



# Provenance & Due Diligence Research Policy

## Section 1 – Purpose

The purpose of this policy is to set out the principles guiding provenance and due diligence research, which informs decision making for the Tasmanian Museum and Art Gallery (TMAG) in relation to making acquisitions and receiving incoming loans.

TMAG is committed to acting in a manner that discourages illegal or unethical trade in cultural property. This policy helps TMAG ensure that its legal and ethical obligations are observed in continuing to develop its collection.

To do so, TMAG will undertake due diligence research for all proposed acquisitions and incoming loans as well as reviewing previous decisions and understandings about the collection.

The objectives of this policy are to ensure that:

- a) TMAG acts ethically and accountably, applying international best practice standards in the consideration, assessment and negotiation of acquisitions and incoming loans;
- b) Earlier decisions and understandings about previous acquisitions may be assessed using this Policy as a benchmark, to align TMAG's collection with the principles and values expressed in this Policy; and
- c) Such practices and processes avoid any act, or omission, that may compromise TMAG's values, ethics and principles, or its legal obligations, in relation to the provenance of acquisitions and incoming loans.

These objectives are to be achieved by ensuring that:

- a) All items considered for acquisition or incoming loan are subject to a provenance and due diligence research process, to establish a legal provenance or secure history;
- b) The findings of provenance and due diligence research, premised on professional judgement, are used to inform decision-making and approvals processes in relation to all acquisitions and incoming loans; and
- c) Provenance and due diligence research practices and procedures in relation to acquisitions and incoming loans are transparent.

## 1.1 Scope

This Policy applies to all proposed acquisitions and all proposed incoming loans.

This policy does **not** apply to assets acquired for display purposes (i.e. props).

TMAG's collections are held within the four main curatorial disciplines:

- 1) Art - incorporating:
  - Art
  - Decorative Arts
- 2) Cultural Heritage – incorporating:
  - Tasmanian history
  - Antarctic and Southern Ocean
- 3) First Peoples Art and Culture – Incorporating:
  - Tasmanian Aboriginal
  - Australian Aboriginal
  - Pacific
  - Non-Australian material
- 4) Natural Sciences – incorporating:
  - Botany
  - Zoology
  - Geology

## 1.2 Authority

This policy is established by the Director and approved by the Board of Trustees (the Board) pursuant to the *Tasmanian Museum and Art Gallery Act 2017* (the Act).

## Section 2 – Glossary / Definitions

**Aboriginal or Torres Strait Islander item** – item made by an Aboriginal or Torres Strait Islander artist/maker or containing Aboriginal or Torres Strait Islander themes or content.

**Accession** - The process which formally acknowledges an item as part of the Collection and, *prima facie*, an item to be held in perpetuity.

**Acquisition** - The process of obtaining valid legal title to an item. Items may be acquired through various methods for the purpose of accessioning into the Collection or acquired and not accessioned.

**Act** - the Tasmanian Museum and Art Gallery Act 2017.

**Bequest** - A gift or form of pledge made to TMAG, forming part of a donor's will, to be received under a will following the donor's death.

**Board** - the Board of Trustees of the Tasmanian Museum and Art Gallery.

**Collection** - items in various media and forms that are TMAG property and have been

formally accessioned.

**Conflict of interest** - a situation where the personal interests of an individual working for, or representing, an organisation actually, potentially or are perceived to conflict with that organisation's interests.

**Deed of Gift** - A formal, legally binding document that establishes that title to an item is given to TMAG as a gift. TMAG's Deed of Gift template also outlines the terms and conditions of the gift and its acceptance.

**Director** means the Director of the Tasmanian Museum and Art Gallery.

**Donor** - An individual, organisation or group who has made or is proposing to make a gift to TMAG.

**Due diligence** - a comprehensive assessment of an item to evaluate its authenticity, ownership and provenance and to identify and assess any gaps in these.

**Gift** - The gratuitous transfer of property and title of the donation. A fractional gift means that a donor retains partial ownership of the donation. A restricted gift obliges the institution to comply with certain requirements that govern the gift's use, attribution, display or future disposition.

**Incoming loan** - any form of contracted arrangement for the transfer of possession of an item to TMAG on a temporary basis under which the transferor grants a temporary right of possession to TMAG.

The terms *lender*, *borrower*, *lending* and *borrowing* and *loan* and all related or derivative terms are to be construed in the context of this definition and unless otherwise specified, references to incoming loan or any related terms may apply to proposed, contemplated, potential, approved or realised loan arrangements.

**Provenance** - The full history and chain of ownership of an item from the time of its discovery or creation to the present day, through which authenticity and legal title are determined.

