

## CHAPTER SIX: DISPOSAL<sup>1</sup>

### 1. Introduction

Even where the deaccessioning procedure is carried out to the highest ethical and legal standards, the purpose and manner of disposal is crucial. Controversy about deaccessioning is, more often than not, a controversy about the appropriateness of the time, manner and purpose of the disposal.<sup>2</sup>

### 2. Disposal policies

The decision to dispose of a collection item, and the means selected to actually dispose of the item, must be based on clear criteria that are published either as part of:

- the statute or constitution that governs the institution; or
- the institution's collections management policy (as approved by the governing body).

These criteria (and the related procedures for disposal) should be incorporated in the institution's collections management policy.<sup>3</sup> Such policies require that the decision-makers:

- demonstrate the long-term local and general public interest served by any intended disposal;<sup>4</sup>
- recognise the interests of people who made, used, owned, collected or gave items in the collections in the selection of the mode of disposal;<sup>5</sup>

<sup>1</sup> First published on 24 December 2008, updated October 2016 by Shane Simpson and Ian McDonald. Panel of Experts for the first edition: Ms Margy Burn, Director, Australian Collections & Reader Services, National Library of Australia; Mr Michael Crayford, Assistant Director, Collections and Exhibitions, Australian National Maritime Collecting institution; Professor Graham Durant, Director, Questacon National Science and Technology Centre; Ms Caroline Lorentz, Manager, Loans, Historic Houses Trust of New South Wales; Mr Tim Sullivan, Deputy CEO and Collecting institutions Director, Sovereign Hill Collecting institutions Association; and Mr Alan Ventress, Director, State Records Authority of New South Wales.

<sup>2</sup> Note that this chapter does not deal with the disposal of material that does not belong to the institution. Where the institution is not the owner, it is a bailee. That situation is discussed in detail in our chapter dealing with unclaimed loans).

<sup>3</sup> See clause 6.11, *Code of Ethics for Museums*, Museums Association UK, 2002.

<sup>4</sup> See clause 6.1, *Code of Ethics*, Museums Australia, 1999: 'By definition, one of the key functions of a museum is to acquire objects and keep them for posterity. Consequently, there must be a strong presumption against the disposal of any items in the collections of a museum'.

<sup>5</sup> See clause 6.3, *Code of Ethics*, Museums Australia, 1999:

*6.3: Even where general powers of disposal exist, a museum may not be completely free to dispose of items acquired: where financial assistance has been obtained from an outside source (e.g. government grant-in-aid, friends of the museum organisation, private benefactor), disposal may require the consent of all parties who had contributed to the purchase or controlled the bequest.*

- comply with any legislation regarding disposal;<sup>6</sup>
- comply with any conditions entered at the time the objects were acquired;<sup>7</sup>
- acknowledge that, as far as practicable, collection items should be kept in the public domain<sup>8</sup> (subject to the degree of permanence that applies to that genre of collection);<sup>9</sup>
- document all disposals and the basis on which decisions to dispose were made;<sup>10</sup>
- dispose of cultural material (including human remains) with sensitivity and respect for the beliefs of communities of origin;
- apply any monies received from the disposal solely for the upgrading of the collection either by purchase or by conservation;<sup>11</sup> and
- comply with the rules that apply specifically to their institution and, in particular, relevant professional Codes of Ethics.

In museums and galleries, the decision to dispose of an object, is one that should always be made by the governing body, not the curator, collection manager or director. The board will very probably accept the advice of management but is under no obligation to do so. This is a further safety device to protect the institution from short-horizon decisions.<sup>12</sup> Moreover, so that the collection is protected from the board, there should be a rule by which the governing body is unable to dispose of collection material without a written recommendation from the relevant curator and the director of the museum or gallery.<sup>13</sup>

With archives, it is different. The board (and legislation) set the parameters but it is the management that determines what falls within those boundaries and applies the guidelines.

