management

(a) The management and control of the Joint Venture will be the responsibility of the Management Committee. This committee will have the overall responsibility for the management and operation of the Joint Venture on a day-to-day basis.

(b) Each of the parties has the right to nominate two (2) representatives on the Management Committee. Each of the parties may, without reference to the other:

- (i) remove either of its nominees from the Management Committee;
- (ii) appoint another in his or her place; and
- (iii) fill any casual vacancy due to either of its nominees ceasing for any reason to be a member of Management Committee.

Any nomination of or removal of a member (or proxy) shall be under the hand of a Director of the XMA or the Director of ## (as the case may be).

(c) The decisions of the Management Committee [must be unanimous/shall be by majority].

(d) The Management Committee:

- (i) may meet together for the dispatch of business, adjourn and otherwise regulate its meetings and procedures as it thinks fit.
- (ii) shall be responsible to both parties to this Agreement and will act only in accordance with the terms of this Agreement and any subsequent direction approved by both parties.

(e) The Management Committee shall not be deemed to have met unless there shall be a quorum. The quorum at any meeting of the Management Committee shall be one representative of each of the parties.

- (f) Any member of the Management Committee has the right to be represented by a proxy. Proxies may only be appointed by the tabling of a written appointment signed by or for the party that nominated him/her to represent such member at any meeting or any specified meetings of the Management Committee. The person so appointed as proxy will in all respects be empowered to act in the place and stead of such member, but only for the particular meeting or meetings for which his/her appointment was made.
- (g) A resolution in writing signed by each member of the Management Committee will be as valid and effectual as if it had been passed at a meeting of the Committee duly convened and held.
- (h) The Management Committee must appoint a Secretary and cause minutes to be made in a Minute Book, recording all resolutions and all proceedings at its meetings. Until otherwise agreed by the parties, the XMA shall supply the Secretary and provide the administrative support reasonably required by the Management Committee.
- (i) Meetings of the Management Committee may be in person, telephone, video-conferencing or any other technologies or media.
- (j) Resolutions of the Committee in all matters relating to the Joint Venture will be binding upon each of the parties.

8. Review and Evaluation

- (a) The Management Committee shall develop performance indicators and an evaluation strategy for reporting to the parties.
- (b) The Management Committee shall report annually to the parties. Such report shall include the evaluation measures set out in Item 5 of the Schedule.

9. Capital and Financing

- (a) The Joint Venture will be financed by equal contributions XMA and ##.
- (b) The initial budget is as set out in Item 6 of the Schedule or as otherwise agreed from time to time.
- (c) The XMA will co-ordinate the accounting for the Venture. The ## will provide all documentation and financial records reasonably required by the XMA in order to permit it to fulfil this task.
- (d) The Management Committee will cause an accounting to be provided to the parties within sixty (60) days of each March 31st, June 30th, September 30th and December 31st.
- (e) Neither party will spend any money or incur any liability in the name of the other, or of the Venture, without the prior authorisation of the Management Committee.

- (f) At least once in every year the Management Committee, will provide each party with a formal financial report on the joint venture. This will be prepared on behalf of the Management Committee by the XMA, with the full cooperation and assistance of the ##.

9. Profit Participation and Costs

- (a) All profits, losses, deductions and credits, shall be allocated between the parties in the amount and proportion determined by the Management Committee.
- (b) Before paying any sum to a party by way of profit, the following expenses (and any additional or other mutually agreed expenses) must be deducted:
 - (i) applicable taxes including Goods and Services Tax;
 - (ii) actual cost of advertising (including television, radio and other advertising conducted in relation to the Venture Product);
 - (iii) manufacture cost of the Venture Product (including pre-production costs of creating artwork, production parts and the like);
 - (iv) monies paid to third party licensors of copyright materials used or reproduced in relation to the Venture Product (including third party licensing royalties at the relevant party's actual licence royalty rate;
 - (v) distribution costs;
 - (vi) promotional expenses;
 - (vii) such other costs or overheads as the Management Committee or the parties may agree from time to time.