**Purchase Agreement** - A formal, legally binding written contract which outlines the rights, obligations and undertakings of the buyer and seller and outlines the terms and conditions of the sale and the transfer of both property and title.

**Repository of last resort** - An occasion where an institution acts as a repository for unprovenanced, illicitly collected or recovered specimens and objects from the territory over which it has lawful responsibility in order to protect such objects from destruction or deterioration, in line with clause 2.11 of ICOM's Code of Ethics for Museums.

**Significance** - The historical, aesthetic, scientific or social values that a museum object or collection has for past, present and future generations.

**Title** - The legal right to ownership of property. This may be supported by full evidence of every transaction subsequent to the first owner's title.

## Section 3 – Policy

## **3.1 Statement**

TMAG is committed to acting in a manner that discourages illegal or unethical trade in cultural property and scientific material.

To ensure its legal and ethical obligations are observed in respect of acquisitions and incoming loans, TMAG undertakes provenance and due diligence research for all proposed acquisitions and incoming loans.

TMAG seeks to avoid any act or omission that may attract legal liability; involve TMAG in civil or criminal proceedings; compromise TMAG's position and reputation for probity in public administration; or provide a direct incentive for, or validation of, illegal or unethical trade in cultural or scientific material.

TMAG recognizes the UNESCO Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property 1970 (the Convention) and acknowledges that Australia is a signatory to the Convention. TMAG also recognizes and is bound by the terms of the Protection of Movable Cultural Heritage Act 1986 and is guided by the International Council of Museums (ICOM) Code of Ethics, Museums Australia Code of Ethics and the Australian Best Practice Guide to Collecting Cultural Material, as well as the CITES Convention and other Conventions listed at 6.2.

## **3.2 Provenance requirements for acquisitions and incoming loans**

All items acquired or borrowed by TMAG should ideally have a documented provenance extending back to the object's initial discovery or manufacture.

Provenance shall be established by investigative research and due diligence:

- Performed by appropriately qualified TMAG curatorial staff, according to Procedures listed at Section 4 of this Policy; and
- Assessed and approved by senior staff in accordance with the approvals processes documented in TMAG's Acquisitions Policy or Incoming Loans Policy.

TMAG may initiate inquiries of prospective donors, sellers, lenders and third parties to seek to ascertain the legal and ethical status of an item or to address any gaps in provenance.

The performance, assessment and approval of provenance and due diligence research, to a level that reasonably establishes appropriate provenance, forms part of the process of, and is essential to, approval of any acquisition or incoming loan proposal.

TMAG will only acquire and/or borrow items where legal title, appropriate provenance and authenticity can reasonably be established.

### **3.2.1 Due diligence in relation to natural specimens**

TMAG will not acquire items where there is reasonable cause to suspect that their provenance includes unauthorised or unethical fieldwork, or intentional destruction or damage to vulnerable species and natural habitats.

TMAG will not acquire items or specimens, where there is reasonable cause to suspect that they have been collected, sold, or otherwise transferred in contravention of local, national, regional or international law or treaty relating to wildlife protection or natural history conservation, including the CITES Convention and other Conventions listed at 6.2.

### **3.3 Gaps and discontinuities in provenance**

TMAG acknowledges that complete and unbroken records of ownership are rare. The provenance of many items may contain gaps or may not be able to be verified through documentary evidence for legitimate reasons, including a past owner's desire for anonymity, or an absence of transaction records arising from the nature of the trade in such material.

TMAG further acknowledges that resolving provenance gaps, particularly during periods of war, conflict, political upheaval or natural disaster, may be further complicated by the loss or destruction of records in such circumstances.

In relation to all proposed acquisitions and incoming loans, as part of the provenance and due diligence research process, appropriately qualified TMAG staff will evaluate gaps and/or discontinuities in provenance to ensure there is no evidence or reasonable cause for suspicion that:

1. The item was illegally or unethically exported from its country of origin and/or any intermediary country in accordance with that country's laws, or unlawfully imported into Australia.
2. If not yet imported into Australia, is ineligible to be exported from its country of origin and/ or any intermediary country in accordance with that country's laws and/or is ineligible to be lawfully imported into Australia.
3. There exist any pre-existing or prior disputes or wrong-doings, unless evidence is provided of a binding settlement or the abandonment, remission of liability, or other extinguishment on binding terms of any claim resulting from the dispute or wrong-doing, in circumstances that do not compromise the contemporary ethical status of the item.
4. With regard to Aboriginal or Torres Strait Islander items, the origin and source of the item has not been identified where it is reasonably possible to do so; and the right of any community or individual to assert a legal and/or customary interest in the item has not been respected.
5. With regard to Scientific specimens, the collection or trade of the specimens contravenes ethical collecting principles, laws or conventions.

