

15. LOANS FOR EXHIBITION

15.1 Introduction

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

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

All museums develop standard loan agreement forms. The two most common documents are (a) the loan-in agreement, whereby the museum borrow material from a third party for the purposes of exhibition, and (b) the loan-out agreement, whereby the museum lends an item from its collection so that another institution may exhibit it.

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

Given the value of the subject matter of the agreement, it is essential that the contract be simple to understand and that it carefully and precisely articulate the parties' intentions. It should play a positive role between the parties: It should act as an outward manifestation of trust and provide an effective and equitable machinery to prevent or resolve disputes.

Different museums have different needs. What works for a federal institution may not be appropriate for a small community museum. Nevertheless small institutions should carefully consider the models developed by the larger ones. This use of precedents should not be unquestioning: like so many other things, contracts do not necessarily get better with age. Thus, many cultural institutions in Australia, which have adopted old American models, do themselves little benefit.

This chapter provides model loan-in agreements, model loan-out agreements and a checklist of issues to discussed and determined when entering such agreements.

15.2 Documentation

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

Whose document will we use?

There is a natural inclination of an owner to insist that the borrower use the owner’s documentation: The owner can be confident in its own documentation. The borrower, which has to administer all of the agreements, will prefer to use its own so that all the agreements are reasonably consistent. Many private owners who are lending a particularly valuable item may insist on using a contract drawn up by their own lawyers. These will usually be considerably more comprehensive and less free of wriggle room than the loan agreements between collegiate institutions. Sometimes it comes down to size and muscle: The bigger institution insists on having the right of way.

There is no right answer and no standard protocol. One answer is definitely wrong: During the course of research for this book it became apparent that some institutional owners and lenders had adopted the practice of signing two contracts – one from the lender and one from the borrower! A moment’s thought will show that this is the worst of all compromises. If there is any issue with the loan, there will be conflicting agreements with conflicting obligations, conflicting duties and conflicting procedures: In all, a fabulous result for the lawyers who get the subsequent brief but a terrible career-move for those who put their institution into such a position.

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

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

Clarity and simplicity

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

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

sense or meaning and check punctuation meticulously to ensure that it reflects the intended meaning.

Duties owed to lenders

The obligations of the borrower to the owner are discussed in Chapter 34.

15.3 Risk Management

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

The contract as risk management tool

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

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

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

These risks affect borrower and the lender (although not always to the same degree). The advantage is in identifying the risks and, together, agreeing how those risks will be met.¹

Private lenders versus institutional lenders

Private owners are more risk conscious and averse than those of earlier times. Perhaps it is because a private lender has fewer pieces of exhibition quality and thus has a greater personal financial and emotional investment in the loan, but they tend to examine the loan-in agreement

¹ For example, see discussion later in this chapter: The 'scary cupboard': the disposal of old and uncollected loans.

very closely and often retain their lawyers to do so. They can be more assertive than institutional lenders and are increasingly prepared to seek recourse to the law.²

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

Restrictions accompanying the loan

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

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

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

Value of the loan

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

High value is something that institutions are familiar with. Indeed they are often complacent. Having a middle aged and unfit person in a uniform sitting on a chair supervising a couple of rooms of paintings, is not really providing security that befits the value of the works. The answer may be that the security is geared to the degree of risk rather than the market value of the

² 'The Evolution of Loans Practice: Development of Procedures and Documentation at the Powerhouse', Penny Huisman, Powerhouse Museum (Newsletter of the Australian Registrars Committee, June 2000, 4.)

material being guarded. Indeed it may be so: perhaps the greatest danger is not from the professional thief but rather the small boy with jam on his fingers. If this is the case, it may be that the institution makes the decision to leave theft risks predominantly to the care of electronic guardians and damage risks predominantly to human supervision.

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

Clear document trails

Tracking and managing documentation is one of the primary roles of the loans registrar. Improved forms of communications, such as fax and email has certainly made this process faster. But they can be a double-edged sword. On the one hand, we can communicate with people more quickly, ideal during busy periods. However, the problem of establishing a clear document trail that shows 'who' made 'what' decision 'when' is more problematic, especially when using email. The issue of security and email – ensuring that sender/recipient are authentic – is one that we have not yet had to address, but it certainly looms. Overall, we have had to strike a balance between an outcome focussed approach and administrative perfection.³

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

Multi-skilled teams

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

As well as clarifying our agreement with the lender, we also altered the way we treat the loans internally. The exhibition designer now plays a more important role in our approval process for inward loans. Loan proposals for exhibition must be submitted to design staff, conservation, curatorial and registration, and finally approved by the Director of the museum.⁴

15.4 A checklist for loan agreements

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

³ Ibid 4–5.