10. Initial Possession and Exhibition

- (a) The parties will share the right to possess and exhibit the Object.
 - (i) Each party agrees to comply with the conditions of loan as determined from time to time by the Management Committee ('Conditions of Loan').
 - (ii) Each party may only exhibit it only in the places, spaces and conditions approved by the Management Committee.
 - (iii) Each shall have exclusive possession of the Object for alternate periods of 12 months ('Loan Period'). The first Loan Period shall commence three months from the date of this Agreement. The XMA shall have the right to possess the Object for the first Loan Period.
 - (iv) Any extension of a Loan Period must be in writing signed by both parties.
 - (v) The party that that has the then current right of possession of the Object has the right to reduce the Loan Period subject to giving the other party at least two months notice in writing.

(vi) The first public exhibition of the Object will be at the place described at Item 7 of the Schedule and is intended to open on or about the date set out in Item 8 of the Schedule.

(b) The first public exhibition of the Object will close on the date set out in Item 9 of the Schedule.

11. Transport, Packing and Unpacking of the Collection Item

(a) The parties shall comply with arrangements specified in Item 11 of the Schedule for the transport of the Item during the Loan Period and, at the end of the Loan Period, its return.

(b) The Borrower must arrange all necessary international customs clearances in relation to the object exported/imported (except for Australian copies of all necessary customs clearance documentation).

(c) The Lender shall arrange all necessary Australian customs clearances in relation to the export/import of the Collection Item.

(d) The party responsible for the packing and unpacking of an Item must comply with all requirements set out in Item 12.

(e) The parties must prepare condition reports as and when required in Item 13 of the Schedule.

12. Possession of the Collection Item

(a) The Borrower is wholly responsible for the Lender's Item from the moment it leaves the Lender's possession until it is returned to the Lender.

(b) The Borrower must remain in the possession of the Lender's Item throughout the Loan Period. Further it must not lend the Lender's Item to any other person whatsoever or let it out of its custody without the prior written approval of the Lender.

13. Return of the Collection Item

(a) On expiration or termination of the Period of Loan the Borrower must return the Lender's Item to the Lender, or to such other place as the Lender may advise in writing.

(b) If the Lender requires that its Item be despatched to a place other than the place from which it was collected at the commencement of the Loan Period, the Lender will be responsible for any additional transportation charges approved in writing by the Lender prior to despatch. Any such additional costs must be approved by the Lender prior to being incurred by the Borrower.

14. Couriers

(a) The party specified in the Schedule as having responsibility for the supply of a courier must:

- (i) meet all related costs including fares, expenses, accommodation and travel; and
- (ii) obtain the other party's written approval of the courier that it selects to oversee the shipment of the Item.

15. Protection of the Item

- (a) The Borrower must at all times ensure that the Lender's Item is treated with all due care and protection against the effects of sunlight, dirt, dust, mechanical vibration, mishandling, atmospheric contaminants, moisture, extremes of temperature and humidity, insects and vermin, fire, theft, foodstuffs, drink, smoking or handling by inexperienced persons or members of the public.
- (b) The Borrower must comply with any conservation and security requirements set out in Item 14 of the Schedule.
 - (i) The Borrower must ensure that any instructions given by the Lender for the unpacking, handling, installation, display, maintenance and repacking of the Lender's Item are followed.
 - (ii) The Borrower must retain and safely store the original packing material at the Borrower's expense and must repack the Lender's Item with the same material and in the same manner as it was packed by the Lender.
- (c) The Borrower must not transport the Lender's Item in a damaged condition except where there is an immediate threat to the safety of the Item or to arrest or reduce ongoing damage to it.
- (d) The Borrower must not in any way whatsoever restore, repair, alter or do anything that may compromise the integrity of the Lender's Item, nor permit any third party to do so.
- (e) The Lender's Item must not be displayed in an outdoor exhibition unless it has been lent specifically for display or operational use outdoors (and unless this is specified in the Schedule).
- (f) If the Borrower breaches any of the conditions relating to the safety or care for the Lender's Item in such manner as the Lender, in its absolute discretion, considers will or may endanger the Item or any of them, the Lender may order the immediate withdrawal of the Item from the exhibition and may take immediate repossession of such Item. If this occurs, the Borrower is responsible for all costs incurred by the Lender as a result of the Borrower's breach including (but not limited to) all costs associated with the return of the Item to the Lender.

16. Damage, Deterioration or Loss of Item

- (c) The condition of the Item on receipt by the Borrower should be exactly the same as that detailed on an accompanying condition report. If there are any points of variance the Borrower must immediately notify the Lender.
- (d) In the event of damage, deterioration or loss occurring during the Loan Period, the Borrower:
 - (i) Must comply with the procedures set out in Item 15.
 - (ii) Must not undertake any conservational or restorative procedures without the written authority of the Lender.
- (e) Both parties will collaborate in giving written notice or other information to the transport company and any insurer or indemnity provider.

