

**18 March 2012**

**PANEL OF EXPERTS:**

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**Ms Charlotte Davy** Senior Exhibitions Registrar, Art Gallery of New South Wales

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**Ms Carol Henry** CEO, Art Exhibitions Australia

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**PART D. EXHIBITIONS**

**CHAPTER 16. LOANS AGREEMENTS**

**16.1 Introduction**

Before using this Chapter it would be wise to have already considered the issues set out in Chapter 15 and, in particular, to have given thought to the checklist for loan agreements. Checklists such as these are an invaluable risk-management tool when drafting agreements because they help you to ensure that the agreement contains everything you need. Given that we usually work from an earlier document (a precedent) it is an understandable temptation simply to review what is already there: it is much harder to recognise what should be there but is not. For this reason, the prudent drafter will always use a checklist of issues as an aid to memory. Checklists are invaluable drafting tools and you should personalise them so that they cover everything relevant to your needs.

**16.2 Form of documentation**

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

***Annexure heavy***

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

- *The unique details of the loan are set out in one annexure:* Name of lender; description of objects being lent; purpose of the loan; value of the objects and so on. This allows all of the matters that will vary from loan to loan to be provided without the need to vary that part of the document that sets out the rights and obligations that govern the loan. Keeping the variables in a separate annexure facilitates the administration of the loan and makes it easier for the subsequent computerisation of the loan details, thus improving administration during the period of the loan.
- *Descriptions of the substantial (and largely immovable) legal rights and responsibilities are contained in another annexure.* When the legal matters are set out in a form that appears 'standard' they can appear less overwhelming (and less negotiable) than when they are contained in the body of the agreement. Their legal effect is the same; it is a matter of psychology, style, and administrative convenience.

### ***Annexure light***

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

## **16.3 Examples of loan-in agreements**

### ***Major institution: non-art museum***

The following is the Loan Agreement/Incoming that Simpsons developed for a federal collecting organisation. Like those of most major institutions, it is of the 'annexure heavy' variety:

## INWARD LOAN AGREEMENT

LOAN No: 2000/62

FILE No: 00/195

LENDER(S): Mr Joe Citizen

23 Every Street

ANYTOWN NSW 2564

LOAN START DATE: 10 May 2010

LOAN FINISH DATE: 10 May 2012

DESCRIPTION OF OBJECTS: See attached schedule

CONSERVATION<sup>1</sup> (Mark 'NO' if not permitted) May the Museum carry out a minimal amount of conservation treatment if necessary [The lender would be advised beforehand of the work to be carried out]. Yes .... No ....

### COPYRIGHT OWNER

Copyright owner's name: .....

Address: .....

The Lender has agreed to loan to the Museum the object(s) described on the basis detailed in the Agreement and on the terms and conditions attached.

The Museum has agreed to accept the object(s) on loan to it on the basis detailed in the Agreement and on the terms and conditions attached.

Lender's Signature(s):..... Date:.....

X Museum, Manager, Registration:..... Date:.....

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<sup>1</sup> The question relating to conservation should not be in this part of the agreement. It would be more appropriate in the Description of Objects annexure where all the variable details are set out.

**Inward Loan no. 2010/62**

For xyz Exhibition

**Loan Schedule**

<b>Description</b>	<b>Value</b>
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1.	\$
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<b>TOTAL</b>	<b>\$</b>
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**CONDITIONS OF INWARD LOAN**

The Lender nominated above agrees to lend the Object listed above ('the Object') for the purposes identified above to the Museum a body corporate established by the ## Museum Act ('the Museum') in accordance with the conditions ('the conditions') of loan printed on the back of this Agreement. Where more than one Object is listed above, this Agreement applies to each of those Objects.

**Costs**

1. Unless the Lender states otherwise in writing, the Museum shall meet all reasonable costs associated with the shipping of the Object.

**Shipment of Object to Museum**

2. (a) Unless the Museum states otherwise in writing, the Lender shall pack the Object and undertake shipping or courier arrangements for delivery of the Object to the Museum. Prior to dispatch of the Object, the Museum and the Lender shall agree on the method of shipment which is to be confirmed on dispatch.

(b) If the Lender ships the Object the Lender shall warrant to the Museum that the Object is adequately and securely packed by professional packing staff for

the method of shipment agreed upon, including any special instructions for unpacking and repacking.

(c) The Lender shall arrange for all necessary international customs clearances in relation to the Object imported/exported, except for Australian customs clearances and shall provide the Museum with copies of all necessary customs clearance documentation.

(d) The Museum shall arrange all necessary Australian customs clearances in relation to the Object imported/exported.