⁴ Ibid 4.

Parties

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

Subject

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

Purpose

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

Period

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

So-called 'permanent loans' should usually be avoided. 'By definition, a loan is a temporary arrangement of finite duration, subject to renewal.'⁵ There is no such thing as a permanent loan; it is still subject to withdrawal at virtually any time, either by the original lender, or that person's heirs. Several collecting institutions have chosen not to collect material because they already have strong holdings in that area on permanent loan. However, perhaps years later, when the owners decide to take back their material the institution is left with an unfortunate gap that is often difficult and expensive to fill. Moreover, resources spent on such material are better spent on items owned by the borrower and not subject to reclamation.

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

- the loan will be reviewed every three or so years⁶; and
- that it is the lender's responsibility to advise the borrower of any change of address or ownership;
- that the lender will give the borrower a reasonably long and specified period of notice before requiring return of the material;
- that the borrower can terminate the loan on a reasonably short and specified period of notice; and

⁵ John E. Simmons, 'Things Great and Small', *Collections Management Policies*, p. 73, American Association of Museums.

⁶ This forces both parties to regularly review the status of the loan and helps to maintain current details of owner and their address.

- that if the material is not collected within a certain period after the expiration of that notice, the borrower may dispose of it as it sees fit and may apply the proceeds of that disposal (if any), as it sees fit.

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

Fees

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

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

Expenses

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

Delivery

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

Return

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

Maintenance and conservation

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

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

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

Storage

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

Presentation

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

Restoration

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

Insurance

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

Where the material is to be covered by government indemnity, care must be taken to ensure that the exact terms of the indemnity are understood by both parties.⁷

Copyright

Is the object subject to copyright? If it is, who is the copyright owner? This may be important if the museum intends reproducing the work, say, in an exhibition catalogue. Care must be taken with this information for many persons filling in the loan agreement will not have the faintest idea of the laws of copyright. Many will wrongly assume that as owners of the material they are automatically owners of the copyright in it. As is explained in a later chapter, this assumption is usually wrong. Relying on such erroneous assertions can cost the museum considerable amounts of inconvenience and money.

Merchandising

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

⁷ Insurance is more fully discussed in Chapter 39: Insurance and indemnification.

Attribution

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

Calamity

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

15.5 The 'scary cupboard': the disposal of old and uncollected loans⁸

Introduction

Every collecting institution has what some registrars colourfully refer to as the 'scary cupboard'. This is the notional place in which are kept expired or unlimited duration loans that have been left unclaimed by lenders who cannot be located by the museum.⁹ It also may have material found in the collection for which no documentation exists and also material that has documentation but which is perhaps ambiguous or partly missing.¹⁰

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

⁸ For discussion of the issues concerning the disposal of material that has been accessioned to the collection (i.e. material owned by the institution), see Chapter 9: Disposal.

⁹ Ildiko DeAngelis, *'Old Loans'*, 2005.

¹⁰ These may include gifts, purchases, loans, commissions, and exhibition props.

In major institutions, to deal with the problem of the scary cupboard it is important to treat the process as a special project to which specific resources are allocated. Otherwise, there are always more pressing things demanding the attention of the registrar. The process is not rocket science but it requires care and time. First, you must undertake an inventory of the collection and reconcile the inventory with the available documentation. This will reveal inventory material for which the documentation is in some way inadequate. It will also reveal missing inventory material – items that cannot be found notwithstanding that there is documentation that establishes or suggests that the material should still be in the possession of the institution. Then the institution must undertake reasonable good faith enquiries to try and track down the owners.¹¹

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

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

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

Irrespective of the type of bailment, a bailee has very limited rights to dispose of goods. As a general rule, disposal is one of the rights that accompany ownership. Unless there is a contract or statute that provides otherwise, the right of a borrower is limited to giving the item back to its legal owner.

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

- common law
- uncollected goods legislation
- specific institutional legislation
- contract

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

Common law

The limited common law rights of disposal were summarised by the NSW Law Reform Commission¹² as follows:

2.15 In some, very limited, circumstances a bailee may be relieved from liability for disposing of goods without authority. The principle of agency of necessity excuses

¹¹ These efforts must be documented, as it is the bailee who must be able to prove that the efforts made to find the owner were reasonable.