### 3. Appropriate mode of disposal

The institution must always be cautious as to the mode it chooses for the disposal of collection items. Where the rationale for the disposal is because the item has rotted or is broken or has otherwise become valueless, even throwing the item away must be undertaken with sensitivity to the potential political, social, health and financial ramifications. When a medical collection throws out a specimen, the issues will be more obvious than the disposal of a common rock from a geological collection. Disposing of an Indigenous artefact that has been irreparably damaged by water raises different issues from the disposal of a 50s toaster that has been similarly ruined.

The decision as to appropriateness requires two levels of consideration – the general and the specific:

**Each class** of item should be considered to determine what mode of disposal would generally be appropriate for that kind of object.

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*6.4: In those cases where a museum is free to dispose of an object (e.g., by virtue of a local Act of Parliament or High Court decision), any steps to sell or otherwise dispose of material from the collections should be taken only after due consideration, and such material might well be offered first, by exchange, gift or private treaty sale, to other museums before sale by public auction or other means is considered.*

<sup>6</sup> For example, the *Archives Act 1983* (Cth) and its state equivalents provide detailed mechanisms that are in turn reflected in policy and explanatory material made publicly available from the website of the National Archive: <<http://www.naa.au/recordkeeping/disposal/disposal.html>>. See later discussion.

<sup>7</sup> See clause 6.2, *Code of Ethics for Museums*, Museums Association UK, 2002.

<sup>8</sup> See clause 6.9, *Code of Ethics for Museums*, Museums Association UK, 2002.

<sup>9</sup> For a discussion of the presumption of permanence, see our comments in chapter 3 (“Collection Management”).

<sup>10</sup> See clause 6.15, *Code of Ethics for Museums*, Museums Association UK, 2002. Further, full records should be kept of all such decisions and the objects involved, and proper arrangements made for the preservation and/or transfer, as appropriate, of the documentation relating to the object concerned, including photographic records: op. cit., clause 6.5.

<sup>11</sup> See clause 6.6, *Code of Ethics for Museums*, Museums Association UK, 2002; although some commentators would say that no collection material should be sold to raise money for the conservation of the remaining collection.

<sup>12</sup> See clause 6.5, *Code of Ethics for Museums*, Museums Association UK, 2002.

<sup>13</sup> Ibid. See too, our comments in chapter 3 under the heading e, “*Integrity of documentation and process*”.

**Each item** requires individual scrutiny to ascertain whether there are any characteristics of:

- the individual item; or
- the circumstances by which the museum came to own the item,

which could or should affect the mode of its disposal.

Commonly, there may be conditions of acquisition attaching to the item (common with gifts and bequests). Sometimes it may be the historical or social significance of the item. For example, the institution may have a procedure for the disposal of animal remains that have putrefied but if one were to add that the item concerned was the heart of Phar Lap, the need for individual consideration, albeit within general guidelines, is essential.<sup>14</sup>

#### **4. Public outcome**

In the case of museums and galleries, all professional codes are unanimous that, except where the disposal is because the item is damaged beyond use, dangerous, or is being returned to its rightful owner, priority should be given to transferring the item to other museums or other public collections.

The most common mode of disposal for galleries and museums is by gift or exchange although there are examples of such institutions buying material from another collection. In Australia however, because the acquisition budgets of public museums is so limited, exchange is the preferred mode.

#### **5. Purpose**

If public confidence is to be maintained in the institution, the purpose for the disposal must be impeccable.

With archives, it is clearly established that it is inappropriate (and indeed illegal) to destroy collection materials for improper purposes.<sup>15</sup>

Where the purpose is to raise money, it is essential that that the money raised by the disposal is applied solely and directly to the benefit of the collection. Application of these monies to administration costs, building programs or debt reduction (for example) is not permitted. Any director or trustee of a museum, gallery or library that sees the collection as the salvation of the institution's money woes is ignorant of the internationally held professional ethical position as to the application of such funds and is similarly ignorant of the many scandals that have overwhelmed even the most prestigious institutions when they have sought to breach this standard of professional conduct.

The principal reason for the disposal must never be to raise money (either to raise income or decrease expenditure).<sup>16</sup> But where money is raised, it must be applied to the acquisition of further collection material.