### **Damage to Object**

3. (a) The Museum shall report any damage or loss immediately to the Lender. Photographic documentation of damage will be undertaken by the Museum.

(b) Where in the opinion of the Museum, the Object may be damaged by infestation, the Object may be fumigated at the discretion of the Museum.

### **Purpose of Loan**

4. (a) The Museum may, at its discretion, display the Object at such places as the Museum considers will be suitable having regard to the necessity to properly preserve the Object.

(b) Should the Museum wish to include the Object as part of a touring exhibition or to loan the Object to other museums this shall be indicated on the front of this Agreement, or the Museum shall obtain the written agreement of the Lender.

(c) The Museum is not obligated to display the Object for the whole of the term of this Agreement.

### **Period of Loan**

5. (a) Subject to these conditions, the Object shall continue on loan to the Museum until the date specified under the heading 'Period of Loan' on the front of this Agreement.

(b) The period of loan may be extended or reduced by further agreement in writing between the Museum and the Lender.

### **Insurance**

6. The Museum will insure the interests of both the Lender and the Museum in the Object from the time the Museum or its agent takes possession of the Object against loss or damage, until the Object is either returned to the Lender (or dealt with in accordance with Clause 16(a) of this Agreement) under an all risks, wall-to-wall insurance policy of the Museum, with terms as similar as possible to the terms of policies taken out by the Museum in respect of Objects deposited with it and subject to the exclusions usually applying to such policies.
7. (a) The Object shall initially be insured for the value specified under the heading 'Value' on the Schedule to this Agreement. The valuation specified by the Lender shall reflect the fair market value of the Object. If the Lender fails to specify an amount under the Valuation heading, the Museum shall set an estimated value for the purposes of insurance for the period of the loan.
  - (b) When the Museum nominates a value in accordance with paragraph 7(a), the value is not to be construed as an appraisal by the Museum.
  - (c) Where the loan period exceeds twelve months, the Lender shall notify the Museum if the nominated insurance value is to be changed. Any such change to the nominated insurance value shall reflect the fair market value of the Object.
8. If insurance is waived by the Lender, this waiver shall constitute the agreement of the Lender to release and hold harmless the Museum from any liability for damages to or loss of the Object whether due to the negligence of the Museum, or any other cause whatsoever.
9. In the event of loss or damage to the Object the liability of the Museum to the Lender shall not exceed the amount recoverable to the Museum by its insurers under the insurance policy effected by the Museum in accordance with clause 6.

## **Conservation**

- 10.(a) Unless otherwise indicated by the Lender under the heading 'Conservation' on the front of this Agreement, the Museum will request the Lender to provide written authorisation for any alteration, restoration or repair of the Object. The Museum for its own purposes, may examine the Object by modern scientific methods.
- (b) During the period of the loan the Museum will, subject to paragraph 10(a), maintain the Object in good order and repair having regard to their condition at the commencement of the loan.
- 11.(a) Condition records will be made by the Museum on arrival and departure. The Museum will provide the Lender with a report on the condition of the Object if requested to do so in writing by the Lender.

## **Credit**

12. Unless otherwise indicated on the front of this Agreement, the Museum will acknowledge the Lender in any publicity or in relation to any reproduction or photographs of the Object.

## **Copyright and Reproduction**

13. Subject to the Museum obtaining the necessary copyright consent (if any), the Museum may reproduce and photograph the Object for publicity, loan, sale or educational purposes.
14. If the Lender is the owner of the copyright in the Object, the Lender agrees that the Object on exhibition to the public may be subject to photography by the public, using existing ambient lighting.

## **Return of Object to Lender**

15. (a) At the end of the period of loan, the Museum shall return the Object to the Lender at the address specified in this Agreement.
- (b) The Object(s) will be returned to the Lender in their original container, unless other arrangements are made with the Museum in writing.
16. (a) If the Museum, having made all reasonable efforts to return the Object, is unable to return the Object within six months of the termination of the loan, the Museum may place the Object in storage with any warehouse company for the account and risk of the Lender or may retain possession and charge

storage fees at the rates quoted by any such warehouse company and carry insurance on the Object also at the cost of the Lender.

- (b) The Museum shall have a lien against the Object and any other objects loaned under separate arrangements by the Lender to the Museum for any storage fees and insurance costs incurred in accordance with sub-clause 16(a).

**Applicable Law**

17. The law applicable to this Agreement shall be the law of Australia and the courts of Australia shall have exclusive jurisdiction.

***Major institution: art museum***

Most loan-in agreements share common principles, irrespective of the subject matter of the loan. That said, art museums have some special needs.

INSERT

INWARD LOAN AGREEMENT

FOR ARTWORKS BEING LENT TO

THE CHRISTCHURCH ART GALLERY

## 16.4 VARIATION AGREEMENT

One of the dangers with model agreements is that they suffer from 'cut and paste' syndrome. The busy Collections Manager takes the last contract they used and amends it for the present loan; then takes that amended document for the next one and makes changes...and so on. Of course all model contracts should be seen as living creatures that can be improved by experience but sometimes, the changes are not deliberate improvements. More commonly, after a while, the integrity of the original document is compromised in ways that are not obvious to the non-lawyer.

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

My description of the contract as being 'a living creature' is intended to recognise that contracts should be regularly reviewed in light of experience from use. All contracts benefit from this but it should be treated as a deliberate process: are there things that are regularly changed in the Variation Agreement that would be best taking up in the standard agreement? The organisation's lawyer should check those changes before being put into effect.

INSERT CHRISTCHURCH VARIATION AGREEMENT

### **Commentary on the inward-loan agreements**

The above agreements reflect the particular needs of each kind of organisation given the scale of exhibitions and the values of items being loaned. The following are some of the issues that deserve to be highlighted: not all necessarily should be included – but they should be considered.

#### ***The lender notifications***

One common matter that would be a beneficial inclusion in most agreements is a clause that obliges the lender to advise the borrower if there is any change in address of the lender or change of ownership of the borrowed material. Many borrowers have faced difficulties when, at the end of the loan period, they discover that the material has been sold, the lender has died, gone bankrupt, gone into liquidation or simply moved. The borrower needs to know that the person giving it instructions has the authority to do so (and the basis of that authority) and needs to be assured it is returning the loan to the appropriate person, entity and place. It is exposing

itself to a potential claim for negligence if it does not do so and including such notice requirements alleviates some of that risk. If the lender fails to provide such notice to the borrower in breach of its obligations under the agreement, it is more difficult for it to allege negligence on the part of the borrower.

### ***Copyright***

Where the loan is of material in which copyright subsists, most agreements should contain a provision that articulates the borrower's rights to exercise any of the rights that are the exclusive property of the copyright owner. Can it be reproduced in the catalogue, on the web site, in advertising for the show, for teaching purposes, for archival purposes? If so, what are the limits of that permission? Too often, the copyright clauses in loan agreements are too bland and without sufficient detail to act as tools that facilitate or maximise the opportunities of the loan.

It is also important that some enquiry be made as to the basis upon which the lender has made the claim of ownership of copyright. All too often, the owner mistakenly assumes that it is the owner of copyright and grants the borrower rights that it does not have. When dealing with non-sophisticated lenders it is well worth including a question in the pre-loan negotiations along the following lines: '(i) Are you the owner of copyright in the work? If so, what is the basis of your ownership of copyright?' This assists the borrower to ascertain the validity of the claim. If the answer to the second question is 'Because it owns the work', the borrower knows that it cannot rely on the claim of copyright and the permissions that flow from it.

Where the lender does claim to be the owner of copyright it is also worth including a simple clause that states: 'If the Lender is not the owner of copyright in respect of any of the Works that are subject to this agreement, the Lender warrants that he/she has obtained all necessary permissions.' This is simple risk management: sometimes, no matter how careful the borrower is and how honestly and fervently the lender believes in its ownership of copyright, the lender may be sued by a third party who believes that they are the real owner of the rights. The inclusion of a warranty such as this means that the borrower can then look to the lender for the costs and damages incurred as a result of its breach.

### ***Period of the loan***

Although most lenders and borrowers think that this is clear in all loan agreements, often it is not. Absolute clarity as to the commencement of the loan is essential because this is the moment that risk transfers to the borrower. All standard loan agreements should be reviewed to ensure that this apparently simple feature is clearly established.

More commonly, loan agreements do not sufficiently specify the end of the loan period. This is particularly important in situations in which the loaned material is not collected or is unable to be returned.

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

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

### ***Return of the loan material***

As is discussed in Chapter 15.7, many institutions are plagued with the problem of uncollected loans – material that can never become part of the collection but which the organisation is obliged to store, insure and administer. Given that all public institutions need to maximise the effectiveness of their limited resources, it is a waste.

It is essential that lenders include full and favourable clauses that articulate their rights over uncollected or undeliverable loan material. The National Museum example above is deficient in that it does not provide for a right to actually dispose of the material. It promises that the museum will warehouse the material and although the storage costs may at some time be recoverable from the owner, it is foreseeable that there will be a time when the storage charges far exceed the value of the material and until the owner is found, the museum has to keep paying the costs.

In the Regional Galleries agreement there is a provision to dispose of uncollected loans but, it is suggested, the time lines are too long. Having to hold the work for six months before putting it in a warehouse is an undue burden on the storage facilities of many regional galleries and having to pay for the warehousing of the work for two years before being able to dispose of it, is similarly too burdensome.

Also in the Regional Galleries example, the disposal power only applies to situations in which the lender is obliged to collect the work. It does not deal with the situation in which the borrower has agreed to return the work but is unable to do so because the lender has failed to advise it of a change of address, has gone into liquidation or done something else that causes to frustrate the borrower's fulfilment of its obligations. As is discussed earlier, it is essential that careful consideration be given to this provision so that the borrower can rely on the contract's mechanisms rather than the more arduous statutory ones.

### ***Catastrophe***

As hard as one might try to avoid them, accidents do happen. People are thoughtless or ignorant. The elements wreak their havoc. Whatever the reason, all borrowers are familiar with the dreaded situation in which loaned material suffers damage.

It is good practice to include a provision that provides an agreed mechanism that will be carried out in such situations. The Regional Galleries agreement includes a simple version of this in the body of the agreement, but where the procedure is more complex, it is best handled as a schedule to the agreement.<sup>2</sup> The relevant clause in the National Museum example needs

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<sup>2</sup>

expansion. It neither gives guidance to staff in the event of disaster nor gives the lender assurance as to what procedures will snap into effect in such circumstances. If we think of the loan agreement as a risk management tool, it is clear that this provision could be made much more useful. It is also interesting to note that the same institution's loan-out agreement contains a much more useful provision – a useful example of how so many institutions use more vanilla contracts when borrowing than when they lend their own material.<sup>3</sup> In a commercial context this approach is understandable but in the case of collecting institutions, where lenders are borrowers and borrowers are lenders, it makes sense to have a uniform approach to such obligations so that the administrative procedures are uniform allowing the staff to be more certain of what is expected of them.

## **16.5 Loan-out of collection material**

### ***Introduction***

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

Outward loan agreements take into account the nature and particular characteristics of the material being loaned. The concerns of a loans officer in an art museum will have some resonances for the loans officer in a natural history museum: the generic issues will be consistent. However, the natural history loan agreement will have greater emphasis on quarantine obligations, the prohibition or regulation of destructive testing, the mechanisms required by CITES legislation and the risk management procedures required by the sometimes hazardous nature of the collection materials (or storage media such as ethanol). Each collection type imposes its own requirements on the loan-out agreement.<sup>4</sup>

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<sup>4</sup> It may also allow the collection to gain an individual kind of benefit from the loan. For example, where a natural science museum lends a quantity of material to a researcher it may require that the researcher gives the museum a copy of the article and, further, that the researcher uses the museum's numbering when referring to the museum's objects. Similarly where the loan material is largely unidentified or classified, the museum may require that all data be made available to the museum. In this way the researcher benefits from having access to the public asset and the public interest is promoted by the enhancement of publicly available knowledge. (If the researcher is not prepared to agree to the release of information because of its potential for commercialisation, the museum should consider entering a commercialisation agreement in respect of the project.)

The issues relevant to the loan-out agreement are no different from those discussed in relation to loan-in agreements: the positions are merely reversed. Each party will consider such issues from its own point of view. Yet the loan-out agreement seems to attract more time and care from collection managers and registrars than the loan-in documentation. Curious. So, if you are reading this chapter because you want to review your loan-out agreement, please take one step back and start by reading the early part of this chapter relating to Loans-in.

### ***The Scream***

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

There is no rule as to how this is resolved. Sometimes the owner insists that the use of their contract must be used; sometimes it the larger institution dominates over the smaller organisation. Unbelievably, some of the managers disclosed that where each insisted on the use of their own agreement, each would sign the other's contract! A lawyer's Christmas! It means that, in effect, there is no written contract of loan because the terms of the transaction are conflictual and uncertain. This is what I call 'The Scream'.

Let's be clear. In every loan transaction there is an owner who is entrusting its asset into the hands of the borrower. Why not acknowledge the obvious? It will save a lot of negotiation time (and avoid your being tempted into The Scream) if your loan-in agreement is consistent with your loan-out agreement. To show that this can be done, the following loan-out agreement is one that is consistent with the loan-in agreement provided above.

### ***Loan-out agreement with commentary***

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INSERT CHRISTCHURCH LOAN-OUT AGREEMENT WITH COMMENTARY