

PART A STRUCTURES AND GOVERNANCE

Chapter 1: Types of Institutional Structures

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PART A. STRUCTURES AND GOVERNANCE

1. INSTITUTIONAL STRUCTURES

1.1 Introduction

There are hundreds of collection-related organisations in Australia. They range from organisations established as statutory bodies with budgets of millions of dollars, to service and professional bodies such as Museums Australia, to small community-based museums and informal clubs with no financial resources at all. They vary in size and purpose. Some are primarily collecting, educational or research institutions, others are service organisations; some are membership based, others are not. Some receive funding from governments, some are supported by funds from their members, and some are supported by sponsorships and donations.

Indeed irrespective of their size or their structure, most collecting organisations live off a cocktail of funding types. Even institutions that are primarily government funded must earn considerable amounts of additional funding to support their activities.¹

The need for a new organisation or the continued existence of an existing one should never be taken for granted. Every organisation should be thought of as a living creature: it comes into being, grows, learns, matures, develops diverse interests, can be trained or ill trained, may achieve its potential or may be a dreadful disappointment. Some organisations flourish into old age; others should either be put to sleep or allowed, gracefully, to die.

This chapter will describe the basic types of structures and their characteristics. Some legal structures suit certain purposes better than others. The structure adopted must complement the objectives of the organisation and provide for the needs and expectations of its members.

1.1.1 Preliminary issues

This chapter is about not-for-profit collecting organisations. This is an important distinction because the function of collecting (and indeed some of the functions of related service organisations) could be done, at least in theory, by

¹ For example, the National Library of Australia earns approximately \$11 million in off-budget funding.

commercial, for-profit, organisations: There are private businesses that run museums, galleries and information repositories; there are private businesses that provide an enormous range of services to the collection community. That recognised, this discussion focuses on the public, rather than the private.

1.2 What does 'non-profit' mean?

'Non-profit' does not mean that the group or organisation does not make money. 'Non-profit' means **non-profit-distributing**, not non-profit-making. A non-profit organisation does not divide the profits among its members. Instead, all profits are spent on the objectives of the organisation. (This is why such organisations are also called 'not-for-profit organisations'.)

Nor does 'non-profit' mean that the participants cannot be paid. It is not the same as 'voluntary'. For example, in a non-profit company such as the Wollongong City Gallery, the staff get paid – they just don't get a share of any profits that the company may make. Any profits go back into the business of running the gallery.

That is why it is important to ask when starting an organisation:

- What will happen to any profits made by the organisation?
- Will they be distributed to the members or will they be ploughed back into the objectives of the organisation?

If the intention is to return any profits to the organisation in order to further that organisation's objectives, then, as you will see from this chapter, there are a number of different structures that might be suitable for setting up such a non-profit organisation.

1.3 Types of legal structure

It is important to have an understanding of the legal foundations of the organisation so that you can better understand its purposes, functions, rights and obligations, and your position within it.

There are numerous legal structures within the collection community. This diversity creates considerable complexity: Particularly in the case of government organisations, there is a bewildering range of underlying structures. In this section, we will describe the various types of legal skeleton, how they differ, and some of the consequences of those differences.

1.3.1 Examples of structures

| The variations | Examples |
|---|---|
| 1. Collections within a federal or state government department | The National Archives of Australia ² Commonwealth Serum Laboratories Museum (Vic) Prince Henry Hospital Nursing and Medical Museum, which is a part of the government department, NSW Health RAAF Museum (Melbourne) Museums and collections of the Army Museum Network (Australia-wide) |
| 2. Collections within federal or state government agencies | Reserve Bank Collection – being owned by the Reserve Bank of Australia, a body corporate that is a government authority. Noteprinting Australia: Exhibition and Display Gallery (Vic) – a collection within Noteprinting Australia, a wholly owned, corporate subsidiary of the Reserve Bank |
| 3. Collections within federal or state government business enterprises | National Philatelic Collection within Australia Post |
| 4. Collections within statutory corporations created by non-specific legislation | Performing Arts Collection and the Art Collection of the Victorian Arts Centre are examples of collections set up by a body that has its own Act and has other purposes. ³ |
| 5. Organisations created under non-specific but enabling legislation | University collections: eg the Grainger Museum at the University of Melbourne Government school collections Local Government collections: City of Melbourne Collection; the Orange Regional Gallery etc. Some such as Monash Gallery of Art exist as a section of the local municipal council but has formed its own board which has powers delegated to it by council. (It is an s |

² Created pursuant to the *Archives Act 1983* (Cth), the National Archives is an executive agency within the Prime Minister and Cabinet portfolio. The National Archives of Australia Advisory Council provides advice to the Minister and to the Director-General of the Archives.