Where money is received in compensation for loss, damage, theft or destruction of collection material, again, that money should be applied directly to the collection. In 2004 there was a public controversy at the Tate when the museum enjoyed an insurance windfall of £15 million.<sup>17</sup> The director sought permission of the Charity Commissioners to apply the windfall to the creation of an endowment, which in turn would provide funds for scholarship and care of the collection and not just for acquisitions. This situation is exceptional for there is no suggestion that the collection is in any way being threatened by the application of the windfall to indirect rather than direct collection purposes.

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<sup>14</sup> This is even the case in archives: although there may be an assumption that departmental documents can be destroyed after a set period, it may be that particular documents that may have ongoing historical interest, should be retained.

<sup>15</sup> Political ends can be met without going so far as improper disposal. All that needs be done is that a document's classification be changed so that it is not accessible.

<sup>16</sup> See clause 6.13, *Code of Ethics for Museums*, Museums Association UK, 2002.

<sup>17</sup> (2004) 143 (January) *The Art Newspaper* 17. The Tate had received £24 million for the theft of two Turner paintings. The museum bought back the title to the works from the insurance company for £8 million. Later, the works were returned. Hence the windfall.

## 6. Modes of disposal

### 6.1 *Sale*

If a decision has been made to sell an object (rather than, for example, gift or exchange it with another cultural institution), the board has a duty to ensure that the museum, gallery or library obtains the maximum benefit from the sale but it also must determine the most appropriate manner of sale. This is a balancing act, for the mode of sale that would raise the most money may not be acceptable for other reasons.<sup>18</sup>

For example, if the board gives selected patrons the opportunity to buy privately, it will be accused of serious breaches of ethical practice. If it sells through dealers it may be accused of favouring certain dealers, rumours of kickbacks can start circulating and the payment of otherwise avoidable commissions is subject to criticism. If the museum sells at auction it can be accused of not getting the best possible price. Moreover, if it openly sells the material, it may affect the local market for such material; if it does so covertly, it will cause more questions to be asked when the story eventually leaks to the Sunday papers.

Each board will have to make up its own collective mind on this. (For example, some have decided that such material must first be offered to other institutions). In any event that decision will probably vary, depending upon the nature, importance and amount of the material to be sold and the reason for the sale.

Only one principle is immutable: whatever decision is made, the process by which the decision is arrived at and the process by which that decision is implemented must be absolutely transparent and impeccably ethical.

### 6.2 *Gift*

It is unusual that an institution would give away material from its collection. The only situation in which this can properly occur is where the gift is to another public institution. For example, when a museum has an established reputation and focus on the collection of glass, it may make sense for another museum with a secondary glass holding, to give that collection to the specialist museum. In such a case, the advantages of freeing itself from the administrative responsibilities that accompany that material may far outweigh the collection's market value. In this case, both museums, and the public, benefit.

In this circumstance, the long-term public interest is maintained and the item remains in public ownership. The gift of a collection item to an individual, corporation or government, is always in breach of professional ethical standards and should be neither contemplated nor condoned by any director or trustee.

### 6.3 *Exchange*

The exchange of material between collecting institutions is a common method of disposal. It avoids all of the ethical problems and the defamatory rumours.

The policy should require the decision makers to articulate the basis of their decision to undertake the exchange. There are always problems in deciding what a fair exchange will be, but so long as the exchange is between public institutions, any argument about fairness is likely to be short-lived. For example, it may be of considerable advantage to one institution to be relieved of the burden of storing and maintaining material which does not conform to the priorities of the collection and it may take this into account when agreeing to swap that object for another of lesser monetary value if the object it receives in exchange will usually or often be on display or will otherwise be useful (for example, for research purposes).

Although the market value of the exchanged items is just part of the calculation, it is prudent to state this specifically in the disposal policy. Cynical criticism is cheap but its effects can be expensive: the policy should state whether the works being exchanged are expected to be of approximately similar value. If there is no such expectation, the policy should say so.

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<sup>18</sup> To appreciate the staggeringly cavalier approach taken in the past, one only has to read some of the tales of the Metropolitan Museum told by its former director, Thomas Hoving, *Making the Mummies Dance: Inside the Metropolitan Museum of Art* (1993). His buccaneering approach to raising funds through deaccession and disposal would make sanguine reading materials for any course on professional museum ethics.

## 6.4 *Destruction and Deletion*

Deaccessioned material is commonly destroyed in natural or social history museums and other collections where the reason for the deaccessioning is that the material is dangerous, unhealthy, or superfluous. Throwing out a rotten specimen or an unexceptional piece of igneous rock is done regularly – albeit in compliance with the museum’s evaluative and administrative procedural safeguards. In art museums the situation is different: destruction is undertaken only in rare and extreme circumstances. If it was important enough to be accessioned in the first place, it will probably have been deaccessioned because it is dangerous to keep, irreparably damaged, diseased, or is of no historical, aesthetic, scientific, social or economic value and so is not worth keeping.

In contrast, destruction is an everyday part of Archives activity. Large volumes of documents are not required to be retained and large numbers, having been retained for a period, are no longer required to be retained. Unless there are other reasons for their retention, they will be destroyed. Furthermore, many of the documents that archives have to retain, and eventually destroy, are in digital form. For this reason, we also talk of ‘deletion’ when referring to the destruction of material held in digital form.

Whether deleting digital material or destroying other material, it is essential to ask: ‘Is the mode of destruction or deletion appropriate? Are there secondary issues that affect the mode of destruction?’. For example, will the mode of destruction make it impossible to reconstitute or resurrect the documents or the information on them? We know that just pressing the ‘delete’ button doesn’t expunge digital material from a hard disk; until the digital information is over-written, deliberately erased by specialist software or the hard-disk is reformatted, the information has not been destroyed, but merely removed from view.

## 7. Power & authority

Before any decision is made, the decision makers must understand the limits of their power. All the following must be checked. None of these stages should be assumed.

### 7.1 *Institutional power*

Statutory bodies must consult their statute; companies, their constitution; and trusts, their trust deed. These powers should be articulated in the disposal policies of the museum. If the power isn’t there, it should not be done.

For example:

#### ***Disposal of historical material not in national historical collection***

*(1) Subject to subsection (2), the Council may resolve that historical material owned by or in the possession of the Museum, but not in the national historical collection, be disposed of by sale, gift, exchange for other historical material, or destruction.*

*(2) The Council shall not resolve that historical material be disposed of by destruction unless the Council is satisfied that the material has no saleable value and cannot be disposed of in any other way.*

*(3) Where:*

*(a) the Council has resolved, in accordance with this section, that historical material be disposed of; and*

*(b) if the value of the historical material exceeds \$250,000, the Minister has approved of the disposal; the Museum may dispose of the historical material accordingly.<sup>19</sup>*

### 7.2 *Degree of ownership*

The museum must have the necessary rights in the material: One cannot exercise greater rights than were conferred by the owner. It is for this reason that it is difficult and sometimes impossible, for the museum to dispose

<sup>19</sup> See section 9A of the *National Museum of Australia Act 1980* (Cth).

of long term loans that are no longer required but whose owners (or heirs) cannot be located. Quite simply, the museum does not have the right to sell goods that it does not own.<sup>20</sup>

### 7.3 *Conditions attaching to the acquisition*

One must make sure that the deaccessioned objects are free of any conditions that would interfere with their being dealt with in the desired manner.

## 8. Procedures

While it is unquestionable that the museum must have the power to deaccession and dispose of material from its collection, it is essential that sensible checks and balances be adopted to ensure that the exercise of those powers is both proper and well advised. A good deaccessioning process will always recommend a prudent, cautious disposal procedure.

As already discussed, there should always be a period of reflection, a '*locus poenitentiae*'<sup>21</sup> between the time that the initial decision is made to deaccession and the time of disposal. It is essential that a prudent policy requires a cooling-off period and then, at the expiration of that time, a re-evaluation of the decision. Part of that re-evaluation should be as to the appropriate method of disposal. What was appropriate when the decision was made, may be no longer so.

In statutory organisations, it is common for the board to have a discretion to dispose of material up to a certain value after which, ministerial approval is required.<sup>22</sup> In some state statutory bodies the power is largely with the board, subject to the consent of the Governor.<sup>23</sup> Others leave the final decision with the governing body.<sup>24</sup> Such requirements are set out in the governing statute and great care must be taken to ensure that the requirements of any relevant legislation are met.

By way of example, consider the provisions of section 10 of the *Australian National Maritime Museum Act 1990* (Cth):

#### *10 Disposal of material in national maritime collection*

*(1) Subject to subsections (2) and (3), where the Council is satisfied that material included in the national maritime collection:*

*(a) is unfit for the collection; or*

*(b) is not required as part of the collection;*

*the Council may determine that the material be disposed of by sale, exchange, gift or destruction.*

*(2) The Council shall not determine that material included in the national maritime collection be disposed of until the Council has obtained and considered reports from 2 independent experts setting out the views of those experts on the importance of the material to the national maritime collection.*

*(3) The Council shall not determine that material included in the national maritime collection be disposed of by destruction unless the Council is satisfied that the material cannot be disposed of by sale, exchange or gift.*

<sup>20</sup> But exceptions to this can be granted by statute or contract: see our comments in chapter 11 under the heading "The scary cupboard: old and unclaimed loans".

<sup>21</sup> That is, the opportunity of withdrawing from a projected contract, before the parties are finally bound; or of abandoning the intention of committing a crime, before it has been completed, 2 Bro CR.569; Ersk Laws of Scotl 290.

<sup>22</sup> For example, see section 8 of the *Australian War Memorial Act 1980* (Cth), section 9 of the *National Gallery Act 1975* (Cth) and section 10(4) of the *Australian National Maritime Museum Act 1990* (Cth)).

<sup>23</sup> For example, see section 10 of the *Art Gallery of NSW Act 1980* and section 24(3) of the *Museums Act 1983* (Vic).

<sup>24</sup> For example, see section 18(2)(b) of the *Art Gallery Act 1959* (WA) and section 4 of the *Tasmanian Museum Act 1950* (Tas).

(4) *Where:*

(a) *the Council has determined, in accordance with this section, that material included in the national maritime collection should be disposed of; and*

(b) *if the value of the material, as determined in accordance with regulations made for the purposes of this paragraph, exceeds \$20,000, the Minister has approved of its disposal;*

*the Museum may dispose of the material accordingly.*

(5) *In each report on the Museum under section 9 of the Commonwealth Authorities and Companies Act 1997, the members must include particulars of any disposals of material during the financial year to which the report relates.*

#### 8.1 *Notification, transparency and record keeping*

The disposal procedure must be transparent. It must be carried out only in conformity with the deaccessioning and disposal policy of the institution, and that conformity must be both real and evident. It requires writing, reasons, supporting documentation and sign-off from all decision-makers. One must be able to retrace the decision path without pause or conjecture.

It is important to ensure that any staff member who may have information relevant to the procedure has the opportunity to comment. This does not mean that the institution must circularise its intention to dispose of collection material or place ads in the local paper. Indeed, there is a balance that must be struck between, on one hand, ensuring that the decision-makers are informed of all relevant objections to the proposed action and, on the other, acting to avoid adverse and ill-informed press publicity and limiting the opportunity for the unscrupulous to take commercial advantage from such inside information. That said, if the decision to deaccession and dispose of collection material requires a great degree of secrecy, it rather indicates that the decision would benefit from further thought.

Prudence requires the maintenance of proper records that detail what material has been disposed of, the reason for that disposal and the manner by which it was executed. All the paperwork that supported the decision and the process should be retained as a matter of course. Such records are an integral part of the history of the collection – and, if push comes to violent shove, will also form the evidence that protects the staff from allegations of wrongdoing. These records should be maintained as a part of the central document registry of the institution, not held piecemeal by the individuals concerned. They are institutional collection records not personal documents.

#### **9. Further reading**

There is an excellent reading list available on deaccessioning and disposal on the ICOM site at <[icom.museum/biblio\\_deaccessioning.html](http://icom.museum/biblio_deaccessioning.html)>.