If there is evidence or reasonable cause for suspicion that the circumstances described in 1, 2, 3, 4 and/or 5 exist, TMAG will not approve the item for acquisition or for incoming loan.

### 3.4 Requirement for provenance warranties and indemnities

In all acquisition and incoming loan arrangements, TMAG will require the seller, donor or lender to provide warranties and indemnities to support their account of title or possession.

### 3.5 Non-consideration of monetary value

The insurance value or purchase price of an item is not relevant to, and will not be considered in, TMAG's assessment of provenance and due diligence findings.

### 3.6 Repository of Last Resort Exemption

TMAG may acquire, or otherwise act as custodian for, items without documented histories if TMAG is acting as a Repository of Last Resort. As acknowledged in Section 2.11 of the ICOM *Code of Ethics for Museums*, in such instances, the establishment of legal title and appropriate provenance may not be able to be ascertained.

In these circumstances TMAG does not seek to retain possession of the items should the lawful title holder be identified, but rather, will seek to restore the item to its legal owner.

### 3.7 Delegated Authority

In relation to proposed **incoming loans**, provenance and due diligence research is assessed and approved by:

- The Head of Herbarium OR
- Senior Curator Zoology OR
- The Director AND/OR
- The Board of Trustees.

Each of the above Senior Staff may assess and approve specific types of Incoming Loan Proposals, in accordance with the TMAG Manual of Authorities and the Incoming Loans Policy.

In relation to proposed **acquisitions**, provenance and due diligence research is assessed and approved by:

- Natural Science curators OR
- Deputy Director Collections and Research
- The Director AND/OR
- The Board of Trustees.

Each of the above Senior Staff may assess and approve specific types of Acquisition Proposals in accordance with the TMAG Manual of Authorities and the Acquisitions Policy.

## 3.8 Compliance

All employees are required to comply with this policy and disciplinary action may apply where an employee fails to comply with this policy without reasonable cause.

### Section 4 - Responsibilities

#### Board

The Board, as the steward of the TMAG collections, is responsible for the oversight of acquisitions and incoming loans policy and processes and for ensuring compliance with all Board-approved policies and procedures.

#### Director

The Director is responsible for ensuring that employees under their management are aware of, understand, and implement the requirements of this Policy and its included Procedures. The Director is responsible for ensuring that a list of all acquisitions and international incoming loans imported under PCOL approved in the last financial year is published in TMAG's Annual Report.

The Director is responsible for ensuring that as Curatorial position descriptions are updated as a matter of course over time a Major Duty is included to reflect the requirement for provenance and due diligence research for loans and acquisitions.

#### Employees

Employees are responsible for:

- a) Understanding and implementing the requirements of this policy.
- b) Requesting assistance as required in the implementation of this policy and escalating foreseeable issues to their manager.
- c) Completing the relevant documentation (for instance, an Acquisition Proposal, an Incoming Loan Proposal) in accordance with this Policy and its related Procedures, unless otherwise determined by the delegated authority.
- d) Creating and professionally maintaining records (paper-based and/or electronic) in accordance with established policies and procedures, for each proposed acquisition or incoming loan, including those that are not approved by the Board, and documenting relevant information and decision-making. The records that TMAG creates are State records and come under the jurisdiction of the *Archives Act 1983*. TMAG has specific and implied requirements for record keeping. These are extended by related financial and administrative legislation that requires employees to be accountable for their actions.
- e) Notifying the Department of Primary Industry, Parks, Water and Environment (DPIPWE) when TMAG takes delivery of any specially protected wildlife or protected wildlife specimen as per s.57(2) of the *Wildlife (General) Regulations 2010*. TMAG is not obliged to accept any donated wildlife specimens.

## Section 5 – Procedures

TMAG staff will conduct provenance and due diligence research in relation to items proposed for acquisition or incoming loan as follows:

### 5.1 Investigations

#### 5.1.1 Primary source

Consult owner/lender of item, to:

- Ascertain and document owner/lender's account of the item's provenance and any previous transactions involving the item; and
- Request and receive evidence of legal title, previous transactions and any other documentation that supports the owner's account of provenance.

#### 5.1.2 Secondary sources

Secondary sources may support primary source accounts of provenance and/or fill gaps in provenance. Where relevant, TMAG staff should consult the following types of information sources, making a professional assessment of the likely utility of such records to guide them in their research:

Museum records;

- Exhibition catalogues;
- Auction catalogues;
- Other published sources; and
- Opinions of relevant professional experts.