¹² Report 54: 'Disposal of Uncollected Goods', 1988, see full Report at <<http://www.lawlink.nsw.gov.au/lrc.nsf/pages/R54TOC>>.

the bailee from liability when there is an actual commercial necessity to dispose of the goods. Traditionally, the defence is confined to:

- (a) those who accept bills of exchange to be honoured by the drawer, that is, the bailee who is entitled to be reimbursed by the person for whom the payment is made; and
- (b) masters of ships in foreign ports, unable to obtain immediate instructions from the owners of the ship or cargo and in need of money for unforeseen expenses.¹³

The defence developed to cover carriers by land, but is still limited to cases of emergency or real business necessity,¹⁴ is for example, where the goods are perishable and it is impracticable to obtain instructions from the owner.¹⁵ The principle also applies where goods are deteriorating or otherwise losing value, but only if the loss is serious enough to constitute an emergency.

2.16 The courts have been reluctant to extend the classes of agents of necessity. This is well illustrated by the decision in *Sachs v Miklos*.¹⁶ In that case gratuitous bailees sold items of furniture that they had stored for three years after several attempts to reach the bailor by letter and telephone had failed. The Court of Kings Bench found the bailees guilty of conversion, and refused to accept that they had acted as agents of necessity, stating that the sale was made for the convenient running of their business (a boarding house), and not in response to any real emergency. In the course of his judgment Lord Goddard CJ said: 'in peace-time such a course would probably have landed them in no real liability for if the market value of the furniture had been obtained and had remained constant they would have had an adequate sum to hand to the plaintiff.'¹⁷

2.17 It is not hard to see why the courts have been reluctant to widen the defence of agency of necessity. The defence developed as part of the specialised law of common carriers, to facilitate the smooth carriage or shipment of goods, and to deal with the unforeseen circumstances which can occur during the performance of such contracts. In cases there is rarely, if ever, any suggestion that the goods will remain uncollected by the owner. It is the intervention of factors beyond the control of the carrier and owner, such as delays, strikes and unforeseen expenses which gives rise to the agency. The concept is, therefore, of limited value when dealing with uncollected goods. By contrast, the possibility that the goods will never be claimed is the major concern of the bailee in possession of uncollected goods.

2. Abandonment

2.18 It is sometimes suggested that an involuntary bailee can argue that the bailor has abandoned all title and interest in the goods, thus permitting the bailee to dispose of the goods at will. While the common law recognises abandonment, the concept is of very limited application. In order to rely on it the bailee must prove that the true owner has intentionally abandoned the goods.¹⁸ Mere accidental or negligent loss of goods does not amount to abandonment. The concept has very little application to the problem of uncollected goods, since in most cases it would be difficult or impossible to prove the requisite intent in the bailors at the time the goods left their possession. Uncollected goods are, by their very nature, merely uncollected; they are not abandoned as that term is legally defined.

¹³ *Hawtayne v Bourne* (1841) 7 M & W 595, 600, 151 ER 905, 907; *Bowstead on Agency* (14th ed, Sweet & Maxwell, 1976) 63–4.

¹⁴ Note 1 at 684, *Sims & Co v Midland Railway* [1913] 1 KB 103.

¹⁵ Or in some similar category, such as livestock, which must be tended, fed and watered. See *Sachs v Miklos* [1948] 2 KB 23, per Lord Goddard, CJ at 35.

¹⁶ [1948] 2 KB 23, followed in *Munro v Willmott* [1948] 2 AII ER 983; and see also *Jebara v Ottoman* [1927] 2 KB 254 at 270 per Scrutton LJ.

¹⁷ *Ibid* 35.

¹⁸ See *Halsbury's Laws of England* (4th ed, Butterworths, 1973) Vol 2 at para 1510.

So – generally, in collecting institutions, we can forget about the Common Law: True necessity is very rare¹⁹ and strictly interpreted; and proving the requisite intention of abandonment is almost impossible²⁰. Accordingly, we must focus on the legislation.

Statutory right to dispose

Disposal of uncollected goods legislation

All States and Territories confer a right to dispose of uncollected goods by statute. These are general legislative powers;²¹ they can be used by shoe repairers and collecting institutions alike. They are only useful if the institution has ensured that its procedures comply with the conditions laid down in the statute. This is a matter of law – not commonsense. The detailed requirements differ from jurisdiction to jurisdiction; so, each collecting institution should ensure that its procedures are compliant.