³ The *Victorian Arts Centre Act 1979* (Vic) specifically gives the Trust the task of establishing these collecting functions (see s.5 (1) (e)-(fb)) but does not specifically establish the collections.

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| | 86 committee of the local council. It has governing powers delegated to it.) |
| 6. Collections established as statutory trusts | New England Regional Art Museum (NERAM) |
| 7. Collections established as non-statutory trusts | |
| 8. Collections within for-profit companies | Allens Arthur Robinson; Westfarmers, ANZ Bank, Macquarie Bank ANZ Banking Museum (Melbourne) Australian Cement Museum |
| 9. Collections established as not-for-profit companies | Wollongong City Art Gallery Ford Discovery Centre a museum of automotive engineering in Geelong (run by Ford Heritage Ltd) |
| 10. Collections established as incorporated associations | Melbourne Cricket Club Museum Essendon Football Club Hall of Fame Ausbuilt Maritime Museum of the Port Adelaide Historical Society Queenscliff Maritime Museum |
| 11. Unincorporated non-profit collections | Various historical societies |
| 12. Privately owned, controlled and funded, public access collections | Jill and Vic Fauser's Private Museum; The Private Museum in Upwey; Wyalong Park Private Museum (McNamara's); Squatters Rest Private Museum; Finch Family Private Maritime Museum |
| 13. Privately funded, not-for-profit collections | Museum of Old and New Art (MONA); Maryborough Military & Colonial Museum; Sherman Contemporary Art Foundation |

1.3.2 Variants 1–3 [Governmental line departments]

Collections within a federal or state government department

Collections within federal or state government agencies

Collections within federal or state government business enterprises

Some collections are simply sections or departments within a government department. They are legally indivisible from the ministry or department within which they nestle and have no separate legal existence.⁴ It is the government, through its ministry and its Minister, that owns the collection material, enters agreements on behalf of the collection and has the right to sue and be sued.

Although there will be laws that impose restrictions or safeguards on the collection (for example the oversight role of the Auditor-General) these are general and are not specifically aimed at departmental collections. They will apply to the whole of that tier of government.

Such collections are funded by the government; their staff are employees of the government. Such collections are the property of the relevant government.⁵

For example, during the 1980s, Australia Post (then a government agency) placed its historical collection of postal technology in a disused Post Office in Richmond (a suburb of Melbourne), appointed a staff member as the Curator to look after the collection, and declared the **Post Office Museum** open. In the late 1980s, however, the business structures and philosophies of Australia Post changed as it commenced the move towards corporatisation. The organisation decided that running a museum was no longer part of its 'core business'. The Museum was closed, the curator was made redundant, and the collections were put into storage. A few years later, Australia Post opened the National Philatelic Centre (a museum of stamps rather than of postal technology) in its Melbourne headquarters building because it had become aware that the stamp-collectors formed a very important part of its market. The staff of the National Philatelic Centre (and the exhibition space

⁴ Examples include defence museums and police museums.

⁵ Variant 3 (collections within government enterprises) is included in this group because its collection is not protected by legislation. It can be abolished at the whim of the enterprise's management.

that's now known as the **Post Master Gallery**) are members of Australia Post's staff and must ensure that their work integrates with the core business of the organisation. If the core business changes, those staff will have to think hard about the ways in which the heritage of stamps can be presented as part of that new core business; otherwise, their jobs may suffer the fate of the curator of the Post Office Museum.⁶

1.3.3 Variants 4–5

Collections that are statutory authorities created by specific legislation

Collections within statutory corporations created by non-specific legislation

These are collections that are either themselves statutory corporations or are created pursuant to non-specific legislation. Like the previous group, the core funding is still from the government but the organisation is expected to earn additional income from non-government sources.

