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CHAPTER TWELVE: LOANS FOR EXHIBITIONS[1]

1. Introduction

One of the features of modern collecting institutions is that they use a considerable amount of borrowed material in their exhibitions and even to augment collection displays. Exhibitions are no longer largely developed from the in-house collection. They involve more material sourced from other institutions and private collectors. They are less static, they change more often and there are more of them. Similarly, displays of the institution's own collection are sometimes augmented by loans: After all, few collections are so comprehensive that they would not benefit from the addition of some choice material held in other collections.

Accordingly, the loan-in agreement has become an essential part of exhibition development and implementation. In particular, given the complexity of managing loans, the loan agreement is the key risk management tool that drives all the mechanisms associated with administration of the loan process.

All museums develop standard loan agreement forms. The two most common documents are:

- the loan-in agreement (often also referred to as the "inwards loan agreement"), whereby the museum borrows material from a third party for the purposes of exhibition; and
- the loan-out agreement (often also referred to as the "outwards loan agreement"), whereby the museum lends an item from its collection so that another institution may exhibit it.

Many Australian institutions still use antiquated loan forms. Others rightly see the review of such documentation as a part of the core risk management strategy of the organisation.

Given that the value of the subject matter of the agreement will often be high, it is essential that the contract be simple to understand and that it carefully and precisely articulates the parties' intentions. Contracts – and the time spent on them – should not be seen as a burden but as things that play a positive role between the parties: they should act as an outward manifestation of trust, as an effective communication tool and means of uncovering areas of potential disagreement or misunderstanding ahead of problems materialising and as effective and equitable pieces of machinery to prevent or resolve disputes.

Different museums have different needs. What works for a federal institution may not be appropriate for a small community museum. Nevertheless, small institutions should carefully consider the models developed by the larger ones. This use of precedents should not be unquestioning: like so many other things, contracts do not necessarily

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get better with age or travel. Thus, cultural institutions in Australia which have adopted old American models do themselves little benefit and every institution should evaluate its agreements at least every five or so years.

This chapter provides a checklist of issues to be discussed and decided, both when drafting template loan-in and loan-out agreements and when entering such agreements.

2. Documentation

An organisation that mounts an exhibition using third party material is likely to enter loan agreements with a range of owners – private owners, dealers, and other institutions. Inherent in this is a tension: 'whose documents will we use?'

2.1 *Whose document will we use?*

There is a natural inclination of an owner to insist that the borrower use the owner's documentation: the owner can be confident in its own documentation.

The borrower, however, will prefer to use its own so that there is a reasonably consistency across all the agreements that it must administer. Many private owners who are lending a particularly valuable item may insist on using a contract drawn up by their own lawyers. These will usually be considerably more comprehensive and less free of wriggle room than the loan agreements between collegiate institutions. Sometimes it comes down to size and muscle: The bigger institution insists on having the right of way.[2]

There is no right answer and no standard protocol. One answer, however, is definitely wrong: during research for this book it became apparent that some institutional owners and lenders adopt the practice of signing two contracts – one from the lender and one from the borrower!

A moment's thought will show that this is the worst of all compromises. If there is any issue with the loan, there will be conflicting agreements with conflicting obligations, conflicting duties and conflicting procedures: In all, a fabulous result for the lawyers who get the subsequent brief but a terrible career-move for those who put their institution into such a position.

If a lender is, in principle, amenable to a loan, the appropriate first step would be for the borrower to supply a copy of the intended documentation for the lender's approval. The lender then reviews the draft and considers what, if any, changes it requires. At this stage, the lender, particularly when it is larger than the borrower, may decide that the borrower's documentation is inadequate, and rather than go to the trouble of extensive negotiation, might insist on the use of its own loan document.

Irrespective of the source of the loan documentation and notwithstanding that the practical detail of the contents will be the subject of considerable negotiation, each loan agreement will have similar general characteristics.

2.2 *Clarity and simplicity*

Ambiguity is an enemy of contract. One of the great (and underestimated) skills of good contract drafting is the ability to state the agreed terms in language that is unambiguous. Clear and simple English is essential – but simplicity is deceptive. It must not be attained at the cost of vagueness or uncertainty.

Nor is legalese your friend. It can be bad enough when used by experts but it is an ugly sight when non-lawyers try to articulate the terms of a contract in unfamiliar and non-expert legal language. Use simple, ordinary language avoiding words or phrases that might have another sense or meaning and check punctuation meticulously to ensure that it reflects the intended meaning.

[2] Perhaps it is just human nature, but it is fascinating to observe how much stricter institutions are when lending to other institutions than when seeking to borrow for themselves. "Do unto others …." may well be an aspiration, for would it not be good practice for museums borrowing from and lending to other institutions to only seek to impose on others what they would accept being imposed on themselves?

2.3 *Two further words of warning!*

Never blindly cut and paste from whatever you might find on the internet, on the basis that whatever you are using works for someone else and so therefore will work for you. You must always consider how your source document/s match up with your needs, which may be very different to those of another institution.

Second, beware of the "Chinese whispers" approach to drafting. Just using whatever agreement was used last time in your institution without checking the extent to which that agreement may have been tailored to a particular situation or particular lender or borrower carries its own set of dangers. As a result of changes being implemented for previous loans, a document can result that may contain any number of provisions that might have been tolerable for a previous loan but that may not be generally desirable. After a while, the accretion of tailored amendments to meet different situations may compromise the integrity of the original document in ways that are not obvious to the non-lawyer – and potentially dangerous for the institution![3]

2.4 *Duties owed to lenders*

The obligations of the borrower to the owner are discussed in our later chapter (chapter 34.

3. Risk management

The risks inherent in the loan relationship are many and varied: if there is a problem in handling a loan, the fallout may be legal; it may be financial; it may be political and it may damage the institution's reputation. It will always be costly in administrative time and resources and is often fatal to the relationship of trust between the borrower and the lender.

3.1 *The contract as risk management tool*

The loan agreement is not just a legal document that evidences the loan: it is the document in which the collected wisdom and experience of the parties is brought together so that foreseeable problems can be averted. Of course there is always risk in the loan relationship and no contract can eliminate that reality but the loan agreement is a key risk management tool: it can play a positive role in the relationship between the parties, cementing trust, preventing misunderstanding and providing agreed procedures for the administration of the loan.

One of the most important functions of the loan agreement is to anticipate problems that could arise during the loan period and present a framework by which those difficulties can be settled. Thus, both the owner and the borrower use the loan agreement to:

- identify the risks that attend the loan;
- articulate how the loan will be administered;
- implement a mechanism that best avoids the most likely risks; and
- prescribe an agreed protocol in the event of calamity.

These risks affect borrower and the lender (although not always to the same degree). The advantage is in identifying the risks and, together, agreeing how those risks will be met.[4]

3.2 *Private lenders versus institutional lenders*

Private owners are more risk conscious and averse than those of earlier times. Perhaps it is because a private lender has fewer pieces of exhibition quality and thus has a greater personal financial and emotional investment in

[3] To avoid this, the Christchurch Art Gallery has adopted an unusual but excellent risk management strategy. The body of the standard agreement remains intact and unamended from loan to loan but where individual transactions require that the standard terms be amended, a very simple Variation Agreement is entered. By using this strategy, the lender can be confident in the integrity of the basic terms of the contract and, if the negotiation results in amendments having to be made, they are made in an obvious, deliberate way that will not, by oversight, carry forward into future transactions.