In general, the various Acts provide two mechanisms:

- (i) **disposal by court order**, where disposal can occur after the bailee obtains a court order permitting the action; and
- (ii) **disposal after notice**, where the disposal can take place after notice has been given to the owner.

Disposal by court order

A bailee can apply to the Local Court for an order authorising the bailee to dispose of goods.²² This application must be served on the bailor, the owner of the goods and on each person claiming to have an interest in the goods.²³ You do not have to give notice if you:

- (a) are unaware of the fact that the person has or claims an interest in the goods; or
- (b) cannot trace or communicate with the person.²⁴

The court order will specify:²⁵

¹⁹ Although there may be situations in which a loan item starts to decompose or leak and so becomes hazardous.

²⁰ Mere accidental or negligent behaviour is insufficient.

²¹ See *Uncollected Goods Act 1996 (ACT)*; *Uncollected Goods Act 1996 (NSW)*; *Uncollected Goods Act 2004 (NT)*; *Disposal of Uncollected Goods Act 1967 (Qld)*; *Disposal of Uncollected Goods Act 1966 (NSW)*; *Disposal of Uncollected Goods Act 1970 (WA)*; *Disposal of Uncollected Goods Act 1961 (Vic)*; *Disposal of Uncollected Goods Act 1968 (Tas)*.

²² *Uncollected Goods Act 1996 (NSW)*, s 8.

²³ *Ibid*, s 8(1).

²⁴ *Ibid*, s 8(3).

²⁵ *Ibid*, s 9(3).

- (a) the goods to which it relates;
- (b) the manner in which disposal of the goods is authorised;
- (c) the date on or after which the goods may be disposed of under the order;
- (d) the amount of the relevant charges due to the bailee in respect of the goods.

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

Disposal after notice to bailor

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

For example in NSW goods are divided into four categories: those up to \$100 in value; those between \$100 and \$500 in value; and those between \$500 and \$5000; and those above \$5000. The bailee's obligations increase in proportion to the value of the material.

Goods of up to \$100 in value²⁶

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

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

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

Goods of between \$100 and \$500 in value²⁷

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

- (a) have been given written notice of the bailee's intention to dispose of the goods, and
- (b) have been given at least 3 months, from the date when notice was given, within which to collect the goods.
- (c) Uncollected goods may not be disposed of under this section otherwise than by way of public auction or by private sale for a fair value.

Goods of between \$500 and \$5,000 in value²⁸

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

- (a) have been given written notice of the bailee's intention to dispose of the goods; and
- (b) have been given at least six months, from the date when notice was given, within which to collect the goods; and

²⁶ *Uncollected Goods Act 1996* (NSW), s 20.

²⁷ *Ibid*, s 21.

²⁸ *Ibid*, s 22.

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

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

Notice obligations

The notice must comply with the requirements spelled out in the Act. For example:²⁹

Notice under this Part must include:

- (a) the bailee's name, and
- (b) a description of the goods, and
- (c) an address where the goods may be collected, and
- (d) a statement of the relevant charges due to the bailee in respect of the goods, and
- (e) a statement to the effect that, on or after a specified date, the goods will be disposed of unless they are first collected and the relevant charges are paid, and
- (f) if applicable, a statement to the effect that the person will retain, out of the proceeds of sale of the goods, an amount not exceeding the relevant charges.

Service of the notice can be achieved either by personal service (where the person can be contacted) or by means of a letter addressed to the person and left at, or sent by post to, the person's last known address.³⁰

The untraceable or unresponsive bailor

If you cannot trace or communicate with the bailor:

- (i) provided that the goods are less than \$5000 and you have made bona fide efforts to find and contact the person, you will be relieved of the need to give notice; but
- (ii) if the goods are valued at over \$5000, you must get a court order.³¹

Perishable goods

Sometimes nature intervenes and requires that rotting or infected material be destroyed or thrown out. The legislation reflects this reality:³²

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

- (a) have been given oral or written notice of the bailee's intention to dispose of the goods, and
- (b) have been given a reasonable opportunity, having regard to the nature and condition of the goods, to collect the goods.

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

This leaves unanswered the most obvious question: What happens where we can't find the owner or the owner is unresponsive?

²⁹ Ibid, s 26.

³⁰ Ibid, s 27.

³¹ Ibid, s 25.

³² Ibid, s 24.

