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Legal issues for Australian Archives, Galleries, Libraries and Museums

by Shane Simpson

## PART C COLLECTIONS

### Chapter 8: Deaccessioning of material from the collection

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Last Updated on 30 January 2009

## 8. DEACCESSIONING OF MATERIAL FROM THE COLLECTION

### 8.1 Meaning of deaccessioning

Deaccessioning is a word that has so far escaped the attention of dictionary authors, yet in the museum world it is commonly used. Even amongst museum professionals, there is no certainty: at the very least, it means the administrative removal of an item from the collection.<sup>1</sup> Others insist that the term includes not only the administrative removal of the item from the collection but also its disposal. My view favours the former because deaccessioning and disposal are different procedures, with different risks and different purposes. After all, every disposal of collection material has been preceded by a deaccessioning – but not all deaccessioning is followed by disposal.<sup>2</sup>

Perhaps the differentiation may not be of great significance for it would be unusual to contemplate the removal of an item from the collection without, at the same time, considering the appropriate manner of disposal. For the purposes of this chapter, deaccessioning is treated as being separate from disposal, although they live their lives as conjoined twins.

#### 8.1.1 *Context*

It is fascinating that the word 'deaccessioning' has such different implications depending on the kind of collecting institution in which it is uttered. In libraries, the deaccessioning of duplicate or out of date material is uncontentious in principle and practice. Similarly, the deaccessioning of material in social history, technology, and natural history collections is both necessary and commonplace.

In art museums however, there is a longstanding controversy as to the propriety of deaccessioning. (The reasons for and against deaccessioning are discussed below.)

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<sup>1</sup> By removal from the collection register, catalogue or database that details what material is in the collection.

<sup>2</sup> It's another version of, 'all cows are four-legged animals; not all four-legged animals are cows'.

Archives are quite different again. Of all participants in the collection sector, archives have the most developed machinery for examining and controlling the deaccessioning process. It is not surprising that they have stringent clearance, justification and descriptive requirements given that archive collection material bears a very high presumption of permanence<sup>3</sup> – but only for its assessed period of importance.

## 8.2 Rationale for deaccessioning

There are many reasons for undertaking deaccessioning including the wish to rid the collection of inferior material, clerical errors, space problems, the cost of maintenance and storage, the decay, deterioration or disease of the item, irretrievable loss or irreparable damage, duplication, the desire to raise money for the purchase of superior or more appropriate material, change of collection focus, non-compliance with the accessioning policy, repatriation and so on. No longer can we afford to treat the collecting institution as a mausoleum of culture.

There is nothing inherently wrong with deaccessioning. In itself there is usually nothing illegal or unethical about deaccessioning. It is done all the time.

- **Collection improvement.** But for deaccessioning, it would be impossible for museums to develop or even maintain their collections. The cost of administering, storing, securing, conserving the collection is the same whether the work is core to the collection or merely the consequence of an earlier, errant purchasing decision.
- **Collection function.** Some collection material, such as some of the material in natural history collections, is specifically held so that it can be used in research programs – many of which require the damage or destruction of the material. The books in public libraries have similar limited life expectancies. This is material that was accessioned in the knowledge and expectation that it would, one day, be deaccessioned.
- **Change of collection function.** Some would argue that as the primary role of museums and art galleries has transformed from

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<sup>3</sup> See discussion of the presumption of permanence at chapter 8.1.

collecting to public access and engagement, these institutions need fewer works but of greater quality or greater public interest.

- **A consequence of other decisions.** Where a government or an institution decides to repatriate collection material such as human remains or sacred objects; where a library decides to close a collection area or a particular type of material (such as, say, periodicals).
- **Application of governing rules.** For some types of collections (such as government archives) deaccession is a normal procedure that is mandated by legislation.

Irrespective of the field of the collection, the golden thread of this issue requires that the policies of the institution be clearly and publicly articulated and the mechanisms by which such policies are implemented, are be transparent and immune from accusations of impropriety. Even the most fervent disciples of deaccessioning would agree that there are inherent dangers involved in the process and that the 'when', 'what', 'why' and 'how' of deaccessioning, determines whether such conduct is appropriate professional activity or a bastard act.

### 8.3 Arguments against deaccessioning

There are various situations or factors that may indicate that deaccessioning would be inappropriate or even unlawful.

1. **Statutory prohibition.** Where the organisation has a governing statute, that Act, or regulations or administrative directives that may flow from it, may limit or prohibit certain deaccessioning.<sup>4</sup>
2. **Constitutional prohibition.**<sup>5</sup> Deaccessioning may be contrary to the constitution of the organisation. More often, constitutional

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<sup>4</sup> It is interesting to note that deaccessioning is a central element in most of the European and British controversies in concerning repatriation of cultural material. In those jurisdictions the material held in the public institutions is actually owned by the State and it is not within the power of the collecting institution to deaccession any of its collection unless it is legislatively empowered to do so. It is not a matter for the discretion of the institution.

<sup>5</sup> No, not THAT constitution!

limitations relate to the disposal of collection material rather than its mere deaccessioning.