17. Insurance

- (a) Unless agreed otherwise the Borrower must insure the interest of the Lender in the Item with an insurance company approved by the Lender from the time the Item leaves the possession of the Lender until the time the Item is returned to the possession of the Lender. The insurance must be against all risks, with exclusions limited to ordinary wear and tear, gradual deterioration, insects, vermin or inherent vice, repairing, restoration or retouching processes, hostile or warlike action, insurrection, rebellion, nuclear radiation, nuclear reaction or radioactive contamination.
- (b) The Item must be insured for the value specified in Item 16 of the Schedule.
- (c) Where the Period of the Loan exceeds one year the Lender may reassess the value of the Item and may notify the Borrower of the reassessed value. If so notified the Borrower must insure the Item for the reassessed value within twenty-one days of such notification.
- (d) Prior to the despatch of the Item the Borrower must provide the Lender with a Certificate of Insurance that the Borrower has effected in accordance with this Clause. Certificates of Currency must be supplied by the Borrower from time to time at the request of the Lender;
- (e) The Borrower must notify the Lender in writing of any changes to, or cancellation of, the policy at least twenty-one days prior to such event.

18. Costs

All costs directly associated with the loan must be borne by the Borrower. Any payments to be made to the Lender by the Borrower must be made in Australian Dollars.

19. Liability and Indemnity

The Lender, its officers, servants and agents shall not be liable for injury or death to any person or any loss or damage to property arising in any way whatsoever out of the loan of the Item to the Borrower. The Borrower must indemnify, and keep indemnified, and must reimburse the Lender, its officers, servants and agents, with respect to any and all loss, claim, demand, action, suit, proceeding, liability, cost and expense incurred by the Lender, its officers, servants and agents in relation to any such injury, death, loss or damage.

20. Access

During the Period of Loan, the Borrower must agree to any reasonable request made in writing by the Lender, to provide the Lender's officers, servants or agents with access to the Item.

21. Acknowledgement, Information and Catalogues

- (a) The Borrower must prominently acknowledge the Lender as specified in Item 17 of the Schedule. Such acknowledgement must be accorded on exhibition labels, in exhibition catalogues and in any publicity or permitted reproduction of the Item.
- (b) The Borrower must ensure that information concerning the Item used in catalogues, labels or for any other purpose conforms factually to information furnished by the Lender or otherwise approved by the Lender.
- (c) Within four weeks of the return of the Item at the end of the Load Period, the Borrower must supply the Lender with the report and associated materials required in Item 18 of the Schedule.

22. Copyright and Reproduction

- (a) The copyright status of the Object is stated in Item 19 of the Schedule.
- (b) Except as stated in Item 19 of the Schedule, the Borrower must not permit the Collection Item to be photographed or otherwise reproduced without the prior written approval of the Lender.
- (c) Notwithstanding clause 22 (b) above, where the Borrower is a public Lender, it shall be entitled to reproduce the Item to the extent and for the non-commercial purposes permitted by *pt III, div 5, Copyright Act 1968 (Cth)* (such purposes may include reproduction for conservation purposes and institutional documentation).

23. Transfer of Joint Venture Interest

- (a) The XMA may not assign, sell, transfer, pledge, mortgage, encumber or in any other manner, whether voluntarily or involuntarily, transfer or permit the transfer of the whole or any part of the XMA Item or its Joint Venture interest except as permitted in this Agreement.