Requirements after the disposal

The money received from the sale, less any authorised charges, gets paid to the bailor or, if the bailor is unidentifiable or not found, according to the legislation dealing with uncollected money.³³

The record-keeping obligations are considerable but reasonable.³⁴

- (1) Within 7 days after disposing of goods in accordance with this Part, a bailee must prepare a record of the following particulars:
 - (a) a description of the goods disposed of,
 - (b) the date on which the goods were disposed of,
 - (c) the manner in which the goods were disposed of,
 - (d) in the case of goods that have been sold:
 - (i) the name and address of the person to whom they were sold, and
 - (ii) the amount of the proceeds of the sale, and
 - (iii) the amount retained by the bailee to cover the relevant charges due to the bailee in respect of the goods,
 - (e) in the case of goods sold by public auction – the name, and the address of the principal place of business, of the auctioneer by whom the goods were sold.
- (2) A record prepared under this section must be kept by the bailee for at least 6 years from the date on which the goods were disposed of and must be made available by the bailee, on request, for inspection by the bailor or by any other person claiming an interest in the goods.

Statutory institutions

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

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

One institution that does enjoy its own statutory mechanism is the National Gallery. By way of example, s 11 of the *National Gallery Act 1975*, is set out below. As you will notice, its procedures are tailored to the needs of the institution while still respecting the rights of owners. The Gallery's mechanism is far more appropriate, quicker and cheaper than the procedures provided under general legislation for disposal of uncollected goods. Further, having the mechanism in the statute means that it does not have to be spelled out in each loan agreement that it enters.

NATIONAL GALLERY ACT 1975 – Section 11

Disposal of property left with Gallery

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

³³ For example in NSW under the *Unclaimed Money Act 1995* the money would be paid to the Chief Commissioner of State Revenue. Each jurisdiction has its own equivalent legislation.

³⁴ *Ibid*, s 30.

- (b) the property has remained in the possession or custody of the Gallery for a period of not less than 1 year after its submission to the Gallery;
- (c) in a case to which subsection (2) applies:
 - (i) the Council has complied with the requirements of that subsection; and
 - (ii) the period specified in the notice under that subsection or, if such notices were sent to more than 1 person, the period specified in the notice last sent, has expired; and
- (d) the property is not the subject of a claim lodged with the Gallery by the person who submitted the property to the Gallery or by any other person who has an interest in the property;

this section applies in relation to that property.

- (2) Where the Gallery has a record of the name and address of a person who has an interest in property referred to in paragraph (1)(a) or of the person who submitted that property to the Gallery, the Council shall send by pre-paid registered post to that person or to each of those persons, addressed to him or her at the relevant address, a notice informing him or her that, after the expiration of 3 months from the date of the notice, the Council intends, unless the person who submitted the property to the Gallery or any other person who has an interest in the property lodges with the Gallery a claim with respect to the property, to deal with the property under this section.
- (3) The Council may, in respect of property in relation to which this section applies, cause a notice, in accordance with subsection (4), relating to the property to be published twice, with an interval of at least 7 days between the dates of the publications, in such daily newspapers as will ensure its publication in every State and internal Territory.
- (4) A notice under subsection (3) shall sufficiently identify the property to which it relates and shall state that, at the expiration of 3 months from the date of publication of the notice, the Council intends to deal with the property under this section unless, before that time, the person who submitted the property to the Gallery or any other person who has an interest in the property has lodged with the Gallery a claim with respect to the property.
- (5) Where:
 - (a) the period of 3 months specified in a notice under subsection (3) that has been published for the second time has expired; and
 - (b) the property to which the notice relates has not ceased to be property in relation to which this section applies;
 the Council may:
 - (c) if the property is a work of art and the Council wishes to acquire it for the national collection – request the Minister to approve its acquisition for the national collection; or
 - (d) in any other case – request the Minister to approve its disposal in accordance with this section.
- (6) Before approving of the acquisition of a work of art in accordance with a request under paragraph (5)(c), the Minister shall obtain a valuation of the work of art from an independent expert.
- (7) Where a work of art the subject of a request under paragraph (5)(c) has not ceased to be property in relation to which this section applies, the Minister may, by notice published in the Gazette, approve the acquisition of the work of art for the national collection.
- (8) Upon the publication in the Gazette of a notice under subsection (7), the work of art to which the notice applies is, by force of this subsection:
 - (a) vested in the Commonwealth; and
 - (b) freed and discharged from all interests, trusts, restrictions, obligations, contracts, licences and charges;
 to the intent that the legal estate in the work of art and all rights and powers incident to that legal estate are vested in the Commonwealth.
- (9) The Minister shall, on behalf of the Commonwealth, transfer to the Gallery for inclusion in the national collection a work of art referred to in subsection (8).
- (10) Where property the subject of a request under paragraph (5)(d) has not ceased to be property in relation to which this section applies, the Minister may approve the disposal of the property and advise the Council accordingly.
- (11) Where the Minister has advised the Council of his or her approval of the disposal of property and the property has not ceased to be property in relation to which this section applies, the Gallery may:
 - (a) cause the property to be sold by public auction; or
 - (b) if the Council determines that the property is valueless or that for some other reason it is not practicable to sell the property by public auction – cause the property to be disposed of otherwise than by sale or to be destroyed.

- (12) For the purposes of a sale or other disposal of goods under subsection (11), the Gallery shall be deemed to be the absolute owner of the property.
- (13) The interest of every person in a work of art to which a notice published under subsection (7) relates is, on the date of acquisition of that work of art, converted into a right to compensation against the Commonwealth.
- (14) Parts VII and IX of the *Lands Acquisition Act 1989* apply in relation to a right to compensation referred to in subsection (13) as if:
 - (a) that right were an entitlement to compensation under section 52 of that Act;
 - (b) a reference in those Parts to an interest in land were a reference to the legal estate in the work of art to which that right relates; and
 - (c) a reference in those Parts to the Minister were a reference to the Minister administering this Act.
- (15) Where a person satisfies the Council that he or she had an interest in property immediately before the property was sold by virtue of subsection (11), the Gallery shall pay to the person such amount as it considers appropriate having regard to the interest that person had in the property but not exceeding the amount by which the amount of the proceeds of the sale exceeded the amount of any expenses incurred by the Gallery in connexion with the storage and sale of the property.
- (16) No action, other than an action under the *Lands Acquisition Act 1989* as applied by subsection (14), lies against any person by reason of any act or thing done in accordance with this section.

Contractual right to dispose

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

The failure to collect material at the end of the bailment period is a clearly foreseeable problem in many institutions. Because this is so, any bailee of third party property would be well advised to include a mechanism in its agreements to deal with uncollected property without having to comply with the vagaries of legislation.³⁵ In particular, the bailee should include mechanisms that

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

In such a situation, the museum acquires its disposal right by means of the contract. Its powers are limited to those granted in the document.³⁶

³⁵ Where there is an agreement, the terms of the contract take precedence over any legislation. For example, s 6(i) of the *Uncollected Goods Act 1995* (NSW) states: 'This Act is available for the disposal of uncollected goods where there is no agreement between the parties on the means of their disposal. If there is such an agreement, this Act applies to any aspect of the disposal of those goods that is not dealt with in the agreement.' In such a situation, the museum acquires its disposal right by means of the contract. Its powers are limited to those granted in the document.

³⁶ For example where an art museum is hosting a competition such as the Archibald Prize, the contractual terms of entry should always give the institution the right to

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

Special legislation for collecting institutions?

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

In the USA, the Registrars Committee of the Mid-Atlantic Association of Museums in 1995 decided that museums needed special legislation.³⁷

The purpose of this draft legislation was to:

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

It set out a number of obligations for both the lender and the borrower:

For new loans, the museum was obliged to make and retain written records of the loan including the lender information, a description of the property, the beginning and end date of the loan. It had to provide the lender with a signed receipt or loan agreement.

For old loans, the museum was obliged to update its records if the lender informed it of changes in contact information or ownership of the property and had to inform the lender whenever renewing or updating information about the loan.

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

As for the mechanism that it provided for converting old loans, as would be expected, the museum was required to make a good faith search for, and attempt to contact, the lender. As in Australia, the mechanism provided for actual notice and deemed notice (by publication). It set out

dispose of works that remain uncollected after a certain time has expired. For further, more commonplace commercial examples of this, consider the conditions on the back of laundry and dry cleaning tickets.

³⁷ Jeanne Benas and Jean Gilmore led the task force and Ildiko DeAngelis, then of the Smithsonian Institution General Counsel's office, was consulting counsel.

timelines and what the museum had to establish in order to acquire full ownership of the property.³⁸

³⁸ For further commentary on the RC-MAAM Model legislation 1995: Rebecca Buck, *'Found in Collection'*, 2005; Ildiko DeAngelis, *'Old Loans'*, 2005.