3. **Transaction forbidden.** These may arise from preconditions imposed on gifts and bequests. They can also arise from trust arrangements. For example, if the item was donated to the museum on the condition that it not be disposed of, or on the condition that it be on public display at least two months a year, any attempt to deaccession and dispose of the item may be in breach of the conditions of gift. In some of these situations, depending on the strict legal effect of the transaction documentation, although the intention of the donor may have been clear, it may not be legally enforceable. For example, in many bequests the intentions of the deceased are expressed in a manner that is 'indicative' but not technically 'enforceable'.<sup>6</sup> In such cases, deaccessioning may raise ethical questions but may not be unlawful.
4. **Characteristic of the material.** In art museums, there has been considerable and ongoing debate as to whether any deaccessioning is appropriate, or indeed ethical. In the art museum context, it is argued that the object is not just rare, scientifically, historically or socially significant: Each work is the unique expression of its creator. It is an approach that sees the inferior works of an artist as important (if not as valuable) as the superior ones for each work is an insight into its creator and none is replaceable.
5. **Danger of fashion.** Artists and their work are subject to the cyclical vagaries of fashion and a work that was seen as sufficiently significant to warrant acquisition in one era may well fall from grace in a later era – only to undergo reassessment in a yet later era. There are many examples of museums that have deaccessioned

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<sup>6</sup> For example, if the deceased said in her will: 'I give my Grecian urn to the Australian Museum. They should never sell it as it has been precious to my family for many generations.' The gift made in the first sentence is simple and complete. The second sentence is only an unenforceable request. It has moral or ethical weight but is not legally binding.

major holdings at the low ebb of the fashion tide only to be unable to buy them back at high tide. This factor is particularly important in art museums where this danger is particularly high.

6. **Danger of damage to market.** The fact that art museums collect the work of living artists creates another complexity: When the work of a living artist is deaccessioned from a public collection, the market for the artist's work is likely to be deleteriously affected. For this reason, some art museums have a policy prohibiting the deaccessioning of living artists.
7. **The whole is greater than the parts.** There are museums in which the collection is interesting for reasons other than merely being a sum of its parts. For example the library of a famous philosopher or composer may be more interesting because of what it tells us about that person than the value of the individual books it contains. These are situations in which the public has an interest in maintaining the collection intact: The collection is itself a collectable.
8. **Damage to donor relationships.** No donor (family) wants to see their generosity discounted and deemed unworthy. Deaccessioning may be objectively warranted on other grounds but its effect on the organisation's past and future donors can be very destructive. Much diplomacy is required and controversy must be averted.
9. **The deaccessioning is for an unethical or controversial purpose.** Even when deaccessioning is permitted, irrespective of the type of museum, the deaccessioning of material from a collection can be controversial. It is not sufficient to argue that the money from the sale is to be applied to the objects of the museum. (These objects may include administrative purposes.) All of the national and international codes of ethics are clear that where any material is sold, the money raised must be applied to the purchase of other material for the collection. It is not acceptable for such sums to be applied to construction, renovation, administration and the like.

## 8.4 Controversy

In the 1960s and 1970s, the American museum world seemed to be continually rocked by 'deaccessioning scandals'. More often than not, these were really 'disposal scandals'. These affected not only small under-financed and understaffed museums; they included some of the very biggest names in the field: The Metropolitan Museum of Art, the Brooklyn Museum, the Norton Simon Museum, the Smithsonian Institution, the Boston Museum, the Carnegie-Mellon, the John Hopkins University Museums, the George F Harding Museum, the Art Institute of Chicago, as well as smaller ones such as the Museum of American Indian-Heys Foundation.

The United States experience is informative but not determinative in Australia. There are some very important differences between Australian museums and those of the United States. In particular, most Australian museums are government owned and publicly funded; in the United States, most are non-government and are privately funded. The standards applied to collection management decisions in a non-government, privately funded environment are subject to less regulation and less rigorous review and audit, than those in governmental, publicly funded institutions.

In Australia, there have been few major deaccessioning or disposal scandals, to date. This may be because Australians are more honest or more professional than their American counterparts, which seems improbable; or because the collections are not worth misappropriating, which is simply untrue. Rather, most museum administrations have learnt from the American experience and have either introduced procedures that will help avoid improprieties or are rather better educated as to the issues involved.

There was a considerable amount of deaccessioning in the 1930s, 1940s, and 1950s, as art museums around Australia swapped material so as to fill gaps in their collections. In the 1980s, the most controversial examples have involved the removal of objects from collections and handing them back to traditional owners. Certainly, the 1982 deaccessioning and sale by the Art Gallery of New South Wales of two works by Willem Menzler (for the purpose of raising funds for the purchase of an undisclosed larger work), went unremarked, and certainly

did not attract the international controversy that the Metropolitan Museum created in the early 1970s when it did similar things, but on a grander scale.

## **8.5 A recent example**

In late April 2004, the front pages of the newspapers carried a story of a good man, successful and senior in his profession, tarnished by the innuendo of improper and indeed fraudulent conduct, and as the articles implied, taking 'retirement' before the final ignominy of being sacked. This was the most recent, and very public, deaccessioning scandal. The difference this time was that it was in Australia.

Did it really merit front-page treatment? Yes, probably it did. The scandal had taken place over the course of several years in the Parliamentary Library of NSW. The collection was old and valuable; there was a strong odour of conflict of interest and the main protagonist, NSW Parliamentary Librarian, was so naïve as to make newsworthy incriminating statements, seemingly on request.

Had he really done anything so wrong? Certainly he did not think so. As far as he was concerned he was selling off those parts of the collection that were no longer useful to the library so that the shortage of shelf space could be addressed. He believed that the criteria of selection for deaccessioning and the chosen manner of disposal had been appropriate and in the best interests of the library. In his view, there was no wrongdoing because the money thus raised was to go to the administrative purposes of the library, purposes that needed such funding because of financial problems caused by budgetary cutbacks.

There was more than one victim in this scandal. Certainly the Parliamentary Librarian was one, although it must be said that his wounds are entirely self-inflicted. Another, may be the collection, although it may well be that the works were appropriate for deaccessioning. Without doubt however, the reputation of the NSW Parliamentary Library and potentially the entire public collections sector was tarnished.

Every senior professional working in public collecting institutions is aware that, even where there is no suggestion of conflict of interest, deaccessioning is highly contentious and, throughout the world, is a common cause of public controversy. It is particularly so in the world of art museums: Art is subject to fashion and the whim of the museum's current director and it is always tempting

to dispense with yesterday's fashion in order to acquire works of the new. For art museums, two issues make these decisions particularly pointed: first, the works deaccessioned are frequently very valuable; and second, the objects are usually unique. Once gone, they are irreplaceable.