- (b) The ## may not assign, sell, transfer, pledge, mortgage, encumber or in any other manner, whether voluntarily or involuntarily, transfer or permit the transfer of the whole or any part of the ## Item or its Joint Venture interest except as permitted in this Agreement.
- (c) If a party wishes to assign the whole of its Joint Venture interest to another institution or company controlled, directly or indirectly, by the party wishing to transfer its interest, then such party may transfer its interest with the consent in writing of the other party. Such consent may not be withheld unreasonably (in respect of an assignment to a responsible and respectable assignee) upon production of such evidence as the party whose consent is sought requires, but may be subject to such conditions as the consenting party considers fair and reasonable in the circumstances.
- (d) Except as provided in (c) above, if a party received and desires to accept a bona fide offer to acquire its Item or its Joint Venture interest, such party must give written notice to the other party stating therein:
 - (i) its desire and intention to dispose of its Item or Joint Venture interest (as the case may be); and
 - (ii) the full details of the bona fide offer (accompanied by a copy thereof, if in writing).
- (e) The party receiving such notice will thereupon have alternative options, which must be exercised (if at all) by notice to the other party, within thirty (30) days after the effective date of the notice of the offer, specifying that it elects either:
 - (i) to acquire the interest to be transferred on the same terms and conditions as are contained in the bona fide offer; or
 - (ii) to terminate the Joint Venture.
- (d) Any purchase hereunder must be consummated on the date specified in the notice of election or ninety (90) days after the effective date of such notice (whichever is earlier). If a party having the above matching right fails to exercise the same, then the interest which is subject to the same may be transferred to the third party and at the time and price and upon the conditions specified in the notice of the offer.

24. Termination of the Joint Venture

- (a) The Joint Venture will terminate if any of the following events occur:
 - (i) the expiration of the Term;
 - (ii) subject to clause 14, the failure of the Management Committee to unanimously agree for a continuous period of forty-five (45) days upon any substantial matter affecting the Joint Venture; and

- (iii) a party provides notice of termination pursuant to clause 10 (d);
- (iv) the mutual agreement of the parties.

(b) Upon termination of the Joint Venture, irrespective of the grounds or termination:

- (i) Each party will return to the other, all property that is in its power or control that is owned by the other.
- (ii) In the case of documentation relating either to the XMA Item, the ## item, or to the Object, each shall provide the other with a complete copy of all such documentation in their possession or control. Without limitation, this shall include copies of all accessioning documentation; condition/conservation reports; loan agreements; exhibition reports; exhibition catalogues (if not already provided).
- (iii) Each party shall immediately cease the manufacture (or cause the manufacture to cease) of all Venture Products.
- (iv) Each party may continue to sell any Venture Products that have been already manufactured or that have been irrevocably ordered, at the time of termination.

25. Dispute Resolution

- (a) In the event that there is a dispute between the parties to this agreement the parties shall negotiate their differences in good faith.
- (b) If any matter remains outstanding ten days after the dispute arising, either party may deliver to the other a notice requiring that the dispute be referred forthwith to a disputes committee.
- (c) The disputes committee shall consist of four (4) members. The Board of Trustees of each party shall each appoint two (2) of its members (none of whom shall be members of the Management Committee) to the disputes committee.
- (d) The representatives of the parties shall be vested with the authority to settle the dispute.
- (e) The disputes committee shall meet within seven days of the delivery of the notice referred to in paragraph (b) above and shall make best efforts in good faith to resolve the dispute.
- (f) In the event that the dispute cannot be resolved within fourteen days of the notice referred to in paragraph (b) above, or such other time as the disputes committee may unanimously agree, either party may forthwith serve notice on the other party requiring that the matter be referred to the Australian Commercial Disputes Centre

Limited ('the ACDC') for conciliation to be conducted in accordance with the Conciliation Rules of ACDC in force at that time.

- (g) In the event that the dispute has not been resolved within twenty-one (21) days (or such other period as may be agreed by the parties) after the appointment of the conciliator, the dispute shall be submitted to arbitration, administered by the ACDC.
- (h) The arbitrator shall be agreed between the parties from a panel suggested by the ACDC or failing agreement an arbitrator appointed by the Secretary General of the ACDC.
- (i) The arbitrator shall not be the same person as the conciliator.
- (j) Any conciliation and/or arbitration shall be held in Canberra and subject to the foregoing shall be conducted and held in accordance with and subject to the laws of the Australian Capital Territory.
- (k) Each party shall pay its own costs incurred in the conciliation and /or arbitration process.