[4] See the "scary cupboard" discussion later in this chapter.

the loan, but they tend to examine the loan-in agreement very closely and often retain their lawyers to do so. They can be more assertive than institutional lenders and are increasingly prepared to seek recourse to the law.[5]

Increasingly, high-net-worth private owners are less flexible than institutional lenders when lending their very valuable material: institutions, because they are in the business of making and receiving loans, are very familiar with the processes and are aware that long term relationships are often the best guarantee of solving a loan problem: A little give and take sometimes eases both parties through the rough passages of the loan. For private lenders who are familiar with commercial transactions, it is understandable that the negotiation of a valuable loan requires a level of attention and risk management similar to that they apply to their other commercial affairs.

3.3 *Restrictions accompanying the loan*

Some loans have quite onerous accompanying conditions that are not directly related to the loan. For example, a private owner may agree to lend provided that access to the objects be restricted, that information provided to the public about the objects be limited, that photography be prohibited. These kinds of restrictions tend to be more commonplace with private lenders rather than institutional lenders.

Before accepting such co-lateral restrictions it is important that they be given very careful consideration. It is important that the borrower not by unduly restricted in its use of the material – not just for exhibition but also use in its associated functions such as its public programs and research activities. There is a natural balance in this regard: for example, where the loan is particularly valuable or fragile it may be entirely reasonable to restrict secondary activities and thus minimise the risks associated with such uses.

Conditions imposed by the lender may be impracticable or expensive to implement, supervise and enforce but if they are not enforced, the lender will be in breach of the loan agreement. When such a breach occurs, the worst consequence is not simply that the lender may demand its loan to be returned forthwith. Less obvious, but potentially more damaging, is that the insurance policy protecting the loan may be invalidated and that the trust relationship with the lender will be destroyed.

3.4 *Value of the loan*

Whenever material is lent for exhibition, it is subject to heightened risk of damage, theft or loss. The more valuable the item is, the greater the financial risk.

High value is something that institutions are familiar with. Indeed they are often complacent. Having a middle aged and unfit person in a uniform sitting on a chair supervising a couple of rooms of paintings, is not really providing security that befits the value of the works. The answer may be that the security is geared to the degree of risk rather than the market value of the material being guarded. Indeed it may be so: perhaps the greatest danger is not from the professional thief but rather the small boy with jam on his fingers. If this is the case, it may be that the institution makes the decision to leave theft risks predominantly to the care of electronic guardians and damage risks predominantly to human supervision.

Another strategy for managing the risk of damage, loss or theft to high value exhibition material is to use exhibition design to control the degree and nature of access that the public is likely to have to the item. It is often easier said than done. In museums where the visitors expect a high degree of interactivity with the exhibition material, establishing boundaries for those expectations is a challenge. For this reason, the exhibition designer is one of the key risk management tools by which some of the loan risks can be managed.

3.5 *Clear document trails*

Tracking and managing documentation is one of the primary roles of the loans registrar. Email has certainly made this process faster but it can be a double-edged sword. On the one hand, we can communicate with people more quickly, ideal during busy periods. However, the problem of establishing a clear document trail that shows ‘who’ made ‘what’ decision ‘when’ is more problematic. The issue of security – ensuring that sender/recipient are

[5] Penny Huisman, Powerhouse Museum, ‘The Evolution of Loans Practice: Development of Procedures and Documentation at the Powerhouse’, (*Newsletter of the Australian Registrars Committee*, June 2000, 4.)

authentic – is one that we have not yet had to address, but it certainly looms. Overall, we have had to strike a balance between an outcome focussed approach and administrative perfection.[6]

This exemplifies the strain between torrential developments in communication technology and the demands of risk management. The establishment of clear document trails is fundamental to the establishment of safe loans procedures and, in this task, easier and faster communication technology does not, without modification of established administrative procedures, enhance safety and prudence of the process.

3.6 *Multi-skilled teams*

Few outsiders realise how many skills have to be integrated into the team that mounts an exhibition. Because it is so much a part of everyday life, it is almost taken for granted within exhibiting institutions – but it should not be. The team that delivers an exhibition is at the heart of the institution's risk management strategy. Every skill added to the team brings with it a greater degree of safety for the loan item, its owner and its borrower. This is already recognised in many institutions:

As well as clarifying our agreement with the lender, we also altered the way we treat the loans internally. The exhibition designer now plays a more important role in our approval process for inward loans. Loan proposals for exhibition must be submitted to design staff, conservation, curatorial and registration, and finally approved by the Director of the museum.[7]

4. Some general comments on structuring loan agreements

There are two basic styles of loan agreement: one can be described as 'body heavy and annexure light' and the other, 'body light and annexure heavy'. There is no right or wrong approach; it is a matter of preferred style.

4.1 *Annexure heavy*

Some borrowers and lenders put as much of the detail as possible into the annexures. For example, the loan–in agreement for the National Museum has a first section that is little more than a cover sheet with a place to sign. All the detail is in the annexures:

- *The unique details of the loan are set out in one annexure*: Name of lender; description of objects being lent; purpose of the loan; value of the objects and so on. This allows all of the matters that will vary from loan to loan to be provided without the need to vary that part of the document that sets out the rights and obligations that govern the loan. Keeping the variables in a separate annexure facilitates the administration of the loan and makes it easier for the subsequent computerisation of the loan details, thus improving administration during the period of the loan.

- *Descriptions of the substantial (and largely immoveable) legal rights and responsibilities are contained in another annexure*. When the legal matters are set out in a form that appears 'standard' they can appear less overwhelming (and less negotiable) than when they are contained in the body of the agreement. Their legal effect is the same; it is a matter of psychology, style, and administrative convenience.

4.2 *Annexure light*

It is the experience of some borrowers and lenders that the use of annexures is daunting – particularly where the lender is not another institution. Where material is borrowed from members of the public, a bulky contract full of legalese creates an unnecessary psychological hurdle in the loan process. The simpler the form and the language, the easier it is for the lenders to understand the terms of the loan and the easier it is for them to agree to those terms.

5. A checklist for loan agreements

Checklists are an invaluable risk-management tool when drafting agreements because they help ensure that the agreement contains everything you need.

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[6] *ibid*, at 4-5.
[7] *ibid*, at 4.

It is usual – and efficient – to work from a template (or what lawyers often refer to as a "precedent"), but it is a dangerous (even if understandable) temptation simply to review what is already there in an agreement. It is much harder to recognise what should be there but is not. For this reason, a prudent drafter will always use a checklist of issues as an aid to memory.

Checklists are invaluable drafting tools and you should personalise them so that they cover everything relevant to your needs. The following are the types of issues that will usually need to be dealt with in a loan agreement:

- parties (that is, the legal names of the people or organisation entering into the loan agreement;
- contacts or representatives for each party;
- the subject of the loan;
- the purpose for which the object is being loaned;
- where the object will be kept while on loan;
- the loan period;
- consignment details (including, if relevant, the names and contact details for couriers and carriers);
- the collection and return of the work (including who is responsible for these and relevant addresses for delivery and pick-up);
- freight and packing (including responsibilities for these and how costs will be allocated);
- the insurance value of the object and obligations relating to insurance;
- condition reporting;
- conservation;
- environmental controls and security;
- other issues relating to exhibition (such as framing, mounting, remounting and so on);
- what will happen if the work is damaged or if some disaster befalls either the work or the borrower;
- visitor photography (for example, whether it will be allowed or not);[8]
- copyright more generally (including in exhibition-related advertising, merchandising and publications);
- acknowledgements and attributions;
- warranties and indemnities (including a warranty that the lender is entitled to make the loan);
- the scope of each party's liability if things go wrong;
- obligations of the borrower in terms of custody of the work and the care it will take of the work;
- the ability of either party to withdraw the object (for example, the right of the lender to recall the work and the borrower to take the object off display);
- what happens on withdrawal of the object;
- any reporting (for example, of visitor numbers when an object is on loan for an exhibition and the provision of copies of relevant advertising, publications and catalogues);
- what will happen to the object if the lender can't be located following the loan period;

[8] Noting also in today's environment that it is extremely difficult, as a matter of practice, to stop people using their phones or other devices to take photos, including to upload to social media. So why not acknowledge this in the loan agreement? On the other hand, the banning of selfie sticks and other paraphernalia that may lead to damage of items or people is perfectly acceptable and usually quite necessary.

- how disputes relating to the loan will be handled;
- what will happen if a “force majeur” event occurs (such as a flood, riot, earthquake or war); and
- which law will apply (for example, if a work is borrowed from Japan, will Japanese or Australian law apply if there is a dispute about the loan or the work or the agreement?);

There will also usually be clauses that lawyers refer to as “boilerplate” – such as clauses stating that the agreement represents the entire agreement, dealing with how the parties can sign and exchange the agreements (for example, by electronic signature and exchanging counterpart copies by email), and what is the effect of one party “waiving” any rights under the agreement.

We discuss some of the more important of the above clauses in more detail below.

6. Some detail on the issues usually covered in loan agreements

Many issues arising in exhibition loan agreements are relevant to both the borrower and the lender. During the negotiation process, each party will need answers to the same basic questions:

6.1 *Parties*

Who is lending the object? This is not always as easy as it seems. The piece may be the property of another institution, an individual, a company, a family trust or a gallery or other agent that is acting on behalf of the owner. The borrower must assure itself that the entity offering the loan has the power to do so and has the power to sign the loan documentation.

6.2 *Subject*

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

In terms of contemporary work (and particularly new media), however, this may not be as easy as it looks! For example, depending on the nature of the relevant object or work, the subject of the loan might include anything from light bulbs to video players, USBs to power cords, and potted plants to pots of specially mixed paint. In many of these cases, it may also be important to spell out what equipment is to be supplied by the borrower. For example, if not supplied by the lender, the institution may need to provide its own projectors, computers, internet access and “peripherals” such as bulbs, cables, lenses adaptors and so on).[9]

6.3 *Purpose*

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

6.4 *Period*

How long will the borrower have control of the object? It is surprising how many large institutions neglect to include this question on their standard loan form. This simple piece of information is important to both parties.

This is particularly important in situations in which the loaned material is not collected or is unable to be returned.

First, at the end of this period, the borrower’s legal duty of care owed to the lender should reduce to those of an involuntary bailee.

Second, it is the date of the end of the loan from which all notice periods will need to be calculated. For example, if the agreement contains a provision that allows the borrower to warehouse, sell or acquire the abandoned material, the borrower must be able to comply meticulously with its time-based obligations and be able to show exactly upon what dates it acquired which rights.

[9] For new media and installation works, it may also be vital to spell out installation requirements (such as room and wall size requirements, power supply, noise and sound “bleeds” and so on), who will be installing and/or operating the object or work, and whether the subject of the loan includes an installation manual to ensure that everything occurs as intended.

Many institutions are plagued with the problem of uncollected loans – material that can never become part of the collection but which the organisation is obliged to store, insure and administer. Given that all public institutions need to maximise the effectiveness of their limited resources, it is a waste. Accordingly, it is essential that agreements also include clauses that fully articulate the respective rights of the lender and borrower should the loan material be undeliverable or never collected.

Also, so-called 'permanent loans' should usually be avoided. 'By definition, a loan is a temporary arrangement of finite duration, subject to renewal.'[10] There is no such thing as a permanent loan; it is still subject to withdrawal at virtually any time, either by the original lender, or that person's heirs. Several collecting institutions have chosen not to collect material because they already have strong holdings in that area on 'permanent' loan. However, perhaps years later, when the owners decide to take back their material the institution is left with an unfortunate gap that is often difficult and expensive to fill. Moreover, resources spent on such material are better spent on items owned by the borrower and not subject to reclamation.

For these reasons, most collecting institutions discourage long-term loans. Those that are accepted should always be subject to a loan agreement that stipulates that:

- the loan will be reviewed every three or so years;[11] and
- that it is the lender's responsibility to advise the borrower of any change of address or ownership;
- that the lender will give the borrower a reasonably long and specified period of notice before requiring return of the material;
- that the borrower can terminate the loan on a reasonably short and specified period of notice; and
- that if the material is not collected within a certain period after the expiration of that notice, the borrower may dispose of it as it sees fit and may apply the proceeds of that disposal (if any), as it sees fit.

Unless otherwise specified, most loan agreements should be very particular as to the owner's right to withdraw from or terminate the loan. Where the item is lent for an exhibition the document must be very clear that the owner may not withdraw from the loan until the end of the exhibition period. The exception is a situation where the owner reasonably believes that the loan item is endangered in some way – whether because of treatment by the borrower, threat from war or terror, or other such reason.

6.5 *Fees*

Are any fees payable to the lender? Some museums charge a fee to loan their collection objects. This becomes almost in the nature of a rental fee.

In art museums, there is a widespread custom that that living artists are paid a modest fee for the exhibition of their work. Although this fee is small, some museums refuse to pay it on the basis that by exhibiting the work they are already rewarding the artist. Others, who would see this as a somewhat paternalistic attitude, argue that they are unable to afford the additional cost. In any event, the rationale is budgetary. Accordingly, museum can take different views of this issue depending on the financing of the exhibition: When a show has corporate sponsors, it may be easier to include artist fees in the budget of the show.

6.6 *Expenses*

What are the expenses associated with the loan? What are they and who will pay them? These must be fully itemised. Nothing should be assumed.

6.7 *Delivery*

What are the collection or delivery arrangements? When? Where? How? Who pays?

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[10] John E. Simmons, *Things Great and Small: Collections Management Policies* (American Association of Museums, Washington DC, 2006) at 83.

[11] This forces both parties to regularly review the status of the loan and helps to maintain current details of owner and their address.

6.8 *Return*

What are the arrangements for the return of the object? When? Where? How? Who pays?

One common matter that should be included in most agreements is a clause obliging the lender to advise the borrower if there is any change in address of the lender or any change of ownership of the borrowed material. Many borrowers have faced difficulties when, at the end of the loan period, they discover that the material has been sold, the lender has died, gone bankrupt, gone into liquidation or simply moved. The borrower needs to know that the person giving it instructions has the authority to do so (and the basis of that authority) and needs to be assured it is returning the loan to the appropriate person, entity and place. It is exposing itself to a potential claim for negligence if it does not do so and including such notice requirements alleviates some of that risk. If the lender fails to provide such notice to the borrower in breach of its obligations under the agreement, it is more difficult for it to allege negligence on the part of the borrower.

6.9 *Maintenance and conservation*

It is clearly of concern to any owner that the subject of the loan will be treated with care. Are there any special requirements?

Although common in old-fashioned agreements, it is totally inadequate to promise a lender that the museum will 'exercise the same care in respect of loans as it does in the safekeeping of comparable property of its own'.

Where conservation is an issue, these matters must be discussed at length (and then captured in the agreement). If the work is constructed of non-durable materials, or if change or decay is in any way the essence of the work, the museum should not be obliged (and perhaps not be permitted) to attempt to prevent any deterioration or make good any damage which is attributable to that characteristic.

6.10 *Storage*

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

6.11 *Presentation*

Is the object to be presented in a particular way? Is it framed or mounted? May Perspex be substituted for glass? Are there special requirements for installation?

6.12 *Restoration*

Does the object need restoration or conservation? If so may such work be carried out? If so, in what circumstances? By whom? Subject to what conditions?

6.13 *Insurance*

Will the museum insure the object for the period of the loan? What are the details of that cover? What is the insurance value of the object? Is it 'wall to wall' insurance or does it exclude transport? Does it cover loss, theft, damage and destruction? Are there any important exceptions of which the lender should be aware? Museums must remember that insurance policies are only contracts and, as such, are negotiable. The terms of the policy must be read with pedantic care before entering the agreement. Those that do not satisfy the museum's needs must be renegotiated.

Where the material is to be covered by government indemnity, care must be taken to ensure that the exact terms of the indemnity are understood by both parties.[12]

6.14 *Copyright*

Is the object subject to copyright? If it is, who is the copyright owner? This may be important if the museum intends reproducing the work, say, in an exhibition catalogue. Care must be taken with this information for many persons filling in the loan agreement will not have the faintest idea of the laws of copyright. Many will wrongly assume that

[12] Insurance is more fully discussed in the last chapter of this book.

as owners of the material they are automatically owners of the copyright in it. As is explained in a later chapter, this assumption is usually wrong. Relying on such erroneous assertions can cost the museum considerable amounts of inconvenience and money.

6.15 *Merchandising*

Some owners are prepared to permit the loan to be used for merchandising. Others will permit it provided that they share in the merchandising income and have some degree of control over the process. Still others will not permit merchandising under any circumstances. This is applicable irrespective of whether the object is in copyright or whether the lender is the copyright owner. These conditions are contractual not statutory. They have force because they are a contractual condition of the loan.

6.16 *Attribution*

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

6.17 *Calamity*

Important loans are often, indeed usually, accompanied by extensive schedules as to what should happen in the event of calamity. It is standard practice that loans over a certain value be accompanied by such requirements. When the loan suffers a calamity, there needs to be a pre-agreed protocol so that each party knows exactly what is going to be done in such event. The lender has an obvious reason to insist that this is rigorously drafted because it is the lender's property that is at risk. Similarly, the borrower must be absolutely sure that it can comply with such expectations and obligations before entering the loan agreement. Should a calamity occur, it is essential that the borrower know exactly what to do, what it is permitted to do and how and when it must communicate with the owner. Conversely, the owner should be completely secure in the belief that the borrower knows and understands its obligation both in the way that it will treat the damaged or endangered property and in the manner and standard of its communication with you.

7. Some particular comments on outward loan agreements

The museum's collection is its core business. Moreover, the items that make up the collection are often of considerable monetary, social, spiritual or intellectual importance. They are often unique and easily damaged or destroyed. Accordingly, when collection items are allowed out of a museum, it can only be in circumstances in which all aspects of the transaction are highly controlled. The loan-out agreement is the very heart of the risk management regime and every prudent owner will need to ensure that its asset is treated in a way that reflects its value and importance.

Outward loan agreements take into account the nature and particular characteristics of the material being loaned. The concerns of a loans officer in an art museum will have some resonances for the loans officer in a natural history museum: the generic issues will be consistent. However, the natural history loan agreement will have greater emphasis on quarantine obligations, the prohibition or regulation of destructive testing, the mechanisms required by CITES legislation and the risk management procedures required by the sometimes-hazardous nature of the collection materials (or storage media such as ethanol). Each collection type imposes its own requirements on the loan-out agreement.[13]

The issues relevant to the loan-out agreement are no different from those discussed in relation to loan-in agreements: the positions are merely reversed. Each party will consider such issues from its own point of view. Yet the loan-out agreement seems to attract more time and care from collection managers and registrars than the loan-in documentation. Curious.

[13] It may also allow the collection to gain an individual kind of benefit from the loan. For example, where a natural science museum lends a quantity of material to a researcher it may require that the researcher gives the museum a copy of the article and, further, that the researcher uses the museum's numbering when referring to the museum's objects. Similarly, where loan material is largely unidentified or classified, the museum may require that all data be made available to the museum. In this way, the researcher benefits from having access to the public asset and the public interest is promoted by the enhancement of publicly available knowledge. If the researcher is not prepared to agree to the release of information because of its potential for commercialisation, the museum should consider entering a commercialisation agreement in respect of the project.

In the course of researching this chapter, a number of experienced registrars and collections managers agreed that the terms of their loan-out agreements were clearly more stringent than those imposed by their loan-in agreements. Why is it that we lend our own assets we want maximum protection but when we borrow the assets of others, we want wriggle room? The contradiction of logic is obvious.

As noted earlier, there is no rule as to how this should be resolved. Sometimes the owner insists that their contract must be used; sometimes the larger institution dominates over the smaller organisation.

Let's be clear. In every loan transaction, there is an owner who is entrusting its asset into the hands of the borrower. Why not acknowledge the obvious? It will save a lot of negotiation time if your loan-in agreement is consistent with your loan-out agreement.

8. Security from seizure legislation in Australia – the *Protection of Cultural Objects on Loan Act (2013)*

In the late 1990s and early 2000s, there were several high-profile cases involving claims or potential claims over works on loan to cultural institutions.

For example, in 1998, the Museum of Modern Art in New York was served with a subpoena for a painting by Egon Schiele, "Portrait of Wally", which was on loan to it from the Leopold Museum in Vienna:[14] the painting was the subject of a Holocaust claim. In the mid-2000s, the Russian government began to refuse to lend valuable works from state collections due to fears that claims following a commercial arbitration decision would be made on the works,[15] or that descendants of the original owners would lodge claims.

The list of people who might have claims over works include not only the above but also disputes over ownership flowing from divorce settlements, from inheritance claims and from commercial transactions such as a security claim over a mortgaged work.

While many would view tussles such as the above as primarily between people claiming ownership, spare a thought to the borrowing institution, often caught in the middle: on the one hand, if it fails to return the work to the lender at the end of the loan period, it is in breach of its contractual obligations and may be liable for damages to the lender but if, on the other hand, it fails to hand the work over to someone with a better claim to the work than the lender, the borrowing institution may be liable in damages to that person for either "detinue" (failing to hand over goods to a person with a good claim on them) or "conversion" (having dealt with the work as if it were the rightful owner).

To deal with this situation – at least in the context of international loans – many countries have enacted what are often referred to as "security from seizure" laws. These essentially protect a work from being the subject of a claim while it is on temporary loan in that country from a foreign lender.

Australia was somewhat late to the party, but now has such legislation – the *Protection of Cultural Objects on Loan Act 2013* (Commonwealth).[16]

8.1 *Outline of the legislation*

A handy guide to the legislation – which we will refer to as "PCOL" – is available for download from the relevant Department's website.[17] In brief, however, PCOL provides general protection both for the object itself (which cannot be subject to seizure while it is in Australia for temporary exhibition purposes) and for people, institutions and organisations who may reasonably handle the object or have it in their possession while it is in Australia (including

[14] See the discussion of this case in, for example, Judith B Prowda, *Visual Arts and the Law*, Lund Humphries and Sotheby's Institute of Art, 2013) at 231-236 and at http://www.commartrecovery.org/cases/schieles-portrait-wally-long-court-case.

[15] See, for example, the claims made against Russian government property by a Swiss businessman, a Mr Nessim Gaon, following an arbitration award in his favour: wwww.nytimes.com/2005/11/17/world/europe/swiss-businessman-tries-to-seize-art-in-a-dispute-with-russia.html. Paintings from the Pushkin Museum in Russia were briefly caught up in his debt recovery efforts.

[16] But for that legislation, it is doubtful that lenders such as Russia would have been prepared to lend, for example, works from The Hermitage to the National Gallery of Victoria, or Indigenous items collected by Captain Cook and held in England to the National Museum of Australia.

[17] See the "Guidelines" available at https://www.arts.gov.au/funding-and-support/protection-cultural-objects-loan-scheme.

the lender, collecting institutions, exhibition facilitators, security companies, storage owners, freighters, conservators and so on).

There are some limits to the protection given to objects under PCOL. For example:

- Objects can still be seized under Commonwealth *Proceeds of Crime* legislation and for the enforcement of some foreign judgements and awards.[18]
- Only institutions authorised by the relevant Commonwealth Minister can be protected by PCOL, and only institutions set up by Commonwealth, State or Territory legislation (or otherwise prescribed by regulations under the Act) can be protected.
- Authorisation lasts for 5 years, after which an institution must re-apply and is generally only available where the work is to be imported into Australia for no more than 2 years and where the purpose of the importation is public exhibition.
- Authorisation is not automatic and to date there is no sense that the Department merely rubber-stamps applications. Instead, there is a process to gain PCOL protection, designed to ensure that authorised institutions are both as transparent as possible in relation to what they are borrowing from overseas and have provenance procedures and practices – both for acquisitions and for loans – that are as thorough and ethical as possible.

(One might say that the legislation is in fact designed to ensure that no-one ever has to rely on the protections it offers – because any and all potential issues with an object should be flushed out by the institutions processes and procedures, including those listed below. International best ethical practice for institutions, however, has long favoured (and stated) that institutions should not collect or display objects that are ethically dubious or that have problematic provenance.[19] In a very real sense, then, PCOL forces institutions into line with ethical obligations, but with less wriggle-room!)

Positive obligations on authorised institutions that increase both transparency and ethical efficacy include:

- consulting with any individuals, groups and communities in Australia to which an object relates, to ascertain their views about a proposed loan (an obligation that has most obvious application to objects relating to Indigenous people, groups and communities, but that applies more broadly to any individual, group or community to which an object relates);
- publishing on their websites photographs of objects that are intended to be imported under PCOL, together with descriptive information and information about the lender and the provenance of the object;
- having in place enquiry and claims handling policies or procedures (again, to be available on the institution's website); and
- reporting annually to government (including in relation to any enquiries or claims made to the institution in relation to an object that has been published under PCOL).

8.2 *Lending to institutions in other countries*

The flip-side to PCOL is what happens when an Australian institution lends potentially contentious items to institutions in other countries.

In these cases, institutions should check whether the relevant country and institution has provisions that are like PCOL and that would protect the object from seizure while it is on loan in that other country. If a claim against the

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[18] For the more morbid reader, note that another exemption is where an object protected under PCOL is needed by police for evidence – for example, a Henry Moore maquette that a visitor may have used as a murder weapon!

[19] See, for example, Parts 2 and 4 of ICOM's *Code of Ethics for Museums*, (3rd ed, 2013), available for download at icom.museum/fileadmin/user_upload/pdf/Codes/code_ethics2013_eng.pdf. That said, however, the ethical standards are fashioned more on concerns over expropriated material and objects that have been illicitly removed, excavated or exported, and far less over concerns about the outcomes of business disputes or marriage breakdowns ...

loan object is a real issue, that foreign legislation must be very closely considered. It certainly should not be assumed that its provisions are equivalent to the Australian legislation.

9. The "scary cupboard" – disposing of old and uncollected loans[20]

Every collecting institution has what some registrars colourfully refer to as the "scary cupboard". This is the notional place in which are kept expired or unlimited duration loans that have been left unclaimed by lenders who cannot be located by the museum.[21] It also may have material found in the collection for which no documentation exists and material that has documentation which is perhaps ambiguous or partly missing.[22]

Such items may have little continuing value to the collection but nevertheless incur storage and maintenance costs and staff time and material resources. They create a dilemma as whether conservation resources should be committed to material that is not the property of the museum. The use to which even the useful material can be put is limited as the institution's right to exhibit, loan out, publish or otherwise use the material may be severely limited by its netherworld status.

In major institutions, it is important to deal with the problem of the scary cupboard as a special project to which specific resources are allocated. Otherwise, there are always more pressing things demanding the attention of the registrar. The process is not rocket science but it requires care and time.

First, you must undertake an inventory of the collection and reconcile the inventory with the available documentation. This will reveal inventory material for which the documentation is in some way inadequate. It will also reveal missing inventory material – items that cannot be found notwithstanding that there is documentation that establishes or suggests that the material should still be in the possession of the institution. Then the institution must undertake reasonable good faith enquiries to try and track down the owners.[23]

With each item, it is important that the institution makes a decision as to what it wants to achieve. Any negotiation as to the future of the item should always be strategically directed so that the registrar (or other person undertaking the negotiation) is sure as to the desired result.

If the owner can be found then negotiations will be undertaken to determine whether the material will be returned to the owner, whether another loan agreement will be entered, or whether the loan will be transformed into an acquisition.

If the owner cannot be found, then the institution must look to the legal mechanisms available to it, to achieve its desired end.

Irrespective of the type of bailment, a bailee has very limited rights to dispose of goods. As a general rule, disposal is one of the rights that accompany ownership. Unless there is a contract or statute that provides otherwise, the right of a borrower is limited to giving the item back to its legal owner. Disposal without authority can lead to the institution being liable for damages to the owner under the principle of "conversion" (dealing with the property as if it were the owner). Aside from legal liability, the public relations consequences to an institution if it disposes improperly of material on loan to it may be immeasurable.

There are generally four legal mechanisms for dealing with uncollected loans:

- common law
- uncollected goods legislation
- specific institutional legislation, and

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[20] For discussion of the issues concerning the disposal of material that has been accessioned to the collection (i.e. material owned by the institution), see Chapter 9: Disposal.

[21] See generally the chapter "Unclaimed Loans" in Marie C. Malaro and Ildiko DeAngelis, *A Legal Primer on Managing Museum collections*, third edition (Smithsonian Books, Washington, 2012) at 319 to 354.

[22] These may include everything from gifts, purchases, loans and commissions to exhibition props.

[23] These efforts must be documented, as it is the bailee who must be able to prove that the efforts made to find the owner were reasonable.

- contract

As we will see, the first of these is almost irrelevant to collecting institutions, the second is applicable to all Australian collections, the third is relevant to some of the statutory institutions (in particular, the state and federal ones) and the fourth is relevant to all.

9.1 *Common law*

The limited common law rights of disposal were summarised by the NSW Law Reform Commission in a 1988 report as follows:[24]

> *2.15 In some, very limited, circumstances a bailee may be relieved from liability for disposing of goods without authority. The principle of agency of necessity excuses the bailee from liability when there is an actual commercial necessity to dispose of the goods. Traditionally, the defence is confined to:*
>
> *(a) those who accept bills of exchange to be honoured by the drawer, that is, the bailee who is entitled to be reimbursed by the person for whom the payment is made; and*
>
> *(b) masters of ships in foreign ports, unable to obtain immediate instructions from the owners of the ship or cargo and in need of money for unforeseen expenses.[25]*
>
> *The defence developed to cover carriers by land, but is still limited to cases of emergency or real business necessity,[26] is for example, where the goods are perishable and it is impracticable to obtain instructions from the owner.[27] The principle also applies where goods are deteriorating or otherwise losing value, but only if the loss is serious enough to constitute an emergency.*
>
> *2.16 The courts have been reluctant to extend the classes of agents of necessity. This is well illustrated by the decision in Sachs v Miklos.[28] In that case gratuitous bailees sold Items of furniture that they had stored for three years after several attempts to reach the bailor by letter and telephone had failed. The Court of Kings Bench found the bailees guilty of conversion, and refused to accept that they had acted as agents of necessity, stating that the sale was made for the convenient running of their business (a boarding house), and not in response to any real emergency. In the course of his judgment Lord Goddard CJ said: 'in peace-time such a course would probably have landed them in no real liability for if the market value of the furniture had been obtained and had remained constant they would have had an adequate sum to hand to the plaintiff'.[29]*
>
> *2.17 It is not hard to see why the courts have been reluctant to widen the defence of agency of necessity. The defence developed as part of the specialised law of common carriers, to facilitate the smooth carriage or shipment of goods, and to deal with the unforeseen circumstances which can occur during the performance of such contracts. In cases there is rarely, if ever, any suggestion that the goods will remain uncollected by the owner. It is the intervention of factors beyond the control of the carrier and owner, such as delays, strikes and unforeseen expenses which gives rise to the agency. The concept is, therefore, of limited value when dealing with uncollected goods. By contrast, the possibility that the goods will never be claimed is the major concern of the bailee in possession of uncollected goods.*

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[24] NSW Law Reform Commission, Report 54 (1988), *Community Law Reform Program: Disposal of Uncollected Goods*, available for download at www.lawreform.justice.nsw.gov.au/Documents/Publications/Reports/Report-54.pdf.

[25] *Hawtayne v Bourne* (1841) 7 M & W 595, 600, 151 ER 905, 907; *Bowstead on Agency* (14th ed, Sweet & Maxwell, 1976) 63–4.

[26] Note 1 at 684, *Sims & Co v Midland Railway* [1913] 1 KB 103.

[27] Or in some similar category, such as livestock, which must be tended, fed and watered. See *Sachs v Miklos* [1948] 2 KB 23, per Lord Goddard, CJ at 35.

[28] [1948] 2 KB 23, followed in *Munro v Willmott* [1948] 2 AII ER 983; and see also *Jebara v Ottoman* [1927] 2 KB 254 at 270 per Scrutton LJ.

[29] 1948] 2 KB 23 at 35.

Abandonment

2.18 It is sometimes suggested that an involuntary bailee can argue that the bailor has abandoned all title and interest in the goods, thus permitting the bailee to dispose of the goods at will. While the common law recognises abandonment, the concept is of very limited application. In order to rely on it the bailee must prove that the true owner has intentionally abandoned the goods.[30] Mere accidental or negligent loss of goods does not amount to abandonment. The concept has very little application to the problem of uncollected goods, since in most cases it would be difficult or impossible to prove the requisite intent in the bailors at the time the goods left their possession. Uncollected goods are, by their very nature, merely uncollected; they are not abandoned as that term is legally defined.

So – generally, in collecting institutions, we can forget about the Common Law: True necessity is very rare[31] and strictly interpreted; and proving the requisite intention of abandonment is almost impossible.[32] Accordingly, we must focus on the legislation.

9.2 *Statutory right to dispose*

Disposal of uncollected goods legislation

All States and Territories confer a right to dispose of uncollected goods by statute. These are general legislative powers;[33] they can be used by shoe repairers and collecting institutions alike. They are only useful if the institution has ensured that its procedures comply with the conditions laid down in the statute. This is a matter of law – not common sense.

In general, the various Acts provide two mechanisms:

(i) disposal by court order, where disposal can occur after the bailee obtains a court order permitting the action; and

(ii) disposal after notice, where the disposal can take place after notice has been given to the owner.

The detailed requirements differ from jurisdiction to jurisdiction; so, each collecting institution should ensure that its procedures are compliant. By way of example only, we set out below the procedure that currently apply in New South Wales.

Disposal by court order

A bailee can apply to the Local Court for an order authorising the bailee to dispose of goods.[34] This application must be served on the bailor, the owner of the goods and on each person claiming to have an interest in the goods.[35] You do not have to give notice if you:

(a) are unaware of the fact that the person has or claims an interest in the goods; or

(b) cannot trace or communicate with the person.[36]

The court order will specify:[37]

(a) the goods to which it relates;

(b) the manner in which disposal of the goods is authorised;

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[30] See Halsbury's *Laws of England* (4th ed, Butterworths, 1973) Vol 2 at para 1510.

[31] Although there may be situations in which a loan item starts to decompose or leak and so becomes hazardous.

[32] Mere accidental or negligent behaviour is not sufficient.

[33] See *Uncollected Goods Act 1996* (ACT); *Uncollected Goods Act 1995* (NSW); *Uncollected Goods Act 2004* (NT); *Disposal of Uncollected Goods Act 1967* (Qld); *Disposal of Uncollected Goods Act 1966* (NSW); *Disposal of Uncollected Goods Act 1970* (WA); *Australian Consumer Law and Fair Trading Act 2012* (Vic); *Disposal of Uncollected Goods Act 1968* (Tas).

[34] *Uncollected Goods Act 1996* (NSW), section 8.

[35] *Uncollected Goods Act 1996* (NSW), section 8(1).

[36] *Uncollected Goods Act 1996* (NSW), section 8(3).

[37] *Uncollected Goods Act 1996* (NSW), section 9(3).

(c) the date on or after which the goods may be disposed of under the order;

(d) the amount of the relevant charges due to the bailee in respect of the goods.

Once the order is obtained the bailee can sell the goods.

Disposal after notice to bailor

There is an additional mechanism that permits a bailee to dispose of uncollected goods after giving notice to the bailee. The rules (and the degree of difficulty) vary according to the value of the goods.

For example, under the NSW legislation, goods are divided into four categories: those up to $100 in value; those between $100 and $500 in value; and those between $500 and $5000; and those above $5000.

The bailee's obligations increase in proportion to the value of the material.

Goods of up to $100 in value[38]

A bailee may dispose of uncollected goods whose value is less than $100 if the bailor:

- has been given oral or written notice of the bailee's intention to dispose of the goods, and
- has been given at least 28 days, from the date when notice was given, within which to collect the goods.

Uncollected goods may be disposed of under this section in such manner as the bailee considers appropriate.

Goods of between $100 and $500 in value[39]

A bailee may dispose of uncollected goods whose value is less than $500 (but not less than $100), if the bailor, the owner of the goods and each person having or claiming an interest in the goods:

- have been given written notice of the bailee's intention to dispose of the goods, and
- have been given at least 3 months, from the date when notice was given, to collect the goods.

Under the section, uncollected goods must be disposed of by way of public auction or by private sale for a fair value.

Goods of between $500 and $5,000 in value[40]

A bailee may dispose of uncollected goods whose value is less than $5000 (but not less than $500), if the bailor, the owner of the goods and each person having or claiming an interest in the goods:

(a) have been given written notice of the bailee's intention to dispose of the goods; and

(b) have been given at least six months, from the date when notice was given, within which to collect the goods; and

(c) if a copy of the notice has, at least twenty-eight days before the goods are disposed of, been published in a daily newspaper circulating generally throughout New South Wales.

Uncollected goods may not be disposed of under this section otherwise than by way of public auction.

Notice obligations

The notice must comply with the requirements spelled out in the Act:[41]

Notice under this Part must include:

(a) the bailee's name, and

[38] *Uncollected Goods Act 1996* (NSW), section 20.
[39] *Uncollected Goods Act 1996* (NSW), section 21.
[40] *Uncollected Goods Act 1996* (NSW), section 22.
[41] *Uncollected Goods Act 1996* (NSW), section 26.

(b) a description of the goods, and

(c) an address where the goods may be collected, and

(d) a statement of the relevant charges due to the bailee in respect of the goods, and

(e) a statement to the effect that, on or after a specified date, the goods will be disposed of unless they are first collected and the relevant charges are paid, and

(f) if applicable, a statement to the effect that the person will retain, out of the proceeds of sale of the goods, an amount not exceeding the relevant charges.

Service of the notice can be achieved either by personal service (where the person can be contacted) or by means of a letter addressed to the person and left at, or sent by post to, the person's last known address.

The untraceable or unresponsive bailor

If you cannot trace or communicate with the bailor:

- provided the goods are worth less than $5000 and you have made bona fide efforts to find and contact the person, you will be relieved of the need to give notice; but
- if the goods are valued at over $5000, you must get a court order.[42]

Perishable goods

Sometimes nature intervenes and requires that rotting or infected material be destroyed or thrown out. The legislation reflects this reality:[43]

(1) Nothing in this Part prevents a bailee from disposing of perishable uncollected goods (that is, goods that have perished or are in imminent danger of perishing) if the bailor and the owner of the goods:

(a) have been given oral or written notice of the bailee's intention to dispose of the goods, and

(b) have been given a reasonable opportunity, having regard to the nature and condition of the goods, to collect the goods.

(2) Goods may be disposed of under this section in such manner as the bailee considers appropriate.

This leaves unanswered the most obvious question: What happens where we can't find the owner or the owner is unresponsive? Given that collecting institutions are less likely (insofar at least as their collections are concerned, to have uncollected perishable goods, we can leave the answer to that to another day – though the option of seeking an urgent court order would appear an (expensive) option.

Requirements after the disposal

The money received from the sale of uncollected goods, less any authorised charges, gets paid to the bailor or, if the bailor is unidentifiable or not found, according to the legislation dealing with uncollected money.[44]

Otherwise, the record-keeping obligations are considerable but reasonable:[45]

(1) Within 7 days after disposing of goods in accordance with this Part, a bailee must prepare a record of the following particulars:

(a) a description of the goods disposed of,

(b) the date on which the goods were disposed of,

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[42] *Uncollected Goods Act 1996* (NSW), section 27.
[43] *Uncollected Goods Act 1996* (NSW), section 24.
[44] For example, in NSW under the *Unclaimed Money Act 1995*, the money would be paid to the Chief Commissioner of State Revenue. Each jurisdiction has its own equivalent legislation.
[45] *Uncollected Goods Act 1996* (NSW), s 30.

(c) the manner in which the goods were disposed of,

(d) in the case of goods that have been sold:

(i) the name and address of the person to whom they were sold, and

(ii) the amount of the proceeds of the sale, and

(iii) the amount retained by the bailee to cover the relevant charges due to the bailee in respect of the goods,

(e) in the case of goods sold by public auction – the name, and the address of the principal place of business, of the auctioneer by whom the goods were sold.

(2) A record prepared under this section must be kept by the bailee for at least 6 years from the date on which the goods were disposed of and must be made available by the bailee, on request, for inspection by the bailor or by any other person claiming an interest in the goods.

9.3 *Statutory institutions*

Collecting institutions established by statute should ensure that their founding statute permits them to dispose of this sort of material after certain precautions have been followed. Such individual provisions can give institutions powers of disposal that are better suited to collecting institutions rather than the provisions that are provided for general bailees.

There are many institutions that do not have their own statutory mechanism that provides for the disposal of uncollected goods. Most of them would be well advised to seek such a mechanism.

Institutions that enjoy their own statutory mechanisms include the National Gallery of Australia and the National Gallery of Victoria.

By way of example, s 11 of the *National Gallery Act 1975* (Cth), is set out below. It's a long section and it's detailed, but as you will notice, its procedures are tailored to meet the needs of the institution while still respecting the rights of owners. The Gallery's mechanism is far more appropriate, quicker and cheaper than the procedures provided under general legislation for disposal of uncollected goods, outlined above. Further, having the mechanism in the statute means that it does not have to be spelled out in each loan agreement that it enters.

Disposal of property left with Gallery

(1) Where:

(a) the Council wishes to apply this section to any property (including a work of art) that is not the property of the Gallery but has been submitted to the Gallery with a view to its acceptance by the Gallery or for any other purpose;

(b) the property has remained in the possession or custody of the Gallery for a period of not less than 1 year after its submission to the Gallery;

(c) in a case to which subsection (2) applies:

(i) the Council has complied with the requirements of that subsection; and

(ii) the period specified in the notice under that subsection or, if such notices were sent to more than 1 person, the period specified in the notice last sent, has expired; and

(d) the property is not the subject of a claim lodged with the Gallery by the person who submitted the property to the Gallery or by any other person who has an interest in the property;

this section applies in relation to that property.

(2) Where the Gallery has a record of the name and address of a person who has an interest in property referred to in paragraph (1)(a) or of the person who submitted that property to the Gallery, the Council

shall send by pre-paid registered post to that person or to each of those persons, addressed to him or her at the relevant address, a notice informing him or her that, after the expiration of 3 months from the date of the notice, the Council intends, unless the person who submitted the property to the Gallery or any other person who has an interest in the property lodges with the Gallery a claim with respect to the property, to deal with the property under this section.

(3) The Council may, in respect of property in relation to which this section applies, cause a notice, in accordance with subsection (4), relating to the property to be published twice, with an interval of at least 7 days between the dates of the publications, in such daily newspapers as will ensure its publication in every State and internal Territory.

(4) A notice under subsection (3) shall sufficiently identify the property to which it relates and shall state that, at the expiration of 3 months from the date of publication of the notice, the Council intends to deal with the property under this section unless, before that time, the person who submitted the property to the Gallery or any other person who has an interest in the property has lodged with the Gallery a claim with respect to the property.

(5) Where:

> *(a) the period of 3 months specified in a notice under subsection (3) that has been published for the second time has expired; and*
>
> *(b) the property to which the notice relates has not ceased to be property in relation to which this section applies;*

the Council may:

> *(c) if the property is a work of art and the Council wishes to acquire it for the national collection – request the Minister to approve its acquisition for the national collection; or*
>
> *(d) in any other case – request the Minister to approve its disposal in accordance with this section.*

(6) Before approving of the acquisition of a work of art in accordance with a request under paragraph (5)(c), the Minister shall obtain a valuation of the work of art from an independent expert.

(7) Where a work of art the subject of a request under paragraph (5)(c) has not ceased to be property in relation to which this section applies, the Minister may, by notice published in the Gazette, approve the acquisition of the work of art for the national collection.

(8) Upon the publication in the Gazette of a notice under subsection (7) the work of art to which the notice applies is, by force of this subsection:

> *(a) vested in the Commonwealth; and*
>
> *(b) freed and discharged from all interests, trusts, restrictions, obligations, contracts, licences and charges;*

to the intent that the legal estate in the work of art and all rights and powers incident to that legal estate are vested in the Commonwealth.

(9) The Minister shall, on behalf of the Commonwealth, transfer to the Gallery for inclusion in the national collection a work of art referred to in subsection (8).

(10) Where property the subject of a request under paragraph (5)(d) has not ceased to be property in relation to which this section applies, the Minister may approve the disposal of the property and advise the Council accordingly.

(11) Where the Minister has advised the Council of his or her approval of the disposal of property and the property has not ceased to be property in relation to which this section applies, the Gallery may:

(a) cause the property to be sold by public auction; or

(b) if the Council determines that the property is valueless or that for some other reason it is not practicable to sell the property by public auction – cause the property to be disposed of otherwise than by sale or to be destroyed.

(12) For the purposes of a sale or other disposal of goods under subsection (11), the Gallery shall be deemed to be the absolute owner of the property.

(13) The interest of every person in a work of art to which a notice published under subsection (7) relates is, on the date of acquisition of that work of art, converted into a right to compensation against the Commonwealth.

(14) Parts VII and IX of the Lands Acquisition Act 1989 apply in relation to a right to compensation referred to in subsection (13) as if:

(a) that right were an entitlement to compensation under section 52 of that Act;

(b) a reference in those Parts to an interest in land were a reference to the legal estate in the work of art to which that right relates; and

(c) a reference in those Parts to the Minister were a reference to the Minister administering this Act.

(15) Where a person satisfies the Council that he or she had an interest in property immediately before the property was sold by virtue of subsection (11), the Gallery shall pay to the person such amount as it considers appropriate having regard to the interest that person had in the property but not exceeding the amount by which the amount of the proceeds of the sale exceeded the amount of any expenses incurred by the Gallery in connexion with the storage and sale of the property.

(16) No action, other than an action under the Lands Acquisition Act 1989 as applied by subsection (14), lies against any person by reason of any act or thing done in accordance with this section.

9.4 *Contractual right to dispose*

Institutional borrowers know what a problem uncollected loans can be. They also know that this problem commonly arises because, during the loan period, lenders change their names, sell their interests, go out of existence, have a fire or change their addresses. Given the expense and inconvenience of the problem caused by such things it makes sense that the loan agreement, as a matter of course, should contain provisions that anticipate such foreseeable problems.

The failure to collect material at the end of the bailment period is a clearly foreseeable problem in many institutions. Because this is so, any bailee of third party property would be well advised to include a mechanism in its agreements to deal with uncollected property without having to comply with the vagaries of legislation.[46] In particular, the bailee should Include mechanisms that

- put an obligation on the lender keep in regular contact with the borrower;
- that require the lender to formally advise the borrower if certain events occur; and
- permit disposal after certain procedures have been fulfilled or attempted.

[46] Where there is an agreement, the terms of the contract take precedence over any legislation. For example, s 6(i) of the *Uncollected Goods Act 1995* (NSW) states: "*This Act is available for the disposal of uncollected goods where there is no agreement between the parties on the means of their disposal. If there is such an agreement, this Act applies to any aspect of the disposal of those goods that is not dealt with in the agreement*". In such a situation, the museum acquires its disposal right by means of the contract. Its powers are limited to those granted in the document.

In such a situation, the museum acquires its disposal right by means of the contract. Its powers are limited to those granted in the document.[47]

However, where there is no contract, or the contract is silent on the issue of what happens to uncollected material at the end of the loan period, the borrower must look to legislative solutions.

9.5 *Special legislation for collecting institutions?*

There is no legislation in Australasia that provides a general mechanism by which all collecting institutions can deal with their scary cupboard. Perhaps this is because the large institutions generally have a mechanism in their individual statute – but this provides no succour to those museums that are not so endowed.

In the USA, the Registrars Committee of the Mid-Atlantic Association of Museums in 1995 decided that museums needed special legislation and drafted model to be used.[48] The purpose of this draft legislation was to:

> *Encourage both museums and their lenders to use due diligence in monitoring loans;*
>
> *Allocate fairly, responsibilities between lenders and borrowers; and*
>
> *Resolve expeditiously the issue of title of unclaimed loans left in the custody of museums.*

It set out a number of obligations for both the lender and the borrower. For new loans, the museum was obliged to make and retain written records of the loan including the lender information, a description of the property, the beginning and end date of the loan. It had to provide the lender with a signed receipt or loan agreement. For old loans, the museum was obliged to update its records if the lender informed it of changes in contact information or ownership of the property and had to inform the lender whenever renewing or updating information about the loan.

As for the lender, it was obliged to notify the borrower of any change in address or of a change in ownership. Usefully, it stipulated that the successor of a lender is responsible for establishing ownership, thus relieving the museum of the burden of proof.

As for the mechanism that it provided for converting old loans, as would be expected, the museum was required to make a good faith search for, and attempt to contact, the lender. As in Australia, the mechanism provided for actual notice and deemed notice (by publication). It set out timelines and what the museum had to establish in order to acquire full ownership of the property.[49]

Legislation dealing with the issue (including legislation modelled on the 1995 model) has been adopted in a number of the US states.[50] Interestingly, while the legislation in the various Australian states and territories generally require uncollected goods over a certain value to be sold, a number of the US states approach the issue by vesting title in the goods in the collecting institution once the relevant procedures have been followed.

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[47] For example, where an art museum is hosting a competition such as the Archibald Prize, the contractual terms of entry should always give the institution the right to dispose of works that remain uncollected after a certain time has expired. For further, more commonplace commercial examples of this, consider the conditions on the back of laundry and dry cleaning tickets.

[48] Jeanne Benas and Jean Gilmore led the task force and Ildiko DeAngelis (then of the Smithsonian Institution General Counsel's office), was consulting counsel.

[49] For further commentary on the 1995 RC-MAAM Model legislation, see Rebecca Buck, '*Found in Collection'*, and Ildiko DeAngelis, '*Old Loans'*, in Rebecca Buck and Jean Gilmore, *Collection Conundrums: Solving Collections Management Mysteries* (American Association of Museums, Washington DC, 2007).

[50] See https://www.arcsinfo.org/programs/resources/legislation/old-loan-abandoned-property-disposition for a list of the states, and links to the relevant legislation.