In social history collections and natural history collections, deaccessioning is frequently undertaken to rationalise holdings that contain unuseful multiples (how many flatirons or duplicate rock samples are really necessary). In libraries, the ephemeral quality of some of the collection (such as editions of text books that have been superseded or multiples of series no longer required when the series is digitised). Given the cost of storing, conserving, insuring, securing, and documenting collection objects, there is no question that all modern collection institutions have to undertake prudent deaccessioning.

What is to be learned from the scandal at the Parliamentary Library? It is not that deaccessioning is, in itself, bad. It is not deaccessioning that is the problem rather why it is undertaken. Further, it should be remembered that it is almost never the *deaccessioning* itself that causes the problem. It is the *disposal*.

In the case of the Parliamentary Library scandal, even the newspaper reports are instructive:

1. The Parliamentary Librarian's downfall happened because there was no detailed, considered and approved policy or procedure in place by which collection items could properly be deaccessioned and disposed. Had he been implementing a policy and procedure that had been carefully articulated and formally approved, there would have been little scope for controversy and even less for scandal and ignominy. Deaccessioning and disposal should be a fundamental part of every collection management policy. If it is not, the management policy is, quite simply, inadequate. This is the responsibility of the institution's senior management and the governing entity that is responsible for the governance of the organisation.
2. It is no answer to say that the money raised by the deaccessioning and disposal was to be put to the administrative purposes of the

organisation. It is clearly stated in all museum codes of ethics, national and international, that any money raised by this process must be reinvested in the collection itself and not used for administrative or capital purposes.

3. The process should never allow a cynical third party (such as a newspaper reporter) to allege that the process was tainted by conflict of interest. This is always difficult for one of the characteristics of humans is that we can always convince ourselves that we are acting with propriety and in the good of the cause. Ethics are things that are breached by others. For this reason, the judgement should not be left entirely to the sensibilities of the individual. The policy and the procedure should assist (indeed require) the individual to act appropriately. This is a basic tenet of good management and governance and it must apply to the director and governing entity of the institution as well as their subordinates.
4. There is no template that can provide an appropriate deaccessioning and disposal policy for every institution. Each has different types of collections, different histories, different collection rationales, and different staffing and financial and resources. That said, each institution should have such a policy. It is a core to risk management and is an essential of good governance.
5. When such a scandal does erupt, the institution should have a procedure in place by which it can make certain that the figure at the centre of the fire does not talk to reporters. The last person who should have been speaking to reporters was the Parliamentary Librarian – the focus of the media heat. This task should have been in the control of someone trained and skilled in handling the media in crisis situations. How many of our directors have crisis media skills training? How many have a protocol that swings into effect when that first reporter telephones? Many would say that they don't need it. The Parliamentary Librarian may well have had a similar view.

He was an honest man, deeply committed to his collection and his profession. But that saved neither his reputation, nor his collection, nor his profession, from being tarnished. If anything positive is to be learned from this sad story, it is this: deaccessioning and disposal is both necessary and dangerous. Accordingly, every public collecting organisation should have very carefully thought though, clearly articulated, policies and procedures for ensuring the appropriateness of such processes. Such protocols protect those responsible for the governance of the collection. They protect the collection from those same people.

## 8.6 Ongoing debate

The following, is an excerpt from the UK *Museums Journal*<sup>7</sup>

YES	NO
<p data-bbox="188 936 751 1003">David Ewing, director, Geffrye Museum, London</p> <p data-bbox="188 1099 751 1290">The Geffrye Museum follows the MA guidelines. In principle, items bought by museums are held on behalf of the public and the aim should be to keep the collections in the public domain.</p> <p data-bbox="188 1323 751 1805">We would offer items to other museums first and then sell on the open market only if there was no public home for them. The proceeds would then be used to enhance the collection. This situation hasn't arisen at the Geffrye, but before disposing of any object we would need to be absolutely confident about title and know its provenance to make sure disposal would not be disputed. The material we hold in our collections is relatively straightforward; we don't hold culturally sensitive material or human</p>	<p data-bbox="774 936 1327 1003">Timothy Wilson, keeper of western art, Ashmolean Museum, Oxford</p> <p data-bbox="774 1099 1327 1821">The tacit contract between UK museums and donors is, in my experience, different from America (where deaccessioning to buy more coveted items is a given), especially in museums such as mine. The Ashmolean has grown since 1683 by the generosity of donors who have regarded it as a permanent home for their treasures. It retains the sometimes eccentric character of a collection of collections. People still regularly seek assurances that the museum will never sell works of art they might leave us. Ideal donors let us accession items suitable for the museum and sell the remainder to make acquisitions in their name. But sales of things once accessioned, with the occasional exception of narrowly – defined duplicates, are a betrayal of donors'</p>

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<sup>7</sup> (2004) January *Museums Journal* 41.

<p>remains.</p> <p>The Geffrye has a well-defined collecting policy, a small purchase fund and limited space, so the collection is not growing very fast. We probably acquire an average of 100 items a year.</p> <p>In my view, disposal of museum collections is justifiable as a process of rationalisation; it should never be done in order simply to raise money. The benefits of selling should be about enhancing the collection and not about developing an income stream for the museum. Rationalising the collection should allow scarce resources to be directed more efficiently. Many museums hold surplus material in their collections, which takes up valuable storage space and requires curatorial and conservation care. It makes sense to dispose of it ethically and if it generates some income to benefit the core collection, so much the better.</p>	<p>expectations.</p> <p>Selling things of doubtful authenticity or that are out of fashion is no better. Increasingly, the history of our great museums is regarded as worth studying. The late Clive Wainwright showed how disastrously post-1945 deaccessioning of Victorian art and of 'mistakes' weakened the V&amp;A's ability to display its own early history, a crucial chapter in world museum history. The history of faking is a developing branch of art history and the source of fascinating exhibitions; and if we root out fakes, how do we teach connoisseurship? So let others deaccession; it is not for us.</p>
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The dynamic nature of this area was demonstrated in October 2007 when the UK Museums Association changed its code of ethics on deaccessioning. After debate at its annual conference it now permits disposal for financial gain in exceptional circumstances. These are:

1. when it will improve public benefit from the remaining collection;
2. is not done to meet a short-term funding deficit;
3. Is a last resort measure;
4. is done after prior consultation; and
5. if the deaccessioned item lies outside the core collection.<sup>8</sup>

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<sup>8</sup> (2007) 185 (November), *The Art Newspaper* 19.

It is interesting to consider how this will work in practice.<sup>9</sup> Its dangers are considerable. Each of the criteria is flawed in that it provides strength only to the hands of those who seek convenient solutions.

1. (i) Any competent lawyer can construct a cogent argument for the deaccessioning of collection material on the ground that it will improve public benefit from the remaining collection. It is no criterion at all.
2. (ii) Deaccessioning is not the answer to short-term funding deficits –nor is it the answer to long-term ones. Indeed, those responsible for the governance of the organisation cannot properly look to the deaccessioning of collection items to resolve the organisation's long-term funding deficits. To do so is lazy and irresponsible.
3. (iii) The vagueness of describing something as a 'last resort', is astounding. One person's 'last resort' is another person's stimulus. It is too easy to say that there was no other option. There are always other options. You might not have worked out what they might be – but to say that something is a 'last resort' tells you more about the decision maker's state of mind than it does about the difficulty of the problem.
4. (iv) 'Prior consultation' is essential and must be undertaken with all of the stakeholders. Who is relevant will vary but would include internal records, donors, a range of third-party experts, the board and relevant government authorities.

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<sup>9</sup> For example at the same time that the Association changed its ethical guidelines, Fisk University in Nashville was dabbling its toes in this troubled brook. Georgia O'Keefe donated a 101 piece collection of art and photography to the financially strapped Fisk University. Alice Walton (the Wal-Mart heiress) has offered \$30 million for a 50% interest in the O'Keefe collection. If approved, the collection would spend half its time at Fisk and half at the new museum of American art that Mrs Walton plans for Arkansas. Further, Mrs Walton would pay \$1 million towards refurbishment of the museum, would appoint five members to the committee that oversees the collection and would have an option to purchase the Fisk's remaining 50% should it ever decide to sell. At time of writing, the O'Keefe estate is seeking to stop the agreement, claiming that it contravenes O'Keefe's instructions that the collection not be sold: (2007) 185 (November), *The Art Newspaper*.30.

5. (v) If the material is outside the accessioning policy that is a good reason to deaccession (unless as with some collections, the history of the collection and its vagaries, is part of the cultural heritage of the collection).

So, how do those responsible for a collecting organisation ensure that its deaccessioning practice is both legal and ethical?

## 8.7 Regulation of deaccessioning

There are four sources of restraint and guidance in relation to deaccessioning in Australia:

1. if the institution is established by statute, the statute:
2. if the institution is established as a company, the governing constitution:
3. any relevant transaction documents: and
4. professional codes of ethics.

### 8.7.1 Statute

Statutory regulation is of two kinds – specific and general. Where the collecting institution is established by statute, most of those statutes make some glancing reference to deaccessioning. For example, the National Gallery Act 1975 states:

#### Clause 9: Disposal of works of art from national collection

(1) Subject to subsection (4), where the Council is satisfied that a work of art in the national collection:

- (a) is unfit for the national collection; or
- (b) is not required as part of the national collection;

the Council may resolve that the work of art be disposed of by sale, gift or destruction.

(4) The Council shall not resolve that a work of art be disposed of by way of gift or destruction unless the council is satisfied that the work has no saleable value.

(5) Where:

- (a) the Council has resolved, in accordance with this section, that a work of art be disposed of; and

- (b) the Minister has approved of that disposal;
- the Gallery may dispose of that work of art accordingly.'

**Clause 38: Power to purchase and dispose of assets**

- '(1) The Gallery shall not, without the approval of the Minister:
- (b) dispose of any property, right or privilege, other than a work of art, where the amount or value of the consideration for the disposal or the value of the property, right or privilege exceeds \$250 000 or, if a higher amount is prescribed, that higher amount;'

Where the collection is a line department within a Ministry, (and thus does not have its own legislation), it will still be subject to the general rules of government record management, retention and disposal.<sup>10</sup>

**Local government** galleries and museums are not established pursuant to their own act of parliament; they are created under the general powers given by the state to local authorities to provide amenities to their residents within their council area. These are governed by general guidelines approved by the council and almost never deal with collection management issues such as deaccessioning. This is the subject of frequent concern. Collections owned by local government museums are not the property of the museum but are the property of the local council. They are thus subject to the vicissitudes of local politics: The attitude, understanding and support of the mayor and the general manager of the council are the key to the governance of the museum, irrespective of the desires of the committee apparently charged with the role. The museum and its collection are subject to the funding priorities of the council itself. In museums owned by local councils, no statute prevents deaccessioning and disposal of the collection, in whole or in part. The protection of, or danger to, the collection is political, not statutory.

**Public archives** usually have clear statutory authority for deaccessioning (or 'reappraisal' as it is commonly referred to in that sector.) See, for example, s 24 of the *Archives Act 1983* (Cth).

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<sup>10</sup> Except in the case of archives, such rules do not regulate the deaccessioning of collection material although they do affect the documentation relating to each collection item.

## **24 Disposal, destruction etc. of Commonwealth records**

(1) Subject to this Part, a person must not engage in conduct that results in:

(a) the destruction or other disposal of a Commonwealth record; or

(b) the transfer of the custody or ownership of a Commonwealth record; or

(c) damage to or alteration of a Commonwealth record.

Penalty: 20 penalty units.

(1A) For the purposes of an offence against subsection (1), strict liability applies to the physical element of circumstance of the offence, that the record is a Commonwealth record.

(2) Subsection (1) does not apply to anything done:

(a) as required by any law;

(b) with the permission of the Archives or in accordance with a practice or procedure approved by the Archives;

(c) in accordance with a normal administrative practice, other than a practice of a Department or authority of the Commonwealth of which the Archives has notified the Department or authority that it disapproves; or

(d) for the purpose of placing Commonwealth records that are not in the custody of the Commonwealth or of a Commonwealth institution in the custody of the Commonwealth or of a Commonwealth institution that is entitled to custody of the records.

In each jurisdiction there will be numerous statutes that impose or regulate the retention or disposal of records.<sup>11</sup> These are the starting point for identifying or defining appropriate deaccessioning and disposal procedures. Under that high level of authority there are usually cascading regulatory requirements.<sup>12</sup> For example, where a government directive (of whatever kind) requires that:

Records must be retained for as long as they are needed to meet business needs, the requirements of organisational accountability and community expectations. Those records deemed to be of continuing value need to be identified and retained in a useable form for the appropriate length of time.<sup>13</sup>

Then, as soon as the records no longer comply with that directive, they are likely to be suitable for disposal.<sup>14</sup>

It is for each public authority to devise a formal disposal schedule and have that approved by the State Archivist. It also must devise and implement its own process for reappraisal and disposal. Such a process will ensure that the disposal is restricted to records that are no longer required for business, accountability or cultural purposes, and that any such disposal will be legal, systematic and consistent.

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<sup>11</sup> For example in Queensland alone, these include: *Public Records Act 2002*; *Public Service Act 1996*; *Electronic Transactions (Queensland) Act 2001*; *Judicial Review Act 1991*; *Freedom of Information Act 1997*; *Evidence Act 1977*; Public Sector Industrial and Employee Relations Directives; Financial Management Standard 1997; Recordkeeping (IS40); Managing Technology-Dependent Records (IS41); ICT Maintenance and Disposal (IS19); and Information Privacy IS42 and IS42A.

<sup>12</sup> Many jurisdictions provide general guidelines to their statutory authorities and departments (for example, Qld: *General Retention and Disposal Schedule for Administrative Records*) but even then each government body designs its own practical reappraisal machinery.

<sup>13</sup> Qld, IS31.

<sup>14</sup> If the principles of retention are the positive, then the principles of deaccessioning and disposal are the negative.

### **8.7.2 Constitution**

Some museums are established as independent corporate entities using the structure of a company limited by guarantee. Such companies are subject to their governing constitution but these too, rarely refer to deaccessioning. Such constitutions rarely deal with matters of collection management. Where they do, these legal mandates are never as fulsome or as carefully articulated as codes of ethics.

### **8.7.3 Transactional documents**

These are the documents that relate to the various transactions between the institution and its 'clients'. These may include all forms of conditional deeds of gift, bequests and contracts. They also include all notes and correspondence that relate to the collection items.

Such documents may affect the museum's right to deaccession. It is not uncommon for a benefactor to donate or bequest an item on the condition that it not be deaccessioned.<sup>15</sup>

Further, there is the question whether such documents should, themselves, be retained or disposed of. Where they provenance, describe, authenticate an item of collection material, they must be retained for as long as the institution considers the item important enough to retain.

Even if the item to which the documents relate is deaccessioned and disposed of, it may still be good practice to retain the relevant documentation – for what it then documents is not so much the item but the history of the collection.<sup>16</sup>

### **8.7.4 Codes of ethics**

Codes of ethics are not law. They are not enforceable. They carry no sanctions. They are merely collective expressions of acceptable conduct within the profession, argued drafted (after extensive consultation and discussion) and

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<sup>15</sup> Of course that word is not usually used. It is more common for the condition to speak of 'not sold' or 'not disposed of'.

<sup>16</sup> It can be important to the history of the collection to document how and why an item came into the collection, what happened to it while it was in the collection and, eventually, why it was deaccessioned and disposed of. At this stage, you are documenting the collection rather than individual items within it.

developed by the museum profession itself. They are valuable because they are the reflection of collective experience. In the highly contentious area of deaccessioning, it would be an ill-advised decision that was not informed by such statements of appropriate governance and practice.

Internationally, codes of practice in relation to deaccessioning have common themes.

- The museum has a long-term duty to the public to maintain the collection and the items within it. It must balance the duty of maintaining and enhancing collections for future generations with that of providing appropriate services to today's public.<sup>17</sup>
- The museum must have a clearly articulated accessioning policy so that deaccessioning is less likely to be needed and, if it is, by which deaccessioning decisions can be properly made.
- The process by which collection items are selected for deaccessioning must ensure that all relevant issues are considered and that the decision is being made for appropriate reasons.
- The persons responsible for making the recommendations and the decisions must be identified. The process must provide in-built safety mechanisms to ensure that such decisions are not the consequence of individual whim or ideology. The participation of an independent and expert third party in the decision-making process is valuable.
- The decision must recognise the interests (legal and otherwise) of the people who made, used, owned, collected or gave the items that are considered for deaccessioning.
- The reason for the deaccessioning should be fully argued and clearly recorded.
- The process by which the decisions have been made must be fully and transparently documented.

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<sup>17</sup> 6.4, Code of Ethics for Museums, Museums Association UK, 2002.

- The decision as to what is to be done with any money raised by the deaccessioning should be established before the deaccessioning is undertaken.
- The method of disposal (whether by exchange, gift, private sale, public auction etc) should be appropriate.

The Museums Australia Code of Ethics chooses not to deal with deaccessioning itself. Rather it focuses on the **disposal** of objects but is silent as to their **deaccessioning**.

In contrast, the Archive world is alive with discussion and guidance as to this process. It recognises that not everything can be kept and acknowledges that most of the material retained by archives will have a half-life. The value of a record will be assessed according to a complex set of criteria including ethical, legal, administrative, financial, research, social, historical and cultural requirements and expectations.