26. Dissolution

Upon termination of the Joint Venture:

- (a) The parties must commence the winding up and liquidation of the assets and affairs of the Joint Venture. The proceeds of liquidation are to be applied and distributed: first to the creditors of the Joint Venture (and if insufficient, each party hereto must contribute rateably to the satisfaction of the debts of the Joint Venture) and to the parties rateably according to their proportionate share in the Joint Venture. The Joint Venture will be terminated upon payment or other satisfaction of all the liabilities and liquidation and distribution of all assets.
- (b) Either party may offer to purchase any asset of the Joint Venture and if both should so offer, then the parties must tender by sealed offer, with the higher tenderer having the right to purchase the asset(s) the subject of the tender.
- (c) Each party will immediately take full power possession and control of its Item forming part of the Object. Neither part shall obstruct or inhibit the other from exercising this right.
- (d) If there is any dispute as to the right to any other assets relevant to the Joint Venture, such dispute shall be resolved pursuant to the disputes provisions of this Agreement. Until such dispute is resolved, the property in dispute shall be held in escrow by the party then in possession of it. While in escrow, that party shall be wholly responsible for that property and shall hold the other party's entitlement therein on trust and shall

indemnify that other for any damage or loss caused thereby during the period of escrow.

27. Insurance and Indemnity

- (a) The Joint Venture must maintain with responsible insurers, such insurance as the Management Committee may determine to be desirable.
- (b) Each party hereby promises to indemnify and hold harmless the other party from and against all claims, demands, losses, expenses, costs and damages which may be made against such other party or which it may incur or sustain as a result of or arising from any negligence or wilful default by the first mentioned party in the performance of any of its obligations under this Agreement.

28. Confidentiality

Except as required by Law, the parties will hold technical and commercial information absolutely secret and must not disclose (or permit to be disclosed) such information to any person, firm or corporation whatsoever during the continuance of this agreement or at any time within five (5) years after its termination.

29. Miscellaneous

- (a) Any notice required or permitted to be given under this Agreement must be in writing and will be effective when personally served or when received or when delivery is refused or unclaimed if by mail (which must be certified or registered) or telegram telex or facsimile to the respective addresses of XMA and ## as set out at the beginning of this Agreement, or such other address as any party may designate by notice.
- (b) This Agreement is binding upon and enures to the benefit of the parties hereto and their respective permitted successors and assigns.
- (c) Each party promises be just and faithful to the other and to be bound at all times to render to the other proper accounts, full information, full particulars and truthful explanations of all matters relating to the affairs of the Joint Venture and to offer every reasonable assistance in carrying out the Joint Venture to their mutual advantage.

30. GST

- (a) The parties acknowledge and agree that:
 - (i) The consideration due or payable for any supply of any goods, services or any other things under this agreement has been calculated without regard to, and is exclusive of, any GST.

(ii) If any GST is imposed on any supply made under this agreement, the supplying party may recover from the recipient party, in addition to any consideration payable for the supply, an amount equal to the GST imposed on the supply calculated at the GST tax rate prevailing at the time the supply is made (the 'GST amount'), provided that the supplying party has provided to the recipient party a valid tax invoice complying with applicable laws and regulations (the 'Tax Invoice').

(b) If the recipient party is required to pay any GST amount in accordance with this clause, the recipient will pay the GST amount within fourteen (14) days of receiving the tax invoice.

20. Applicable Law

The law applicable to the Agreement is the law of the Australian Capital Territory.

READ UNDERSTOOD AND AGREED:

Signed for and on behalf of)
X Museum of Australia)
)
)
)
 Director

in the presence of:)
)
)
)

Signed for and on behalf of)
)
)
)
)
 Director

in the presence of:)
)
)
)



SCHEDULE

Item 1: Description of XMA Item:

| Collection Item | <i>descriptor</i> | <i>descriptor</i> | <i>descriptor</i> |
|-----------------|-------------------|-------------------|-------------------|
| 1. | | | |
| 2. | | | |

Item 2: Description of ## Item:

| Collection Item | <i>descriptor</i> | <i>descriptor</i> | <i>descriptor</i> |
|-----------------|-------------------|-------------------|-------------------|
| 1.XMA Item: | | | |
| 2. ## Item: | | | |

Item 3: Purpose of Joint Venture:

- (a) *Publicly exhibit the whole Object;*
- (b) *Present educational programs relating to the Object.;*
- (c) *Cause journal and news article to be written in relation to the Object;*
- (d) *Develop, manufacture, distribute and sell merchandise relating to the Object;*
- (e) *Such other purposes as may be agreed in writing between the parties from time to time.*

Item 4: Initial Period

Five years

Item 5: Evaluation Measures

Item 6: Budget

Item 7: Place of First Exhibition**Item 8: Date of Opening of First Exhibition****Item 9: Date of Closing of First Exhibition****Item 10: Obligations of Lender Preparatory to Delivery****Item 11: Transport Obligations**

As determined by the management Committee

Item 12: Packing and Unpacking Obligations

12.1 A representative of the lender museum must be present at each unpacking or repacking of its Item.

12.2 Suitably qualified personnel approved by the lender museum must carry out repacking of the Item at the conclusion of any exhibition.