All of the major government collecting institutions are structured as statutory bodies.⁷ They each have their own statute that accords them corporate status,⁸ defines its function, grants it an array of rights, imposes a number of restrictions, and outlines the structure of governance for the organisation. Although they are legally independent entities, statutory bodies are also part of the machinery of Government. Although they can sue and be sued in their own name, their chief executives and boards are still answerable to the Government (and in particular through the Minister in the portfolio or department within which they sit.)

Their employees are public servants and the collection is owned by the statutory authority. Of course, given that the statutory body is a government entity, at the end of the line, the collection is the property of government. However, the significant difference in these instances is that there is a distinct administrative and decision-making machinery responsible for the collection. It

⁶ M. Birtley, *Museums Management Materials*, Deakin University, Topic 1, Governance Systems.

⁷ This includes federal and state libraries, archives, museums and galleries. Each such institution has its own legislation.

⁸ In other words they have an independent legal existence.

is protected by its legislation and it cannot be done away with unless the parliament concurs.

Statutory bodies are controlled by a wide range of instruments: by their own statute; by the regulations and by-laws enacted pursuant to that statute; by departmental directives; by the general legislation designed to control arms of government.⁹ These vary between jurisdictions.¹⁰

1.3.4 Variant 6

Collections created under non-specific but enabling legislation

These collections do not have an independent existence: They are components of a greater statutory creature. Their statutory underpinnings are enabling rather than prescriptive: they give no guidance whatsoever as to the legal complexities of keeping cultural material. There are two very common examples:

- (a) Collections established by universities; and
- (b) Collections established by local government. The local government library, museum or gallery is merely established as a committee or division of the council and is, for legal purposes, an indivisible part of council.¹¹

Similarly, unless there is a trust or other structure superimposed,¹² the university/council collection is simply the property of the university/council.

⁹ For example, legislation that gives oversight to the Auditor-General or to an integrity oversight mechanism such as the Independent Commission Against Corruption (NSW).

¹⁰ For example, Commonwealth statutory corporations are usually directed to do things by Ministers through s 28 notices under the *Commonwealth Authorities and Companies Act 1997* (Cth) and not through a broad departmental directive. Under s 28 the responsible Minister may notify the directors of a Commonwealth authority in writing of general policies of the Commonwealth Government that are to apply to the authority. The responsible Minister must consult the directors before notifying them of the policies but the directors have a duty to ensure compliance with the policies. This is not the only way that the Commonwealth can make directives. For example the *Public Service Act 1999* (Cth) introduced a Charter of Values across the whole Commonwealth Public Service.

¹¹ Take the situation where a city council decides to stop funding its art museum or art gallery so that it can put its money into sporting and recreational facilities. The collection has no individual legal identity. The board members have little power. Assuming that council owns the collection, it can dispose of it and spend the money on swings and roundabouts.

¹² Where there is a trust, careful regard must be paid to the terms of the trust as these may have the effect of describing the purpose of the trust, limiting the powers of the trustee, and thus affecting the presumption of permanence.

University collections

In these cases the museums, galleries and libraries are generally component parts of the whole university.¹³ Most universities are statutory corporations and their power to own and operate such collections is generally set out in their legislation.¹⁴ Their primary funding comes from the central funding of the University, either directly or via a departmental structure.

Local government collections

Collections established by local government are interesting in that they only exist because of state legislation authorising the establishment of local government. The city's library, museum or gallery is merely a committee of Council and accordingly, their collections are owned by the Council.

City galleries, museums and libraries are almost always established pursuant to the generic powers granted to local councils under the *Local Government Act* of the relevant jurisdiction. The power under which these important community facilities are established, funded and administered, are usually extraordinarily general. Museums, libraries and galleries are often not specifically mentioned in the legislation at all; they are included by inference as committees established by council to deliver community services and facilities.¹⁵

¹³ To illustrate the generality of a university's power to establish an internal collection, see *Sydney University Act 1989* (NSW), ss 6 and 7.

¹⁴ If not specifically provided for, the legislation establishing a university will always have powers that are sufficiently wide to empower the governing council of the university to establish such collections.

¹⁵ For example, s [24 of the *Local Government Act 1993*] (NSW) provides:

'A council may provide goods, services and facilities, and carry out activities, appropriate to the current and future needs within its local community and of the wider public, subject to this Act, the regulations and any other law.'

Then s 355 of the Act describes (in the most general terms imaginable), how local government may exercise its functions:

A function of a council may, subject to this Chapter, be exercised:

- (a) *by the council by means of the councillors or employees, by its agents or contractors, by financial provision, by the provision of goods, equipment, services, amenities or facilities or by any other means, or*
- (b) *by a committee of the council, or*
- (c) *partly or jointly by the council and another person or persons, or*

Some of these collections can be confusing to identify. What may look, at first glance, to be local council bodies can in fact be something quite different. For example, the New England Regional Art Museum is often considered to be a part of the Armidale Dumaresq Council. Legally, it is not. Rather it is a reserve trust created pursuant to the *Crown Lands Act 1989* (NSW). As such, it has its own separate legal identity, distinct from that of the Council. Originally the Minister appointed a number of local citizens to manage the trust.¹⁶ Then the Minister removed the individuals and appointed the Council to manage the statutory trust. This has benefits and drawbacks: an obvious benefit is that the works in the collection are the property of the trust and not the local council. The drawback is that a local council can too easily forget that it is charged with management of an institution that is independent and is not simply a vassal or asset of council.

Local councils play a crucial role in the establishment and continued support of collecting institutions in the cities but particularly in regional areas. Those that are established under the Local Government legislation are part of their local council. Their employees are employees of council; their collections are the property of council. They are subject to the vagaries and influences of local politics and their governance is often subjected to political pressures that have little to do with codes of ethics espoused by the Council of Australian Museums Association (CAMA)¹⁷ or the International Council of Museums (ICOM). (But more of this later.)

(d) *jointly by the council and another council or councils (including by means of a Voluntary Regional Organisation of Councils of which the councils concerned are members), or*

(e) *by a delegate of the council (which may, for example, be a Voluntary Regional Organisation of Councils of which the council is a member).*

It is s 355 (b) that provides the non-specific legislative power that underpins most local government museums and galleries. It is for that reason that the committees that control such organisations are referred to as 'Section 355 Committees'.

¹⁶ See s 92 (6) by which the affairs of a reserve trust can be managed (a) by the Minister, (b) by a trust board appointed by the Minister (c) by a corporation, or (d) an administrator.

¹⁷ "Code of ethics Council of Australian Museum Associations" (1985); "Previous possessions, new obligations : policies for museums in Australia and Aboriginal and Torres Strait Islander peoples Council of Australian Museum Associations" (1993); "Code of ethics for art, history and science museums Council of Australian Museum Associations" (1994).

1.3.5 Variant 7

Collections established as statutory trusts

Some structures are incorporated by virtue of generic legislation such as the *Crown Lands Act 1989* (NSW). This legislation allows the Minister to establish 'reserve trust' (as do its variants in other jurisdictions). So-called 'trusts' created pursuant to legislation are not trusts other than in name. They are incorporated bodies (which true trusts are not). They are really generic statutory corporations;¹⁸ they enjoy the powers set out in the legislation; they are obliged to comply with the generic duties and restrictions set out in the legislation; they are overseen by their Minister of the Crown. In short, they are 'cookie-cutter' statutory corporations, in that the government does not need to draft individual legislation for each such statutory body.

Such collections, for example the New England Regional Art Museum (NERAM), are the property of the Crown. They are formally under the management of the Minister of Land and Water Conservation but usually the Minister delegates this responsibility to either a trust board or a corporation. In the NERAM case, the Minister initially appointed a board of trustees and later dismissed them and appointed the city council as the trustee. For all intents and purposes it seems as though the collection belongs to the city council, but it does not. Similarly, its staff are employed by the council **as trustee** for the Crown Land Reserve Trust. Abolition of the collection would require a decision of the Minister and the Minister has the power to dispose of the collection 'in such manner as the Minister considers appropriate'.¹⁹ Accordingly, the safety of a collection under such a structure is far less assured than collections created under specific legislation. Its future lies in the power of the Minister's pen.

1.3.6 Variant 8

Collections established as non-statutory trusts

In some respects, a trust is an obligation rather than a structure. It is a legally enforceable obligation that rests on a person (or group of people) who is given the legal ownership of property, either for the benefit of another or for a

¹⁸ They are generic in the sense that they do not have their own individual legislation.

¹⁹ *Crown Lands Act 1989* (NSW), s 111.

specified purpose. The trustee is the legal owner of the trust property. The beneficiary merely has an equitable interest in the property.²⁰

The structure may be provided in the 'trust deed', the written document that sets out the property, objects, powers and persons responsible for the trust. Trustees are heavily regulated and their legal responsibilities are onerous.

Beware the use of the word 'trust' as it is often misleading. Many organisations that use the word 'trust' in their name or describe their board members as 'trustees' are not, in a legal sense, trusts. For example the Art Gallery of NSW is a statutory corporation. It has its own legislation.²¹ In that legislation, the board members are called 'trustees'. This use of the words 'trust' and 'trustees' merely gives an old-world sense of security that is really a non-legal reference to the custodian role that the board members are expected to play. It does not make them trustees in a legal sense; nor does it make the gallery itself a trust. The Art Gallery of NSW is not a trust: It is a statutory corporation.²²

Similarly, the National Trust is a company limited by guarantee. It is not, in any legal sense, a trust. However, in that it is a non-government not-for-profit organisation that works to preserve the nation's heritage for both its present and future citizens, it is reasonable to call it a trust in a colloquial sense.

²⁰ This tension between legal and equitable ownership is sometimes colloquially called 'split title'. The 'split' is between control, management, and possession (enjoyed by the trustee), while benefit, enjoyment and use (enjoyed by the beneficiary). For example, the late Peggy Glanville-Hicks left her house to be used as a residence for composers. The house is owned by a trust made up of eight fine individuals. For so long as they are trustees, they are owners of the house and are responsible for its maintenance, choosing who should be composers in residence, raising money, and so on. The members of the community of composers are the 'beneficiaries'. The House is owned by the trustees, so that the composers might benefit.

²¹ *Art Gallery of NSW Act 1980* (NSW), amended 2001.

²² There are many examples of this in the cultural sector, for example the *South Australian Country Arts Trust Act 1992* (SA) purportedly establishes the South Australian Country Arts Trust. What it actually establishes is a statutory corporation that the legislation calls a 'trust'. It could have called it 'dachshund' or 'milkshake' but 'trust' has a much better ring to it.

1.3.7 Variant 9

Collections within for-profit companies

A corporate collection is an asset of the company. It does not have a separate legal entity. It is funded by company funds and tended by company employees and contractors.²³

Like other non-core assets, corporate collections may be readily sold. They are susceptible to downturns in finances, takeovers, changes of corporate ideology, issues with public relations or human resources, the death of the chief executive officer or even attacks of sports sponsorship virus.²⁴

1.3.8 Variant 10

Collections within not-for-profit companies

Several collection organisations, and almost all service organisations in the sector, are non-profit distributing companies limited by guarantee.

A 'company limited by guarantee' doesn't have shareholders – it has members. These are people who 'guarantee' that if, when the company is wound up and its debts exceed its assets, then they will contribute the (nominal) amount stated in the constitution. It is usually between \$20 and \$100.

If the organisation's budget is large and its activities are extensive, or if the organisation is to have a national or interstate focus, this option will be the first type of structure to consider. It is legally straightforward, its constitution is easy to amend so that it meets the individual needs of the organisation and it is a well-known and therefore comfortable structure.

The company owns the collection and the board of the company is responsible for its management. This is an excellent model for museums and galleries presently based within local government administrative structures: by moving the collection to a separate, not-for-profit structure, the collection is protected from some of the vagaries of council politics.

²³ A corporate collection might start as a public relations initiative to support a claim of 'good corporate citizenship'; some such collections may be the product of ego-driven competition with other corporations; others might focus on providing a beautiful workplace (or client place). Whatever the rationale, they usually come into existence because of the commitment of one or two driving souls within the power elite of the organisation.

²⁴ Some of the major corporate collections that have now been disposed of (wholly or in part) include those of Fosters; Coles Myer; BHP Billiton; WMC Resources, John Fairfax; Tempo, Orica, CUB and Shell. On the other hand there are still companies that have bountiful collections: UBS, Goldman Sachs, Macquarie Bank, Allens, JP Morgan, Deloitte, Minter Ellison, Deutsche Bank.

1.3.9 Variant 11

Collections established as incorporated associations

In all jurisdictions, special legislation has been enacted to make the incorporation of non-profit organisations with community, cultural or sporting purposes a fairly simple matter.²⁵ Accordingly this is a particularly useful structure for community museums or special interest groups. It is easy, cheap and gives the members the security of limited liability.

Generally, to be eligible to form an incorporated association the organisation must have more than a specified number of members (usually more than four), have a set of objects and rules and have a non-profit purpose.

Because Incorporated Associations were invented to give protection to community groups, they have a simple structure and simple rules. Their establishment involves little complexity and in every state, the government provides a useful website providing all the information needed to set up an Incorporated Association.²⁶ Such sites even provide model constitutions and other pro-forma documents.

1.3.10 Variant 12

Unincorporated non-profit collections

Many historical societies and special interest groups in the community are unincorporated. It might operate a neighbourhood museum; it might be a reading group or a craft group; it might be a group of collectors who share an interest in nineteenth-century porcelain or in twentieth-century art glass.

Any group of people that bands together for a specific purpose, but which does not incorporate as a company, an incorporated association or a cooperative, can be described as an **unincorporated association**. If you are unincorporated, formation is free and without formality and thereafter the group runs itself according to its own rules and settles internal disputes in its own way. It is basically a private club. It sounds ideally simple and effective, but

²⁵ South Australia, *Associations Incorporation Act 1956–1967*; Western Australia, *Associations Incorporation Act 1895–1969*; Tasmania, *Associations Incorporation Act 1964*; Victoria, *Associations Incorporation Act 1981*; Queensland, *Associations Incorporation Act 1981*; Australian Capital Territory, *Associations Incorporation Ordinance 1953*; New South Wales, *Associations Incorporation Act 1984*.

²⁶ Just Google 'Incorporated Associations' and stand back.

unincorporated bodies would usually be better served by a more considered, more certain, formal structure.

But when incorporation is simple and inexpensive, why would you remain unincorporated and expose your members to personal liability? It is not hard to imagine a member or a visitor being badly injured after slipping on wet steps or tripping on a loose board. In such a case, the injured person will seek compensation and will sue the legal entity responsible. Because the collection is not incorporated, it has no legal existence separate from its members. Accordingly, the injured person will sue the members and the assets of every member are legally exposed. It was precisely to protect community groups from this kind of situation that the state and territory governments introduced the Incorporated Association structure. It is simple, inexpensive and provides basic protection for all its members.

1.3.11 Variant 13

Privately owned, controlled and funded, public access collections

There are hundreds, if not thousands of collections that are privately owned, controlled and funded, which allow public access to the collection. Many of these are private heritage collections that have grown out of the personal interests of their owners and the collection objects are essentially assets of the business owners.

These have been a part of our culture for a very long time. The selling of tickets to see private collections curios and freaks of nature was a favourite of Victorian times and its modern manifestations extend from small private interest collections of little commercial (and sometimes little cultural) interest to hugely important and large scale operations.

1.3.12 Variant 14

Privately funded, not-for-profit collections

This is the new, big, important development. Although it has long been a feature of American collecting, it has been unusual for the wealthy in Australia to establish foundations for the exhibition of cultural material. The principal difference between these kinds of collections is the issue of ownership. Some of these collections are owned by structures in which the public participates in governance; others are more tightly, privately, controlled. The common characteristic is that they are formally structured as not-for-profit entities and gain their funding from private endowment and donations.

1.4 Working together

The foregoing discussion has tried to give you a skeleton so that you can better understand the many structural options that are available. Within each of the main types, there are variations. Further, it is often advantageous for the organisations – often with different legal structures - to work collaboratively. In these cases, the collection objectives are shared but not the structure. For example, the Sovereign Hill Museums Association is an interesting example of collaboration between differently structured collecting organisations: Notwithstanding its name, it is a not-for-profit company limited by guarantee. Moreover, although its name suggests that it is a service organisation, the Sovereign Hill Museums Association has its own collection. In addition the Association has important working relationships with incorporated associations such as the Ballarat Historical Society. In that example, the Sovereign Hill Museums Association gets access²⁷ to the Ballarat Historical Society collection (which is more broadly based in some areas, particularly in documentary records) and in return, the Sovereign Hill Museums Association manages the Ballarat Historical Society collection within its facilities. There is nothing that stops organisations having different structures from working together, sharing goals, resources, and collection material.

²⁷ Including use of Ballarat Historical Society collection material in the Sovereign Hill Museums Association public programs.