Some larger organisations have their own codes of ethics. In one infamous instance, a Victorian organisation that was facing funding issues, decided to deaccession and sell an important painting. Its code of ethics forbade deaccessioning so, on legal advice, its board voted to suspend the operation of the prohibition, passed the motion to deaccession the work, and then voted to restore the effectiveness of the code of ethics. The president of the organisation argued at a Museums Australia conference that this conduct was appropriate and legal. Perhaps it was legal.

## **8.8 Deaccessioning procedures**

### ***8.8.1 Collection management policy and the accessioning policy***

Before you can devise a satisfactory **deaccessioning** policy you have to have an adequate **accessioning** policy as part of your collection management policy.<sup>18</sup> Quite simply, a good accessioning policy reduces the problems faced by museum administrators in allocating the limited resources available to the

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<sup>18</sup> The collection management policy will include a written statement of the museum's purposes and explains how those are furthered by the activities of the museum. The accessioning policy should really be just a part of the larger collection management policy.

acquisition, maintenance, conservation, storage, security and exhibition of collection material. It also reduces the frequency with which the museum will need to face issues of deaccessioning and disposal and when deaccessioning is mooted, gives the staff a more clear understanding of why the object was accessioned in the first place. If the reason for accessioning the object is understood, the reasons given for deaccessioning will have to take these into account.

### **8.8.2 Deaccessioning procedures**

While it is unquestionable that the museum must have the power to deaccession material from its collection, it is essential that sensible checks and balances be adopted to ensure that the exercise of those powers is both proper and well advised. To do this, each collection needs a detailed, considered, procedure to identify what material must be retained and what material should be deaccessioned.

Each institution must develop its own deaccessioning policies so that they fit the needs, nature and size of the institution and the collection. There is no one model that is right for all. That said, good deaccessioning policies have similar characteristics.

1. **Can you prove you own it?** The most basic requirement of deaccessioning is that the records prove ownership. One might say that it should never have been accessioned in the first place if ownership could not be proved – and they would be right. But there are several instances where an Australian collection has deaccessioned (and disposed of) material from its collection only to have someone claim that they or their forebear was the owner of it. Some of the earliest collection material is often the most lumpen in the collection and worthy of deaccessioning – but the quality of its acquisition documentation makes it difficult to do without risk.
2. **Was any limitation on deaccessioning attached to the acquisition?** Do the records reveal whether there are any legal restrictions on deaccessioning the material? For example, sometimes there are conditions of gift that will prevent this action.

3. **Would the deaccession comply with the legislative obligations of the institution?** Where the institution's constitution or statute provides for deaccessioning, you must take care to comply fully with them. No ifs. No maybes.<sup>19</sup>
4. **Who are the right decision makers?** Does the procedure clearly identify those who are entrusted to make such appraisals? Are they sufficiently qualified, trained and experienced to undertake that responsibility?
5. **Does the process protect against undue influence?** The decision should not be the decision of one person. Not even the director. In a major collection it will usually involve the Senior Curator in charge of the relevant collection area, the Registrar, the Director and then the Board.

The Curator can make expert assessments as to the place of the material in the collection, the Registrar is able to inform the process as to any legal or administrative conditions or impediments relating to the material and the Director is responsible for supervising the over-all probity of the decision and assuring the Board that the deaccession is appropriate.<sup>20</sup>

It is important that all of the people who are in charge of the material and the decision, actually state their recommendation in writing. The procedure needs to make it clear to the Board that all

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<sup>19</sup> Refer to the example above of the National Gallery of Australia Act (Clth) that permits deaccessioning only for certain reasons and only provided that certain conditions are met.

<sup>20</sup> For example: *'The Curator should submit a proposal for deaccessioning to the appropriate Assistant Director for approval. If approved, the Assistant Director should forward it to the Director. The proposal should provide catalogue information about the object and a statement about the object and a statement justifying the deaccessioning proposal.'* (Museum of Applied Arts and Sciences)

of their key staff approve of the recommendation, not just the director.<sup>21</sup>

6. **What consultation is necessary or desirable as part of the assessment process?** If in doubt, the curator should always seek an outside opinion and that opinion should be made available to the other decision-makers.
7. **What are the particular needs and practices of the sector?** Different collection types will require different procedures.<sup>22</sup> Even where organisations are within the same general collection area (say, archives) the procedures will vary enormously depending upon the needs and expectations upon the individual types.<sup>23</sup>
8. **Does the policy require the deaccessioning submission to make recommendations as to the appropriate mode of disposal?** Good deaccessioning process requires a good disposal process and it is incumbent that those making the recommendation to the Board also give guidance as to the most appropriate way of removing the material from the collection and disposing of it. Outcry rarely occurs because of the deaccessioning itself: It arises at the time of disposal.
9. **Does the policy allow for a period of reflection?** Good deaccessioning policies provide an opportunity to reconsider. A cooling-off period. For example, the Museum of Applied Arts and Sciences provides for a two-year delay between the making of the deaccessioning decision and the actual deaccessioning.
10. **Is there a formal process for that reflection?** The reason for having a period of reflection is to protect the collection from improper or hasty decisions. It would be just administrative

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<sup>21</sup> Many of the USA examples of deaccessioning problems arose where the director exerted undue influence on the curatorial staff – or have failed to take into account their professional opinions. The Board needs full information.

<sup>22</sup> Art museums will require very different procedures from social history museums.