12.3 All packing and unpacking instructions issued by or on behalf of the lender museum must be followed explicitly.

Each Item must be handled with special care at all times to prevent damage or deterioration. For the purpose of repacking, original packing materials must be retained and the Item repacked with the same materials and in the same way as they were delivered to the borrower museum.

Item 13: Condition Reports

An initial condition report on the Item will be prepared by the Lender prior to the Collection Item being delivered to the Borrower. A dated and signed copy of this report will be made available to the Borrower at time of delivery of the Item.

The Borrower shall provide conservation personnel who shall prepare a condition report on the Item upon each unpacking and prior to each repacking, noting any changes in the condition of each Item. A dated and signed copy of each report shall be countersigned by a representative of the Lender and the Borrower.

Item 14: Standard of Conservation and Security**14.1 Conservation:**

For the purpose of safeguarding the condition of the Item and the Object, the borrower museum must maintain them in a temperature between 18 and 23 degrees Celsius, relative humidity at between 50 percent to 60 per cent and light levels to a maximum of 75 lux for works on paper and within a range between 100-200 lux for paintings. Fluorescent lights must be filtered to remove the ultra violet range.

No hanging devices are to be removed, repositioned or replaced by the borrower museum without the written approval of the lender museum. If such consent is given, such devices must be returned to the Item prior to final packing.

The borrower museum must ensure that any cleaning and maintenance of the exhibition display area is done under appropriate supervision.

14.2 Security:

The Item must be stored and installed only in a facility that is equipped with adequate fire detection/prevention systems.

All external doors and accessible windows must be locked and fitted with alarms and the exhibition and storage areas must be covered by electronic or closed circuit television surveillance devices that are activated whenever security personnel are not present. The alarm systems must be monitored continuously a security control centre, police station, or by an accredited recognised security company.

While the exhibition is open to the public the borrower museum must ensure that the number of security staff in the exhibition is sufficient to keep the Item and all exits from the venue constantly under visual surveillance.

While an exhibition is closed to the public the borrower museum must ensure that the perimeters of the exhibition venue are patrolled periodically.

Item 15: Protocol in event of damage, deterioration or loss of Item

Item 15.1 In event of damage, deterioration or loss of Item the borrower museum must:

- (i) telephone the lender museum immediately upon the discovery of the damage, deterioration or loss and seek instructions;
- (ii) comply with all instructions given by the lender museum;
- (iii) provide a detailed written report to the lender museum covering the nature, extent, circumstances and any other relevant details concerning the damage, deterioration or loss as soon as practicable and in any event within seven (7) days of its discovery;
- (iv) where the damage, deterioration or loss may have occurred in transit, notify the carrier;
- (v) retain all packing materials until the lender museum and the carrier have had an opportunity to inspect the Item, the damage and the packing materials; and
- (vi) take photographs to document the damage.

Item 16: Insurance Value of Loan Items:

Item 17: Acknowledgement: 'On loan from the X Museum of Australia'

Item 18: Promotion and Attendance Report:

The report furnished by the Borrower to the Lender shall include the following:

- (i) attendance figures (which shall be broken down into school groups, other special tours and general public);
- (ii) press clippings relating to the exhibition;
- (iii) two free copies of any catalogue or printed material produced by the Borrower and one free copy of any publicity or media material which refers to the Item;
- (iv) details of any radio or television promotion, publicity or other coverage of the exhibition;
- (v) copies of all printed promotional and publicity material;
- (vi) details of the education program and any other services that the Borrower associated with the exhibition;
- (vii) sales figures of exhibition merchandise.

Item 19: Copyright

19.1 Copyright in the XMA Item is owned by

19.2 Copyright in the ## Item is owned by

19.3 Where the Lender is the owner of copyright in the Item, the Borrower is entitled to reproduce the Item for the following purposes:

- (i) the exhibition catalogue;
- (ii) promotion and advertising of the exhibition;
- (iii) etc;

OR

19.4 Where the Lender is not the owner of copyright in the Item, the Borrower shall be responsible for obtaining any permissions required to permit any reproduction to be performed by the Borrower.

Item 20: Special Conditions: