

CHAPTER FOUR: ACQUISITION OF COLLECTION ITEMS¹

1. Introduction

Whenever a collecting institution acquires an object it undertakes a bundle of obligations including storage, maintenance, conservation, insurance, security, documentation.² Each of these adds to the demand on its resources and so it essential that it develop acquisition procedures that are considered and carefully articulated. Attention given to acquisition procedures is essential to good governance of the collection – and thus the institution.

2. Basic Methods

The basic methods of acquisition are:

- purchase;
- gift;³
- bequest;
- exchange;
- legal deposit (for specified libraries); and
- field collection.

The first four of these are legal transactions; the fifth results from legal obligations; the last may be affected by a range of legal considerations. All of them have the effect of acquiring the title in the object for the collecting institution.

3. Considerations

Irrespective of the method of acquisition one must consider:

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² Note that this discussion is focussed on material to be accessioned into the permanent collection. Large museums acquire many non-collection objects such as props and education collections. The due diligence issues are often minimal, or quite irrelevant, with such acquisitions.

³ Whether under the Cultural Gifts Program, or otherwise.

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- relevance of the item to the institution's mission statement and acquisition policy,
- the ethics of the acquisition, and
- assurance as to title and provenance.

Once it has been determined that the material is appropriate, the issue is to determine and implement the method of acquisition.

Where the acquisition is by means of purchase, gift, bequest or exchange, the narrow legal issue is whether the parties have concluded a clear and enforceable transaction that reflects their unambiguous intentions. The primary intention of the participants is that ownership should pass from the present owner to the collecting institution. That may be attended by many other consequent intentions whether they be commercial terms or idiosyncratic conditions, but the root of the transaction is the passing of ownership from one party to the other.

4. Due diligence

4.1 General comments

The technical legal issues are sometimes easier to satisfy than the ethical ones: For example, whether or not the collecting institution owns the human remains in its collection may be answered quite easily from the legal perspective but whether or not it should own them, may be a more difficult matter. (That said, where documentation is limited, proving legal title to an item can be quite difficult.)

Given that provenance is so often imperfect, there is inevitably an element of risk in acquiring collection material. These matters can come back to haunt one's successors.⁴ It is a risk that must be considered. It is a matter of judgment. Given the nature of some collection material, if some risks were not undertaken, much important material would be lost.

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

Sometimes the issue is not 'who is the owner?' but 'what can be done with the item?'

How do you overcome the difficulty of disposing of an object that has been lent to the collecting institution and whose owners (or heirs) cannot be found? In such cases the institution has only the right to possess the material, not to dispose of it (for this can only be done by an owner, not a mere bailee). Many collecting institutions are stuck holding material in their storerooms that they would rather divest but lack either a contractual or a statutory right to do so. This is one of the reasons that long-term loans are discouraged. It is also one of the reasons that collecting institutions established by statute should always contain a provision in their Act which empowers them to dispose of such material after a certain length of time and after certain enquiries have been made.⁵

By way of contrast, other types of complexity may be relevant to material collected in the field. For example, such items may be affected by laws relating to: ownership of apparently abandoned goods; shipwrecks,⁶ fauna flora and specimens found on private, leasehold, public or other lands; heritage, cultural property and export/import laws; and laws governing items taken contrary to statute, regulation or licence. All of these raise complexities as to the legal title that can be claimed for material collected in the field.

⁴ For example, every major art gallery in Australia has had to review its collection in light of the international proliferation of claims made by descendants of the owners of works stolen by the Germans during World War II, and those with Asian art (and particularly objects from India) have had to reassess the provenance of items in light of the arrest of prominent dealers, including Subhash Kapoor.

⁵ See chapter five for a discussion of deaccessioning issues.

⁶ This is of particular importance to maritime archaeology collections which are affected both by Commonwealth and State legislation but also by similar legislation in other countries.

In almost all cases, illegality has a detrimental effect on the enforceability of title – and the professional practice of recording and publishing the time, place and circumstances of the field collection may well provide concrete evidence of the illegality surrounding the acquisition. (We hasten to add, however, that this should not be read as suggesting that the practice should be abandoned. To the contrary, the practice can greatly assist the professional assessment of all relevant legal and ethical issues and, where a problem is identified, its resolution.)

4.2 *Acquisition documentation*

In undertaking any acquisition, there is no substitute for carefully drafted writing. The quality of the collecting institution's agreements and records may not be called into issue for years, but when they are, the lawyers representing the interests of the claimants will subject them to detailed and aggressive scrutiny.

What does one do when faced with a patron's heir who says that the valuable collection verbally given to the collecting institution was really only a long-term loan? Or when the work turns out to be a fake or to have been misattributed? What if it is alleged that the source of the item did not have the right to sell or donate it? What if the collecting institution has failed to comply with the necessary formalities because a non-expert drafted its forms?

Claims relating to collection items never take into account the fact that the staff were over-worked and under-resourced; nor that they were acting in good faith; nor that what was done was in accordance with common practice at the time the item was acquired. Each case is determined by its own merits and circumstances. Each document is subjected to critical analysis. It either works or it doesn't.

Too many collecting organisations have collection material in which, if tested, they could not prove ownership. Indeed, the truth is troubling. For example over the years, particularly before the emergence of the professional collection managers, some institutions entered long-term loan material in their acquisition register as though they owned it. It is a liability that is completely hidden from the public and the auditors – but it is a liability nevertheless. Indeed, in the course of research for this book, it was evident that many major collections claimed ownership of material in which they had never obtained legal title. Sometimes the documentation on the file is poorly drafted, confusing, ambiguous or simply absent. Sometimes it has just been misunderstood.

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

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

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

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

- an acquisition register in which all material acquired by the organisation is formally noted and described;
- a documentation file that contains either the original or copies of all of the documentation supporting the decision to acquire the material (including provenance due diligence enquiries, information and materials,

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

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

⁹ See extensive discussion of this topic in the later chapter, "Loans for exhibition: The Scary Cupboard: Old and unclaimed loans".

the internal assessments as to the compliance of the material to the organisation's Acquisition Policy, and the contract, deed or other documentation that evidences the manner and the terms by which the acquisition was achieved).¹⁰

So what is it that acquisition documentation must establish?

4.3 *Establishing provenance and title*

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

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

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

5. Provenance and authenticity

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

5.1 *Representations by the Seller as to authenticity*

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

A little later, in *Power v. Barham*,¹⁴ the defendant sold four pictures purported to be by Canaletto. They were not. Here the purchaser won. One judge distinguished the earlier case on the ground that Canaletto was a more modern painter and that therefore one could be expected to actually ascertain the work's authenticity and not merely give an opinion! The importance of the case was that the judges decided that the proper approach was to look to the ordinary meaning of the words used at the time of the transaction to see whether, in all the circumstances, they implied a warranty of genuineness or whether they conveyed only a description or expression of opinion.¹⁵

¹⁰ To assist, the organisation should have a series of carefully drafted standard forms. At the very least it should have a standard Deed of Gift form and a standard Purchase Agreement. Examples of these are set out later, though it is always best to ensure that the ones you use take into account all those legal issues and developments that are likely to be relevant to your particular situation, as well as developments in best practice.

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

¹² This is always subject to statutory intervention, including where relevant statutes of limitation apply.

¹³ (1797) 2 Esp 572.

¹⁴ (1836) 4 Ad & E 473.

¹⁵ For a recent Australian case, see *McBride v Christie's Australia Pty Ltd* [2014] NSWSC 1729 (4 December 2014), in which Christies was held to have made false representations in relation to the authenticity of a painting, allegedly by Albert Tucker, but in fact a forgery.

It should also be noted that words written on the receipt are not, in themselves, sufficient. One must look to the words used at the time of the transaction together with the receipt, to see if a warranty as to authenticity has been given.¹⁶

The difficulty in providing a warranty varies from item to item. It is easy to prove that a diamond is a diamond but far harder to prove that an egg is by Fabergé. On the other hand, most reputable dealers are prepared to sign such warranties because their preparedness to stand behind their word is one of the factors upon which they base their business.

5.2 *Certificate of authenticity*

Where the purchase does not involve a full written contract or even a particularly descriptive receipt, it may be appropriate to require of the vendor a Certificate of Authenticity. These are commonly given by vendors of fine art, multiples and fine prints and take the form of a document that certifies such matters as authorship, genuineness, title, size, process, relevant dates, signature, and so on. By issuing a document that sets out the basic features of the object and signing as to the truth and accuracy of those details, the vendor promises that the item is what it is purposed to be. It doesn't make the details any more true than they inherently are. Rather, the certificate becomes a contractual term of the transaction and, accordingly provides the purchaser with evidentiary proof of the intentions of the parties should it become necessary.¹⁷

Certificates are not necessary when you have a full written contract documenting the transaction because you would include such matters in the contract. However, they remain useful for smaller transactions in which a full contract may be seen as over-kill.

5.3 *Warranty as to authenticity*

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

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

(i) two or more experts as to this medium and period agree that the Work/Object has been misattributed or is a forgery or counterfeit or does not comply in some other material way with its description stated herein; and

(ii) the Buyer provides notice to the Seller of its intention to return the Work/Object within four weeks of the date of purchase; then

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

5.4 *How to undertake due diligence prior to acquisition*

'Due diligence' is a phrase that is commonly used in the corporate world. It is considered a basic part of good governance. All decisions involving a major expenditure of corporate resources are preceded by a rigorous examination of the risks and obligations that are involved in the transaction. The price, so often the focus of superficial enquiry, is merely one of the many matters that must be taken into consideration.

We set out below some of the questions that any institution might address when considering acquisition. Although there are important common themes, each institution should develop its own due diligence protocols in light of its own particular needs and characteristics.

(a) Compliance with acquisition policy

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

¹⁶ *Hyslop v. Shirlaw* (1905) 42 Scot.LR668.

¹⁷ There is no legal obligation in Australia for vendors to provide a certificate of authenticity. This is not the case in other jurisdictions. In particular, many states in the USA have such legislation.

Does the intended acquisition comply with the institution's internal Acquisition Policy?

(b) *Relevance*

Irrespective of the beauty, rarity or value of the material, is the material within the intended scope of the collection?

Are there other collections that are better suited?

(c) *Necessity and desirability*

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

(d) *Importance*

Not all collection material acquired by institutions is "important" in the sense that it is rare, valuable or precious. It may be all of these things but most collections will need collection material that can't make any substantial claim to importance. Sometimes it's just really useful.

Some institutions do have rigorous requirements of "importance" – particularly in respect of material that they are considering for accession to their permanent collection. Even then, it must be recognised that the concept of 'importance' is a subjective one and it is essential that the person within the institution who is recommending the acquisition be able to put in writing his or her argument as to why the material is important to the collection.

(e) *Quality*

Quality is not necessarily analogous to importance. A quality object is not necessarily important – it may be a wonderful example of something commonplace. It is perhaps more unusual for the truly important not to have quality. Again it is a subjective matter and it is important that the proposer of the material be able to articulate why an object is of "sufficient" quality that its acquisition is warranted.

(f) *Condition*

The state of repair of the material is always significant but is in itself not determinative. Rarity may mean that it is important that the institution acquire an example irrespective of its condition. On the other hand, for something to be of 'museum standard' usually implies that it is the finest example available to the collection.

Sometimes the purpose for which the material is being acquired will determine the importance of condition. An item that is being considered for acquisition for the permanent collection will have a considerably higher bar to jump than if it were being considered for a research collection or teaching collection.

So, has a condition report been undertaken? Is it in accordance with the expectations of the institution? Is the condition of the material appropriate for the collection into which it is intended to be accessioned?

Does the material require restoration? If so has it been costed? What other issues attach to any restoration that is required?

(g) *Conservation requirements*

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

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

(h) *Proposed use*

What is the intended use of the material?

Some material may be appropriate for the permanent collection. Other material may be only suitable for subsidiary purposes such as the research or the teaching collection. It is important to examine how the material is going to be

used within the institution for this will help determine the priority that should be accorded the acquisition. If it is for research, the acquisition of duplicate examples is not only common; it is often essential.

(i) *Is the acquisition financially responsible?*

What are the direct costs of the acquisition?

Given the acquisitions budget, are the direct costs of the acquisition justifiable and, how is the acquisition going to be funded?

Assuming that the material must be paid for and further assuming that the institution does not have the cash on hand to fund the purchase, what prudent legal mechanism can be adopted to reserve the material for the collection without entering a legally binding commitment to acquire it until the funding is in place.

What are the indirect costs of the acquisition? Have the run-on costs such as storage, transport, insurance, personnel, restoration, documentation, been taken into account.

Given the operations budget of the institution, are the additional run-on costs justifiable and funded?

(j) *Provenance*

Has the provenance of the material be satisfactorily established?

Provenance is important for purposes of cultural history but it is also important for providing evidence that can be used to prove legal title – the right of ownership.

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

(k) *Legal title*

Has the seller established that it has title to the material?

Is there a full description of the current owner of the item and the means by which they became the owner?

What proof has been provided of that ownership?

Are there simple enquiries that might be made to test the story? (For example if a biographer offers for sale the diary of her now-dead subject, the institution considering the acquisition should at least make enquiries of the subject's executor to establish whether the claim of ownership is reliable.)

Have the basic enquiries been made to check that the material has not been reported as missing or stolen. (For example, where a work of art is being purchased other than from the artist, has reference been made to the Art Loss Register?)

Did the material originate overseas? If so, was the material legally removed and exported from its place of origin?

Is it legally present in Australia?

Is there anything about the answers to these questions that indicate legal niceties or ethically tortured constructions? Some great institutions, leading curators and prominent board members have been all suffered greatly when harsh light has been applied to questionable transactions. This is one area in which standards have greatly changed in just a few years. There are now rigorous ethical standards imposed on collection transactions.¹⁸

(l) *Identity of the source*

Who or what is the source of the material? You cannot afford not to know.

¹⁸ The cavalier days of the Metropolitan under Thomas Hoving now make great yarns but are very dangerous templates for modern professional standards. Indeed, consider the sleep patterns enjoyed by Marion True and the chairman of the Getty since that particular scandal was revealed.

If the material is being purchased: “Is the vendor of substance and of established reputation?” This is relevant to the establishment of legal title, the enforceability of warranties given by the vendor and also the ethical reputation of the institution.¹⁹

The related (but distinct) question is to ask: “Has the seller established that it has all the rights necessary to undertake the transaction? For example, is it selling in its own right or as an agent, executor or trustee? If the vendor is not acting in its own name, who is the actual owner?”

(m) *Conditions*

Are there any conditions affecting the title that the collecting institution would usually expect to enjoy? Preconditions in the acquisition transaction can seriously affect what the institution does with the item: how it is exhibited or used; what public access is permitted and so on. These matters are always important to the acquisition decision.

If there any conditions associated with the acquisition do they affect provenance? Title? Right or ability to exhibit?

Does the institution have the legal power to agree to those conditions?

Even if it does have the legal power, why should it agree to the conditions?

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

(n) *Documentation*

How will the transaction be documented?

Who is responsible for preparing that documentation?

Should this be prepared ‘in-house’ or does the value or complexity of the transaction require outside counsel?

(o) *Copyright*

If the material is protected by copyright, does the transaction include any assignment or licence of those rights?

If so, has it been established that the vendor of the material also is the owner of the copyright?

(p) *Warranties*

Is the vendor prepared to give a warranty as to the truth of its promises and an indemnity against any loss suffered as a consequence of any breach of those warranties?

For example, when the Getty approves the purchase of an object the vendor will be required to warrant for a period of 48 months from delivery of the object that:

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

(While we understand that it has been the practice of the Getty to only ask for these warranties for 48 months from delivery of the object, there is no reason why such warranted should be limited by reference to any particular period of time, particularly as information may only come to light years after an acquisition.)

¹⁹ If an artefact is purchased from a *tombaroli* or from a dealer in antiquities of dubious reputation, the status of the object and the ethical reputation of the institution, the director and the curator may well be tarnished. Nowadays, such matters can particularly attract adverse media comment, and will rarely play well with sponsors and funders (including governments).

If a seller or donor is not certain of any particular fact or information, then, if there is no real concrete basis on which they could possibly give it, it may even be better that they don't provide that particular warranty. Collecting institutions need to be particularly careful of being lulled into a false sense of security in relation to provenance, and of relying on a warranty (which might be all too readily forthcoming) where there is no real basis for providing one. In each case, a collecting institution should assess whether, given all the other known information about the object, it feels comfortable that all relevant risks have been both identified and considered and that, despite any gaps, it is comfortable in the acquisition.

(q) *Delivery*

How will the material be delivered?

Who is responsible for organising delivery?

Who is responsible for paying for delivery?

(r) *Does the acquisition comply with the highest standards of professional ethics?*

To answer this, a separate due diligence enquiry must be made. The time has passed when institutions could close their eyes to issues of illegal export, holes in the chain of title and ethical dilemmas that may nevertheless affect the acquisition notwithstanding that the process is actually lawful. It is often said that there is a difference between The Law and Ethics and it is never truer than in the acquisition of collection material.

Remember that ethics change. The collection of human remains was, at one time, commonplace enough in Australian institutions. Nowadays completely different attitudes apply.

If the material is to be imported into Australia, what enquiries have been made to ensure that the material was or will be legally exported from its country of origin? What enquiries have been made to ensure that the material is being legally imported into Australia? Has the smell test been applied?²⁰

With some types of material it is important to consider whether it was scientifically excavated. This may well determine its usefulness as a collection item and may be the first indication that there are ethical issues attaching to the acquisition that must be settled.

Are there any circumstances attached to the acquisition that may attract accusations of conflict of interest on the part of persons connected with the institution (such as staff, board members, sponsors, donors, suppliers...)?

If there are problems found as a result of such enquiry, what is the monetary exposure of the institution?

Does it represent a danger to the reputation of the institution either amongst the professional collection community or the public?

(s) *Approval procedures*

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

(t) *Announcement, Exhibition and Publication*

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

(u) *Publication of Due Diligence Checklist*

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

(v) *Final test*

²⁰ For example, if a collecting institution is considering an Italian antiquity that is a common focus of the *tombatori* – and the purchase is to be through Switzerland ...

Because we are all inclined to be kind when evaluating our own decisions, prudent institutions might implement a three-fold test:²¹

- Have we actively questioned the item's provenance?
- Are we prepared to make conspicuously available for public inspection its complete and accurate provenance?
- Are we able to produce and publish records of each step taken throughout the acquisition process?

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

5.5 *When authenticity is in issue*

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

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

A. PAINTINGS AND DRAWINGS

The following checklist may help elicit critical data for authentication.

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

B. PRINTS

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

1. *The name of the artist and basic biographical data.*

²¹

See www.savingantiquities.org/f-culher-museums.htm.

2. *A description of the print (including the size of the total edition, the serial number, and the condition and state of the print).*
3. *The date of the execution of the plate (or stone, or wood block, etc.), the date of the impression, and the date of the artist's signature.*
4. *The process used in making the print (woodcut, etching, lithography, silk screen, etc.)*
5. *Has the seller represented that the product is not a reproduction, that it meets the tests of an "original print" as defined by the Print Council of America, and the artist's signature is genuine?*
6. *How many editions of the print were made? Have editions been made in different colours? How many prints in each edition? Are there any outstanding prints, such as artist's proofs, which have not been included in any edition?*
7. *Was the artist also the printer? If not, was the print made under the artist's supervision? Who besides the artist participated or collaborated in the production of the plate and the print?*
8. *Who has possession of the plate (or stone, or wood block, etc.) from which the print was made? Has the plate been marked or cancelled to show that the original edition has been completed? Has the plate ever been substantially reworked?*
9. *Did the print ever serve as a book illustration or was it ever a page or an insert in a magazine?*
10. *What rights, if any, has the artist reserved in the print, whether by copyright protection or otherwise?*
11. *Is it possible to obtain from the artist or his representative a certification as to any of the foregoing items that the purchaser considers relevant?*
12. *Are there historical records relating to the print to establish a provenance?*
13. *What collateral evidence of authenticity is available, such as catalogues, advertisements, collecting institution and gallery records, etc.?*
14. *Are there any available records of cleaning, restoration or other treatment?*

C. SCULPTURE

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

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

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

D. ANTIQUES

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

6. Legal title

Given that provenance is so often imperfect, there is often an element of risk in acquiring collection material. As the establishment of the provenance is the starting point for proving legal title, where the collecting institution decides to acquire an item despite an imperfect provenance, it must realise that it is also making a decision to acquire the item without provable legal title. Is the item so crucial to the collection that you are prepared to spend resources on an item to which you can never fully prove ownership? It is a risk that **must** be considered. It is a risk that can come back to haunt.²²

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

6.1 Principles

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

The acquisition of title in a collection object is no different in principle, merely more complex and thus more difficult to effect with prudence. We don't ask ourselves whether the grocer had the right to sell the milk. The subject of the transaction and the transaction itself are so commonplace that we assume that the product labelled 'milk' and found

²² For example, provenance may be clearly established but the legal title revealed by that provenance may be flawed (for example, because of the taint of a forced acquisition during the Holocaust period).

in the 'milk section', is milk, and that the grocer has the right to sell it to you. Collecting institutions are not entitled to make the same assumptions in the acquisition of collection items.

Inherent in the transfer of title there are a number of legal landmines.²³ At its simplest, ownership is a bundle of rights. When we say that we own something, we are using a shorthand way of saying that we have the right to loan it, sell it, destroy it, exhibit it, pawn it, or do anything we like with it.

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

The basic rule is that a donor or vendor can pass no better title than he or she possesses. Thus the recipient takes the chattel subject to any infirmities of title.²⁴ It is this principle that underlies the numerous claims being made throughout the world in respect of art that was looted by the Nazis during the Second World War. There are many complex issues inherent in establishing such claims but the claims are all based on the basic principle that the right of the current owners are defective because they have bought the works from vendors who did not have good title to the work.²⁵

Although the Nazi loot issue is one that primarily affects art museums, less epic but similar situations occur quite commonly in most collecting institutions. Resolving requests for the return of collection material bought by or given to the collecting institution, is part of the business of administering collections. These disputes are time consuming, expensive and can be damaging both to the collection and to the reputation of the institution. They are best avoided by making rigorous chain of title enquiries prior to making the decision to acquire.

6.2 *Practical Approaches*

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

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

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

How this is best achieved will always be the subject of debate and no one procedure will guarantee title however the most effective way to ensure that the institution is protected is to devise a due diligence checklist for the acquisition of material.²⁶ That said, generally, the acquisition documents should, where possible:

- state the basis of the acquisition; i.e. whether it is a gift, a bequest, an exchange or a purchase;
- contain a statement from the source of the object as to how he or she came to have it; and

²³ The intricacies of these were explained at length in *The Problem of Obtaining Proper Legal Title to Objects Acquired by Museums, Historical Societies, Art Galleries and Archives* by Eutick and Cordato (Museums Association of Australia). This is not a simple book, for it deals with a complex legal area. However, all administrators should study and understand it. The following discussion does not purport to deal with the subject in such a comprehensive fashion.

²⁴ There are exceptions to this general rule and these, along with many examples, are discussed in Eutick and Cordato, referred to above.

²⁵ It is perhaps the self-evident morality of many of the claims that has prompted the judiciary to adopt legal interpretations on matters such as Limitation of Actions that permit such claims to be brought.

²⁶ See our comments elsewhere in this chapter on due diligence.

- contain a warranty from the source that he or she has the right to do what is being done.

6.3 *Defective Records*

Despite the best efforts of current collection administrators, most collecting institutions have material in their possession for which the documentation either is ambiguous, only partial, or entirely missing.

Each such item must be treated individually. Whilst there are mechanisms for dealing with uncollected loans,²⁷ there is no one right approach. Where the documentation does not unambiguously establish the institution's title in the material, nothing can cure that defect except either better documentation or a court's decision.

In any event, the institution is usually reluctant to raise the issue with potential claimants. It does not want the embarrassment of having to admit that its documentation is less than perfect and that its claim to its collection material is unassailable. In taking the 'do nothing' approach it is tacitly agreeing to continue to carry all of the burdens and expenses of retaining collection material without complete assurance of ownership. This sits uncomfortably with modern understanding of good governance. A better approach is to look at each such item (either individually or as a class),²⁸ and consider the exact flaws in the title and decide what the institution wants to achieve. Once the goal has been determined, then a strategy can sensibly be formulated. Sometimes, the aim will be to expunge the material from the collection; with other items it may be to ensure that desired material will stay permanently within the collection; for still others, it may be to restore material to its rightful owner. The list goes on.

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

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

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

6.4 *Basis of the acquisition*

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

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

²⁷ See our chapter on loans.

²⁸ If you are dealing with an individual artwork, you would undertake an individual consideration of the issues; but if it was an enormous collection of material such as an archive of a company being given to a collection, you would undertake a more wholesale approach. It is a matter of assessing the risk and balancing it against the potential benefits.

6.5 *Basis of the transferor's rights*

Persons donating or selling material to the collecting institution, usually do so in good faith. They truly believe that they have the right to give or sell the object. All too often, the institution's personnel rely on that good faith and fail to ask basic questions such as, "How did you come to own this object?" This is particularly important when the object is a family heirloom (because competing claims by relatives are common) but also is an essential part of the provenance of the object. Simply asking the right questions frequently identifies defects in title. If the answers are not quite right, the alarm bells should ring. Further investigation will be required.

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

6.6 *Warranties*

Collecting institutions frequently fail to insist on warranties in their acquisition documentation. This omission can be costly. It is not just the purchase price that is at risk. These other costs may include transport, insurance, the cost of any conservation procedures, the administrative costs of accessioning and the costs associated with simply storing and protecting the object. All of these will be wasted if the title acquired by the title is successfully attacked. Moreover, the legal processes involved in a challenge to title are themselves expensive. Given this, the collecting institution is well advised to include in its acquisition documents a warranty as to title that will enable it to recover some of its losses if something goes awry.²⁹

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

I hereby warrant that I am the owner (or agent of the owner) of the item described in this (purchase agreement/deed of gift etc.) and have the right to enter this transaction. I also warrant that I hereby transfer full legal and equitable title in the item to the museum.

If my title is defective I agree to

(i) return the purchase price plus (12%) interest computed from the date of the sale, or the fair market value of the item as of the date the title's invalidity is declared, whichever is the greater; and

(ii) indemnify the museum against any awards, expenses, costs or any other like losses incurred as a result of the defectiveness of title.

If the item has been imported into the country it would be wise to include a clause warranting that it has been legally exported from its country of origin.³⁰

²⁹ For example, see *Menzel v. List* 267 N.Y.S. 2d 804, 49 Misc. 2d 300 (1966), aff'd 28 A.D.2d 516, 279 N.Y.S. 2d 608. In 1962, Mrs Menzel, the owner of a Chagall painting stolen by the Nazis in 1941, sued Mr List, the current owner of the work for return of the work. Mr List had purchased it in good faith from Mr Perls, a collector who in turn had purchased the work from a Paris dealer in 1962. The defendant argued that the Statute of Limitations had expired. The Court disagreed. It held that the limitation period did not commence until the date upon which the present 'owner' had been asked and had refused to return the work. Mrs Menzel got her Chagall back, Mr List was successful against Mr Perls, and Mr Perls was left to seek redress against the Paris dealer. It was an expensive exercise in the importance of establishing title.

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

Note also that how statutes of limitations apply (and are interpreted) can vary from country to country, so you should always get legal advice on your own particular situation should the issue arise.

³⁰ This is discussed at greater length in our chapter on the repatriation of cultural material.

I further warrant that the export of the item from any foreign country has been in conformity with the laws of such country and that its importation into Australia was in conformity with the laws of Australia.

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

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

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

6.7 *Statutes that affect title*

There are many statutes that affect title, including those relating to the illegal export of cultural property, laws protecting shipwrecks; laws protecting flora and fauna; laws protecting historic places and property. The collecting institution must be alert to the particular issues raised by these statutes whenever it is dealing with material that is likely to attract such protection. Again, the most effective way of limiting risk is to ask the right questions and listen critically to ensure that the answers are comprehensive and credible.³¹

6.8 *Contractual conditions that affect title*

Some donors attempt to attach conditions to gifts. Most collecting institutions strenuously resist accepting gifts with conditions: such conditions are too easy to breach. For example, if a donor gives an object on the condition that it be exhibited no less than once every 10 years, what is the legal status of the object if the collecting institution fails to honour the condition? It is highly likely that such failure can terminate the rights of the institution and expose it to a claim from the owner (or his or her estate).³²

It is wise for the collecting institution to have a policy that prohibits the acceptance of gifts with conditions. It is also prudent that it have a mechanism by which that general policy may be reversed in individual and special instances. This procedure "should state who has the power to approve exceptions and what written records must be kept to explain each exception. As a safeguard, the acquisition policy should require that a deed of gift for a restricted gift should be counter-signed by an official authorised to approve exceptions and that evidence of the restriction should always be on file with the accession records".³³

7. Legal deposit

Under the Copyright Act 1968, a copy of any work published in Australia must be deposited with the National Library of Australia. Many states have similar legislation, under which copies of material are deposited with the relevant State library (or other institution/s).³⁴ Once the material is deposited with the relevant collecting institution, it may generally be used in exactly the same ways as any other material acquired by that institution.

Given that the legislation benefit only the collections of a handful of institutions, we do not deal with it further here.

³¹ In Australia, there is no statutory equivalent of *The Dealing in Tainted Cultural Objects (Offences) Act* that was passed in the United Kingdom in 2003. Introduced at a time when the sale of treasures looted from Iraqi museums was a matter of public controversy, the purpose of this Act was to inhibit illegal sales in the London art market. See www.culture.gov.uk/cultural_property/illicit_trade.htm.

³² How do you overcome the difficulty of disposing of an object that has been lent to the institution and whose owners (or heirs) cannot be found? In such cases, the institution has only the right to possess the material, not to dispose of it for to do so can only be done by an owner, not a mere bailee. (A bailee is a person who has the right to possess something without being its owner. For example, a person who borrows a book from a friend has the right to possess the book but does not become its owner.) Many collecting institutions are stuck holding material in their storerooms that they would rather divest but lack either a contractual or a statutory right to do so. This is one of the reasons that long-term loans are discouraged. It is also one of the reasons that collecting institutions established by statute should always contain a provision in their Act, which empowers them to dispose of such material after a certain length of time and after certain enquiries have been made.

³³ Marie C. Malero, *A Legal Primer on Managing Museum Collections* (Washington DC, Smithsonian Institution Press, 1985) at 104.

³⁴ See: *Copyright Act 1879* (NSW); *Libraries Act 1988* (Qld); *Libraries Act 1982* (SA); *Libraries Act 1988* (Qld); and *Libraries Act 1988* (Vic).

8. Donations

Overseas, many collecting institutions were initially brought into existence by generous collectors who decided to open their private collections to the community. This is not historically the case in Australia, where (with the exception of the Museum of Old and New Art in Hobart) all of the most important collecting institutions are federal, state or local government institutions. However, some of these would never have come into being had it not been for the determination and generosity of private philanthropists.³⁵ Generally, Australian collecting institutions look to philanthropists to enhance their collections. At a time in which acquisition funds are limited, institutions have to develop their donor programs if their collections are to grow in size and quality.

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

- the power to accept donations;
- the degree of desire for the object; and
- the means by which legal ownership of the material will be secured.

The second of these considerations is essentially a curatorial matter – tempered by the priorities of the collecting institution as articulated in its acquisition policy. The following material focuses on the collecting institution's power to accept gifts and how best to secure a gift, for these are legal matters.

8.1 *Power to accept gifts*

The collecting institution only has the power to do things permitted by the instrument that governs it. For example, a collecting institution established by a State or Federal government will have its own, individual legislation. That statute (or its attendant regulations) will invariably provide a specific power to accept or refuse gifts.³⁶ Usually, the statutory provision that provides the power to accept gifts will specify that any gift must be accepted in pursuance of the institution's objects or functions.³⁷ Thus a natural sciences collection may not have the legal power to accept the gift of a vintage motorcycle, even if it were inclined to accept it.

By contrast, collecting institutions established by local governments do not have the benefit of having their own individual legislation and are established pursuant to more general powers provided by the legislation that establishes and governs the operation of the relevant council. While the relevant Local Government Act will grant the local council the power to establish a museum, gallery or library, it will never provide specific powers such as that to accept gifts.³⁸

Such powers are, however, implicit, for they are essential to the operation of the permitted function. Accordingly, any restrictions as to the power to accept gifts may be found in the relevant enabling legislation.

Indeed, they provide little more than the general and they vary so much from State to State that the best advice is to contact the relevant local government authority, in writing, and ask it to advise of any such restrictions.

³⁵ For example, the Orange Regional Gallery in NSW is hugely indebted to Mary Turner who both fought for the establishment of the museum and donated many of the key works in its collection. Similarly, the National Gallery of Victoria benefitted enormously from the bequest of both artwork and property by Alfred Felton, while the State Library of New South Wales benefitted from significant donations by both Sir William Dixson and David Scott Mitchell. More recently, the National Gallery of Victoria has benefitted from significant donations of works from Joseph Brown, and various regional galleries and the Art Gallery of South Australia have benefitted from significant donations from William Bowmore.

³⁶ For example, section 30 of the *Museum and Art Gallery of the Northern Territory Act 2015* (NT) spells out a power for the Board to accept gifts, grants and bequests.

³⁷ These objects or functions will also be specified in the statute.

³⁸ For example, the *Local Government Act 1999* (SA), provides in section 7 that a local government body may “*provide services and facilities ... including ... cultural services or facilities*”; section 3C of the *Local Government Act 1989* in Victoria provides that, in achieving the “*best outcomes*” for a community, a local government should have the objective of improving “*the overall quality of life of people in the local community*” and a function of “*planning for and providing services and facilities*”.

Collecting institutions that are non-profit companies or incorporated associations will have to examine their articles or constitutions and ensure that they have the power to accept donations.³⁹

8.2 *Approval of gifts*

One of the day-to-day difficulties for curators is that they are frequently approached by kindly, generous or powerful people who wish to donate material. The pressure to accept unwanted donations can be enormous particularly where the potential donor is rich or influential. For this reason, it is essential that, in addition to an acquisitions policy, every collecting institution have a protocol for dealing with such offers.

A common approach is for all offers of gifts to be channelled through the registrar or the director. They will prepare a recommendation (often for the board, which may have the responsibility for approving gifts). No staff member should indicate that a gift might be accepted until the relevant person or body has considered it.

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

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

- the gift complies with the accessioning policy of the organisation;
- the decision is made according to an ethical procedure free of duress and conflict of interest;
- the decision makers are appropriately informed and expert;
- the acquisition is prudent given the finances and other resources of the collecting institution (having regard to any ongoing costs associated with the display or storage of the item and any costs related to conservation).

8.3 *Ordinary gifts*

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

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

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

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

³⁹ If this reveals that the collecting institution has been accepting gifts without having the legal power to do so, the board should immediately take steps to have the powers amended to include such a power, and then ratify their earlier decisions. Companies limited by guarantee can amend their constitutions through the means set out in those constitutions; statutory organisations will have to take the relevant steps to lobby their minister to have their enabling legislation amended.

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

There are three situations for which standard forms should be developed:

- for where there is no intellectual property being gifted;
- for where the donor is giving the institution both the item and the copyright in it; and
- for where the donor is giving the item, retaining the copyright but granting the institution a licence to use the copyright

The first (a deed of gift without any gift of intellectual property) may be used where the gift is of material in which there is no copyright⁴⁰ or in which the copyright has expired⁴¹ or where the donor does not own any of the relevant copyright. It might also be used where a donor does own copyright, but does not want to donate any copyright ownership or licence.

From time to time, however, the donor of the object also owns the copyright in it. Sometimes the donor is prepared to donate the copyright as well as the object: sometimes not.

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

This form must make it absolutely clear that the donor intends that the collecting institution is to receive full legal ownership so that the rights of the collecting institution are unquestionable. The form should be signed by the donor and the institution, and should contain words such as the following:

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

Once the gift is complete, it cannot be revoked.

8.4 *Future gifts*

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

It is not uncommon for a patron to seek to leave material with a collecting institution on the understanding that it will be later given or bequeathed to the collecting institution.⁴² Then the patron has a change of mind, or dies without giving the necessary instructions in the will, and the collecting institution is asked to return the material that it had expected to keep. This is not merely a matter of disappointment; the collecting institution will have expended resources on the object that it may not have been prepared to apply, had it known that its possession was to be only temporary. Moreover, public collecting institutions are established for public purposes and it is questionable whether it is proper to apply those resources for private purposes.

⁴⁰ These may include flora, fauna, mineral samples and so on.

⁴¹ These may include very old drawings, paintings, photographs, sculptures, three-dimension objects of craft or design such as clothing or furniture, print music, books, photographs, recordings, films and so on.

⁴² A controversial example of this was the housing of the Sackler collection of oriental art at the Metropolitan Museum: for many years the Met essentially paid to warehouse a collection that was then gifted to the Smithsonian Institute. See the article in the September 1978 edition of *ARTnews* by Lee Rosenbaum entitled "The Met's Sackler Enclave: Public Boon or Private Preserve?".

A deed that records an intention to pass the physical possession of the gift at a later date should be registered (including on the Personal Property Securities Register).⁴³ Non-registration does not affect the validity of the gift as regards the collecting institution and the donor, but it is risky because, unless it is registered, it may be defeated. In particular, an unregistered deed of gift (and an unregistered interest in the relevant object/s under the *Personal Property Security Act*) may be voided by any creditors of the donor.

8.5 *Conditional Gifts*

(a) *The Condition Must Be Legal*

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

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

- conditions precedent must be fulfilled before the passing of legal title in the gift can be complete;⁴⁴ and
- conditions subsequent are those that bind the donee after the gift is complete.⁴⁵

If a condition precedent is breached, title never passes and the donor remains the owner. If a condition subsequent is breached then, subject to any contrary intention expressed in the deed, the gift is at an end and, thereafter, the collecting institution will only hold the item as a trustee for the donor. Such conditions can be very onerous on the collecting institution and they are frequently honoured largely in the breach. This is very dangerous because it exposes the collecting institution to claims for the return of the gift.

(b) *The collecting institution must have the power to accept*

Careful consideration must be given to the statute or rules which govern the collecting institution to ensure that the power to accept such gifts is present, and if so, whether there is any binding procedure that must be adopted.

In most statutory collecting institutions, the decision to accept a conditional gift is one that only the board or trustees can make. Some have delegated this to the director, but in no case should the decision be made at curatorial level. The obligations imposed by such conditions can haunt an administration long after the curator has gone to greener pastures.

(c) *Tax deductibility as a condition*

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

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

(d) *Detailing the Conditions*

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

⁴³ Section 184C of the *Conveyancing Act 1919* (NSW), and cognate legislation in the other states and territories provides for registration of deeds but such registration no longer provides for priority over other interests. Rather, to ensure priority, collecting institutions should consider whether or not they should register their security in relation to the relevant property under the *Personal Property Securities Act 2009* (Cth): see, generally, <https://www.ppsr.gov.au>.

⁴⁴ For example, "I will give you this collection if you name the new wing of the collecting institution after my grandmother".

⁴⁵ For example, the condition that the item be on permanent display.

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

(e) *Filing*

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

All documents should also be scanned and securely archived electronically, in case originals are lost.

9. Exchange

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

9.1 *Exchange between public collecting institutions*

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

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

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

9.2 *Exchange between public collecting institution and dealers*

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

No collecting institution can afford the odour of scandal, whether established or merely alleged. All sources of funding, whether governments, patrons or sponsors, are sensitive to such matters and in attempting to save money by acquitting material by exchange, the benefits may be massively outweighed by any public controversy.

9.3 *Procedure*

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

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

9.4 *Formalities*

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

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

- a description of object A;
- a statement that a condition report on object A has been annexed to and forms part of the contract;
- a warranty by owner A that the description of object A is correct and that upon delivery, the condition of the object will conform with that described in the annexed condition report;
- a promise by owner A that it is the owner of all rights in, and title to, object A;
- a promise by owner A that it knows of no adverse claim in respect of the object A;
- a statement that owner A intends to pass all rights in and title to object A to owner B;
- mirror description and promises by owner B concerning object B;
- a statement as to any agreed arrangements concerning delivery;
- a statement that makes it clear exactly when the titles will pass (for example it may state that title will not pass until each party confirms in writing that it has gained possession of the other's object and that the object conforms with the condition report);
- a mechanism by which the parties can undo the deal in the event that one party does not get its item – either at all, or in the condition described in the condition report annexed to the agreement.

In relation to the last of these points, what will happen if one of the items is destroyed during transit? One party gets a new collection item and the other gets nothing. To avoid this, it would be prudent to include a term by which the parties promise that:

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

10. Bequests

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

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

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

10.1 Commonly occurring problems

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

(a) *Inadequate or Inaccurate Description*

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

(b) *Unsuitable Gifts*

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

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

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

It should be clearly stated here that there is no obligation on any beneficiary (including a collecting institution) to accept an unwanted bequest. If the bequest does not comply with the institution's accessioning policy and procedures, it should be refused.

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

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

(c) *Dealing with living patrons*

Where possible, when a patron informs the collecting institution that he or she intends to leave a bequest to the collecting institution, it is important that the director views the intended gift and discusses the situation with the patron. With a modicum of diplomacy, many problems can be averted: Unwanted bequests are best headed off early. The patron must be made to feel appreciated but the institution must seek only to acquire objects that are within its accessioning policy, without any attendant detritus that would otherwise cause expense, inconvenience and even scandal.⁴⁶

One of the techniques often used by directors with their patrons is to explain that, while a particular object is not required by their institution, it may be appropriate and desirable to another institution. Assistance in making that referral may be all that is required to save the day.

(d) *Deeds that take effect on death*

⁴⁶ Deaccessioning the unwanted material at a later date is not an answer, for it is likely to undermine the trust of the institution amongst its other patrons. No collecting institution can afford to have a scandal that may affect its relationship with its numerous potential benefactors. They are horses that are easily spooked. See our next chapter, on deaccessioning.

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

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

(i) *Completion of Gift Dependent On Condition Subsequent*

With this type, the item is gifted to the institution but the gift does not actually mature (and thus ownership does not pass) until the death of the patron.⁴⁷ In other words, for the gift to be complete, the patron must die. The transaction is final (in that it cannot be reversed) but its completion is contingent upon and its timing determined by, the occurrence of the later event.

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

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

(ii) *Immediate gift but delayed possession*

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

Whichever option is adopted, the institution will need to ask: 'What are the consequences of the decision for the institution?' Perhaps the most important consideration is the duty of care to the intended collection item. When the institution becomes the owner of the item, irrespective of whether it has possession of it, it assumes the obligations of ownership and has a duty of care towards the item.⁴⁸ Accordingly, if the gift is to be immediate but possession is to be delayed, the parties must negotiate a protocol for the care of the item. Those conditions should be included in the Deed of Gift.⁴⁹

In both options, the trigger is death: that is the event that perfects the gift – either by completing the pre-condition to the gift or by triggering the hand-over of physical possession.

11. Purchase

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

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

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

⁴⁷ In other words, death is a precondition of completion of the gift.

⁴⁸ At the very least there is a duty to ensure that it the item is appropriately conserved and exhibited.

⁴⁹ These issues may be dealt with by side letters but it is better to include them in the principal document because of its formality and the rigour of its drafting. The gravitas of the form makes it more likely that the patron will acknowledge the importance of such terms and thus make it more likely that they will be honoured. Further, in the highly unlikely event that they were not and the institution has to act to protect the item, enforcement will be legally, if not diplomatically, a more straightforward matter.

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

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

- Has the approval for the transaction been through all of the necessary decision-making procedures of the institution?
- Does the item comply with the Acquisition Policy of the collecting institution? Is it within the intended scope of the collection?
- Is the material required or desirable?
- Is the acquisition financially responsible?
- Does the acquisition comply with the highest standards of professional ethics?
- Has the provenance of the material be satisfactorily established?
- Has the seller established that it has title to the material?
- Has the seller established that it has all the rights necessary to undertake the transaction? (e.g. is it selling in its own right or as an agent or a trustee?)
- Are there any conditions affecting the title that the collecting institution would usually expect to enjoy?
- If the material is copyright, does the transaction include any assignment or licence of those rights? If so, has it been established that the vendor of the material also is the owner of the copyright?
- Is the transaction to be appropriately documented? Are the people responsible for such documentation sufficiently experienced and fully briefed?
- Is the vendor prepared to give a warranty as to the truth of its promises and an indemnity against any loss suffered as a consequence of any breach of those warranties?
- How will the material be delivered? Who is responsible for organising delivery? Who is responsible for paying for delivery?

12. Collaborative acquisition methods

It is perhaps one of the features of modern collecting institutions that they are collaborative in ways that, even forty years ago, would not have been considered appropriate, or indeed have been considered at all. The benefits of collaboration have been well enumerated.⁵⁰ Examples include collaborations between:

- museums and other collecting organisations such as libraries;
- museums and schools;⁵¹ and

⁵⁰ See, generally, the writing of Stephen Weil in books such as his *Making Museums Matter* (Smithsonian Institution, Washington, 2002).

⁵¹ By way of example:

Museum with school: the NY City Museum School (See: <http://www.newyorkmetro.com/urban/articles/schools01/school4.htm>). Here, students from 6th to 12th grade learn traditional curricula by using the resources of collecting institutions such as South Street Seaport, the Children's Museum of Manhattan, American Museum of Natural History, the Jewish Museum and the Brooklyn Museum of Art, and their professional methodologies: Students use the Museum Learning Process (observe, question, research, analyse, synthesise, present and reflect).

Museum with school and library: the Strong Museum in Rochester NY, which in traditional terms is a toy museum, also combines a museum school and a library. The Gelsner Library, situated within the Strong Museum, is a branch library of the Central Library of Rochester and Monroe County. Museum guests may use a public library

- museums and public broadcasters.⁵²

Collaborations at the institutional, structural and functional levels provide institutions with an opportunity to demonstrate that the combination is more vital, relevant, inclusive, accessible and creative than its constituent parts. The legal negotiations and structures that under-pin such collaborations are beyond the scope of this book to discuss in detail. However, if those legal foundations are not clearly articulated, the collaboration will surely fail when subjected to pressure. Sometimes these arrangements are little more than funding arrangements;⁵³ sometimes they are, in effect, joint ventures.⁵⁴ Sometimes the collaboration involves a merger of two existing entities into one new one. These are complex transactions and it is pointless to talk about them in generalities. Each instance will have its own catalysts, drivers and imperatives.

On a more modest level, collaboration is also evident in object acquisition and collection development. Given the expense of museum-quality material, several collecting institutions have negotiated sharing relationships.⁵⁵ Rather than facing the difficult and lonely task of raising the money necessary to purchase a collection item, some institutions are co-operating to share both the cost and the ownership of a desired item.

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

12.1 *Joint purchase and ownership*

In 1980 the Smithsonian Institution's National Portrait Gallery and the Boston Museum of Fine Art jointly purchased Gilbert Stuart's portraits of George and Martha Washington for \$4,875,000. Then in 1981 the Getty Museum combined with the Norton Foundation to jointly purchase Poussin's Holy Family for \$4,000,000.

None of this was particularly new: In 1973 the Louvre had combined with the Metropolitan Museum of Art to jointly purchase a medieval carved ivory comb depicting the Tree of Jesse. This illustrates the point that international boundaries are no impediment to joint purchase.

There are several Australian examples of acquisition co-venturing. For example, John Glover's painting Mount Wellington and Hobart Town from Kangaroo Point was bought jointly by the National Gallery of Australia and the Tasmanian Museum and Art Gallery;⁵⁶ and in 1991 the manuscript of Patrick White's novel, *The Memoirs of Many in One*, was jointly purchased by the National Library of Australia and the State Library of NSW. In this latter case, each institution has a colour microfilm of the original for primary access, and the original moves from one library to the other as it is needed.⁵⁷

With all such deals it is essential that the parties work out an arrangement so that everyone can enjoy the fruits of the venture.

By way of example, consider the problems of negotiating the deal between five art museums in the State of Washington that jointly purchased a collection of American drawings and works on paper that would have been beyond the means of any one of them. The basic rules of their consortium were as follows:

- the life of the consortium is to be 99 years;

card to borrow children's titles, family favourites, parenting books, and volumes related to museum exhibits. Books may be returned to the museum or to any Rochester public branch library: (See <http://www.strongmuseum.org>)

⁵² See, for example, the announcement by Mr Greg Dyke, Director General of the BBC that the BBC was going to make its enormous program archives available on-line, free of charge. He said: "I believe that we are about to move into a second phase of the digital revolution, a phase which will be more about public than private value; about free, not pay services; about inclusivity, not exclusion": http://news.bbc.co.uk/1/hi/entertainment/tv_and_radio/3177479.stm.

⁵³ For example, the long-lived collaboration between the State Library of NSW and the Law Foundation of NSW. The latter funds a law library within the State Library so that the public has access to legal information and tools.

⁵⁴ Which is where each organisation retains its own identity but where each supplies various services or facilities to the common purpose.

⁵⁵ At law these would be called either loan agreements or joint venture agreements.

⁵⁶ See: <http://artsearch.nga.gov.au/Detail.cfm?IRN=141634>.

⁵⁷ For example, for exhibition or close examination of the original by a researcher.

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

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

12.2 *Standing loan joint ventures*

This technique differs from the above because each participant owns outright its portion of the individual parts. This is particularly useful where a work has been fragmented.

For example, the head of an alabaster neo-Sumerian statue had been separated from its torso. The Metropolitan owned the head and the Louvre owned the body. In 1974 the parties came to an agreement by which the work could be reunified and exhibited as a whole. Each retains ownership of its own portion, and the right to exhibit the whole work rotates every three years.⁵⁸

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

By way of an example only, and intended to tease out the issues in such a transaction, the following points could be covered in a joint venture agreement:

- a statement setting out the background to the agreement, including a summary of the purpose of each participating organisation and the reasons they are participating in the joint venture;
- the scope of the joint venture;
- how long the joint venture is to last (including any extensions and whether or not those extensions will be automatic);
- the share each party will have, and a statement as to what assets each will own;
- how any profits will be dealt with (for example, from touring or exhibition fees, or from merchandise);
- if any trade mark is applied for, who may apply and register and that the ownership of the mark will be in the joint names of the parties;
- how the venture will be managed (for example, through a management committee, and how that management committee will be appointed);
- the powers of any management committee in relation to decisions relating to the subject matter of the joint venture (including in relation to conservation and outward loans);
- how decisions will be made by any management committee (for example, whether these must be unanimous or whether a majority decision can be binding);

⁵⁸ For another more recent example: in early 2016, the Musée Guimet in France gave Cambodia a stone sculpture of a head on long-term loan (to be fitted again to the torso from which it had been separated), while Cambodia loaned the Musée Guimet the original base of to another statue in the Museum's collection.

- how any management committee will report and what performance indicators it might use;
- how the joint venture will be financed;
- how costs will be managed and borne;
- which party will have initial possession of any object that is subject to the joint venture, and for how long;
- when the other party will acquire possession and for how long;
- how any object that is subject to the joint venture will be dealt with when neither party wants to exhibit it;
- arrangements for transport, packing and unpacking;
- insurance issues;
- condition reporting and how any damage, deterioration or loss will be handled;
- what liability each party will bear to the other and the extent to which a party in possession will indemnify the other;
- access to objects when they are not in one party's possession;
- what acknowledgements are to be given (for example, in credit lines and in catalogues);
- what copyright and reproduction issues arise and how third-party rights will be handled;
- whether a party may assign, selling or mortgaging their interest in the joint venture or whether there is a prohibition on this without the consent of the other party or parties;
- how the joint venture may be terminated;
- how disputes will be resolved;
- what happens on termination of the joint venture (including in relation to objects); and
- whether the parties must keep any or any particular information confidential.