<sup>23</sup> For example where the archive is maintained within a government department, library, company, school or law firm.

humbuggery if the staff had to wait say, two years merely to put into effect the decision already made. No. The cooling off period is only effective if, at the end of the period, the decision is re-evaluated. The policy should require this re-evaluation and should set out who is responsible for initiating it and supervising the task.<sup>24</sup> In large institutions this will be the Registrar. For example, at the Museum of Applied Arts and Sciences the policy states that:

*The Registrar will be responsible for maintaining files relating to Notifications of Deaccessioning. At the end of the two year period, the Registrar will notify the relevant curator that the review of the decision is now required. The Registrar will alert the Curator to any use made of the object during the two year period which might affect the decision to deaccession, or the method of disposal of the object. If the decision to deaccession stands, the Registrar will amend all relevant records in relation to the object, and arrange for disposal of the object as indicated by the Board.*

As useful as this is, I would suggest that it could be tightened by requiring the Curator reconsidering the decision to do so formally and send that decision up the line again to the Assistant Director and the Director – because they too may have cause to reconsider (but for different reasons to those of the curator or the director.)

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<sup>24</sup> For example, '*In order to safeguard against mistaken assessment of the future use of an object, a period of two (2) years should elapse between approval by the Board of Trustees of the deaccession and disposal of the object, at which time it would be reviewed by the Curator. The review of the Curator's recommendation by the appropriate Assistant Director and the Director, guards against ill-considered or subjective decisions by one person.*

11. **Record the deaccessioning history of the collection.** Whenever material is deaccessioned the collection register should be notated so that it is clear that the material has been deaccessioned and its current status recorded. It may have been deaccessioned from one collection and accessioned into another (say, the educational collection); or it may have been destroyed or exchanged. The file should reflect the history of the material while in the possession of the organisation. This information is part of the provenance of the material and part of the history of the collection. Accordingly the material should usually be photographed and all documentation retained, notwithstanding that Elvis has left the building.

It is not possible to set out a cookie-cutter deaccessioning process for all types of collection organisations. The Deaccessioning Policy of the National Gallery of Australia provides a useful example for art museums.

## ***NATIONAL GALLERY OF AUSTRALIA***

### ***DEACCESSION AND REMOVAL OF WORKS OF ART POLICY***

Endorsed by Council 30 April 2008

#### **1. Introduction**

Central to the aims of the National Gallery of Australia as prescribed in the National Gallery Act 1975 is the development and maintenance of a national collection of works of art. As part of this collection development activity, the Gallery from time to time, needs to refine its collection through a process of deaccession and removal of works of art that for various reasons no longer positively contribute to the quality of the collection. A decision to deaccession a work of art from the collection requires Curatorial, Directorial, Council and Ministerial approval. In deaccessioning any item, the Gallery needs to proceed with great care and consideration to avoid any undue public concern and importantly avoid adverse reaction to current and future benefaction.

The policy provides the rationale, authority, process and criteria for the deaccession and removal of a work of art from the national art collection. It is distinct from the Gallery's Write-off and Disposal of Assets Policy which relates to non-work of art assets belonging to the Gallery.

#### **2. Authority**

2.1 The Gallery's powers to remove a work of art are expressly set out in the Act. The main provisions are contained in section 9 of the Act which deals with disposal by means of sale, gift or destruction and section 10 of the Act which enables the Gallery to arrange for the exchange of a work.

**2.2** Section 9 of the Act provides that where the Council of the Gallery is satisfied that a work of art:

- (a) is unfit for the national collection; or
- (b) is not required as part of the national collection

it may resolve that the work be disposed of by sale, gift or destruction provided that in the case of a gift or destruction the Council is satisfied that the work has no saleable value. Where the Council resolves to dispose of a work it must then seek the approval of the Minister to that removal. If the Minister gives approval the Gallery may arrange for the disposal to take place

### **3. Principles and Parameters of Deaccession and Removal**

- 3.1 Deaccession will only take place with the overall objective of improving the collection or pursuant to paragraph 4.1.8.
- 3.2 Deaccession will not take place in response to current trends or on the basis of personal taste.
- 3.3 Deaccession of work which was the subject of a gift or bequest to the Gallery will not be disposed of except as provided in 5.2.
- 3.4 The Gallery will not dispose of a work by a living artist except with the written permission of the artist.
- 3.5 A work that has been acquired for the collection with a restriction that it be retained for a certain period of time will not be disposed of while the restriction continues.
- 3.6 Removal of the work will be undertaken in an accountable process such as public auction or tender, transfer to another institution, gift or by destruction where the removal is required pursuant to paragraph 4.1.8 and the work has no saleable value.
- 3.7 In the case of a transfer of a work, regard will be given to other Commonwealth collecting agencies where appropriate.

3.8 Funds received from the disposal of a work must be used for the acquisition of works for the same area of the collection or such other area of the collection as the Council may approve on the recommendation of the Director and relevant curatorial staff.

3.9 Where possible and relevant, the name of the donor or the fund from which the work was originally acquired is to be credited to a new acquisition.

3.10 Full documentation on the work will remain with the Gallery.

3.11 The Gallery will provide full disclosure in the Gallery's annual report.

#### **4. Criteria for Deaccession and Removal**

**4.1** When considering a work for deaccession the Council will have regard, amongst other things, to whether the work falls within any of the following categories:

**4.1.1** A work, the significance or aesthetic merits of which falls below the general level of the collection.

**4.1.2** A work which lowers the overall level of quality or representation of an artist or any area in the collection.

**4.1.3** A work where a more superior example has been acquired.

**4.1.4** A work which has deteriorated to such an extent that it is no longer exhibitable and is beyond restoration to an acceptable standard.

**4.1.5** A work which has been found to have been falsely documented, described or attributed, or to be a forgery.

**4.1.6** A work which is duplicated in the collection where duplication serves no scholarly or educational purpose. A duplicate means a work produced as a multiple or in an edition, for example a work struck from the same die or printed from the same block or plate.

**4.1.7** A work which is no longer representative of the collection, as characterised in the Gallery's Acquisition Policy at the time of disposal.

**4.1.8** A work which presents a risk to staff, the public or to other works.

## **5 Donated work or a work by a living artist**

**5.1** The Gallery will not dispose of a work by a living artist except with the written permission of the artist.

**5.2** Having regard to any conditions or trusts attaching to gifts or bequests the Gallery will not dispose of a work falling outside the Gallery's Acquisition Policy without first obtaining the consent of the donor, the relevant trustee or the personal representatives of the donor's estate save that if, despite every reasonable effort having been made, the Gallery is unable to locate the donor, trustee or personal representative then, it may dispose of the work in accordance with sections 9 or 10 of the Act.

## **6 Procedures leading to disposal**

**6.1** A report by the relevant curatorial staff, recommendation by the Director is to be submitted to Council stating the reasons for the proposed removal of the work from the collection, the context of the work within the collection and the effect its removal would have. The report should include an estimate of the current market value of the work with, where ever possible, documentary verification. The report should satisfy the Council that:

- 6.1.1** In the case of gifts and bequests every reasonable effort should be made to locate the donor, trustee or personal representatives in accordance with 5.2.
- 6.1.2** There is no legal restriction on the deaccession and removal of the work.
- 6.1.3** Consideration has been given to the implications of disposing of a work given to the Gallery.

- 6.2** A period of not less than six months should be allowed to elapse following the Council's approval in principle of the recommendation and the Council's final resolution to remove the work. Exceptions would only relate to objects that posed a danger to humans or other works of art.
- 6.3** Subsequent to the Council's resolution to dispose of a work after the six month setting aside period, Council will seek the approval of the Minister to the proposed removal.
- 6.4** Following the Minister's approval to the deaccession of the work, or, in the case of an exchange, following the Council's resolution to exchange the work, the acquisition records relating to the work will be marked accordingly.
- 6.5** The acquisition number will not be reassigned to another work and the IRN (Internal Record Number) for the work held on the Collection Management System will be marked as deaccessioned, not for publication on the internet and not retired.
- 6.6** Section 10 of the Act provides that where the Council is satisfied that the exchange of a work of art in the national collection for another work of art would be advantageous to the collection then the Gallery may make the exchange.
- 6.7** Catalogue and other records of the work will reflect that the work has been deaccessioned and removed. In all cases except of a gift or exchange with a public museum, the Gallery will retain all original documentary material concerning the work including photographs and appraisals. In the case of a gift or exchange with a public museum the original documentation will be transferred to the museum with the Gallery retaining copies.

## **7 Removal**

**7.1** Following the Minister's approval to remove a work by way of sale the work may be offered for sale by public auction or tender.

**7.2** Where the Gallery has decided to gift or exchange a work in accordance with section 10 of the Act the agreement for exchange may include payment of a sum of money in recognition of the difference in value between the works exchanged.

**7.3** Where the provisions of 4.1.4 apply the Council may, subject to obtaining the Minister's approval for removal under section 9 of the Act, remove the work to the Gallery's Conservation Department for practical testing or research purposes.

**7.4** Where the provisions of 4.1.5 apply any removal must take into account the protection of the public interest as well as the interest of the Gallery.

**7.5** Depending on circumstances surrounding the acquisition of the work consideration may be given to:

**7.5.1** rescission of any purchase order

**7.5.2** sale by public auction or tender with full disclosure.

## **8 Ethics, Confidentiality and Disclosure**

**8.1** Reflecting the Gallery's ethical standards under no circumstances should a work be purchased by or have its ownership transferred to any member of the Council or the Gallery staff, or members of the immediate family of any of those people.

**8.2** Neither Gallery staff nor members of Council shall inform any non-essential third parties that a decision has been made to remove a particular work or the manner by which the work is to be disposed. Such information must be kept confidential to the Gallery.

**8.3** Where appropriate the Council may require any person assisting with the sale of a work to keep the provenance confidential subject to the Director's discretion.

**8.4** Details of the disposal will be reported promptly to the Council and be included in the Gallery's Annual Report.

## **1. Interpretation**

**9.1** In this Policy:

a reference to a 'work' is a reference to one or more art objects or a work of art in the national collection;

a reference to 'the collection' is a reference to the national collection; and

a reference to 'the Act' is a reference to the National Gallery Act 1975.

The following is an example of a Submission Form that will provide comprehensive information on which to base a deaccession decision for an art museum:

**NATIONAL GALLERY OF AUSTRALIA**  
**Council Meeting [date] \_\_\_\_\_**

**Submission for Deaccession**

**Artist or culture:**

**Title / date:**

**Medium / size:**

**Donor/Vendor:**

**Valuation when acquired:**

**Current market value:**

**Curator's report [250 words]**

**Curator: name, title**

**Date:**

**Assistant Director, Australian / International Art recommendation:**

**Date:**

**Director's recommendation:**

**Director**

**Date:**

**File no:**

**National Gallery of Australia Council Meeting [date]\_\_\_\_\_**

**Submission for Deaccession**

**Curator: name, title**

**File number:**

**Submission for Deaccession**

**Artist or culture:**

**Title / date:**

**Medium / size:**

**1. ACQUISITION DETAILS:**

**Date acquired:**

**If the work was a donation or bequest are there any restrictions attached to the work?**

**If the work was a donation is the donor still alive?**

**If not, have other surviving members of the family been contacted to ascertain that they have expressed no objection to the disposal**

**If the work was purchased, state the specific fund used and the price paid for the work**

**Provenance**

•

**2. Condition of the work:**

**When was it last exhibited:**

**Exhibitions and references in standard texts:**

**3. Does the work have future value as a loan, as part of a study collection, or for research purposes?**

•

**4. How well is this type of work represented in the collection?**

**Similar works in Australian public and private collections?**

**5. Reasons for deaccessioning and disposal?**

Expert opinions sought or volunteered?

Proposed methods of disposal [in order of priority]

**6. Outline any legal restrictions that would limit the Gallery's right to dispose of the work**

PREPARED BY:

DATE:

.....

.....

(Curator)

I certify that the deaccessioning and disposal of ..... would be in accordance with the Disposal Policy of the National Gallery of Australia.

**CERTIFIED BY:**

**DATE**

.....

.....