#### 5.1.3 'Red Flag' resources

TMAG staff undertaking provenance and due diligence research will, where relevant, check the item's status on:

- [The Art Loss Register](#)
- [Interpol Stolen Works of Art Database](#)
- [ICOM Red Lists.](#)
- [Personal Property and Securities Register](#)
- [UNESCO Database of National Cultural Heritage Laws](#)

## 5.2 Documentation and reporting

TMAG staff undertaking provenance research must create and maintain records (either hard copy or digital) in relation to their research findings.

Findings should note the source of information.

All relevant findings should be documented, including adverse findings.

Once the provenance and due diligence research has been completed, the staff member will complete the *Provenance and Due Diligence Checklist* noting all relevant findings.

The completed Checklist should be submitted as part of the Proposal for Acquisition or Incoming Loan to which it refers.

Loan items are tracked manually and/or in Collection Management System under their assigned TMAG loan number.

## 5.3 Alignment with Protection of Cultural Objects on Loan Scheme (PCOL)

The import of loan items under PCOL must meet the requirements of the Scheme.

The Scheme requires TMAG to make the following information available on the TMAG website **at least four weeks prior to display**:

- A photograph of the object:
- One of the following:
  - The name of the lender (or if there is more than one entity, the name of each), or
  - The name of the person authorised to act on the lender's behalf (or if there is more than one lender, a person who is authorised to act on behalf of each lender), for example an authorised person would be a solicitor acting on a person's behalf, or
  - If the lender is a private lender who does not wish to be known publicly a statement such as 'private lender', 'private collection' or similar;
- A description of the object sufficient to identify it, including as much of the following information as the borrowing institution is able to ascertain:
  - The name and nationality of the artist, manufacturer or creator of the object
  - The title of the object
  - The type of object it is (for example, a painting, sculpture, drawing, installation, historic artefact) or a description of the material from which it was created (for example, gouache and pen on paper)
  - The dimensions of the object
  - The date on which the object was created or the period in which the object was created or likely to have been created (a year, i.e. 1871, or a

- range of years, i.e., 1871-1875)
- The place or likely place the object was created or manufactured; or, if the object consists of archaeological or paleontological material, the place where the object was found, or likely to have been found
- A description of significant or identifying marks or significant inscriptions on the object (for example the description of a signature or an inscription on the back of a painting);
- Provenance information, including the date and place the object was acquired by its current owner and, where possible, the date and place the object was acquired by the preceding owner:
- Information about where the object may be seen by a member of the public while it is in Australia including:
  - The title of the temporary public exhibition in which the object is to be displayed, and
  - Each address in Australia at which the object is to be displayed, and the period it will be on display there.

The following may also be considered for inclusion:

- A statement detailing which registers / lists have been checked (such as the Art Loss Register, ICOM Red Lists, Interpol database of Stolen Art)
- A brief summary of the full provenance for the object
- A statement regarding any time periods of concern such as 1933–1945, or for objects of Australian origin, the circumstance of their export from Australia.

The import of international loan items under PCOL must also meet consultation requirements of the Scheme. These requirements must be met when the item:

- Relates to or holds particular significance for a person, group or community in Australia; and/or
- Was created by an Aboriginal or Torres Strait Islander artist/maker, contains Aboriginal or Torres Strait Islander themes or content, or relates to an Aboriginal or Torres Strait Islander person or community; and/or
- Relates to, or embodies the culture of, a First Nations community from a country other than Australia
- Is a document or record that may be relevant to a state, territory or national archive or government records office.

TMAG's *Consultation Policy* provides a framework for all consultation undertaken by TMAG in fulfilment of the requirements of the Scheme. In relation to items of significance to the Aboriginal and Torres Strait Islander community, consultation approaches are also guided by the TMAG Tasmanian Aboriginal Advisory Group and its Terms of Reference.

## Section 6 – References

### 6.1 Internal Reference Material

- Acquisitions Policy and procedures
- Consultation Policy
- Deed of Gift
- Incoming Loans Policy and procedures
- Manual of Authorities
- Records Management Policy
- Tasmanian Aboriginal Advisory Group Terms of Reference
- TMAG discipline-specific acquisition policies and procedures.

### 6.2 External Reference Material

- Aboriginal and Torres Strait Islander Heritage Protection Act 1984
- American Association of Art Museum Directors, *Guidelines on the Acquisition of Archaeological Material and Ancient Art*, 2013
- Archives Act 1983
- Australia Council, *Protocols for Producing Indigenous Australian Visual Arts*, 2010
- Australian Government, Attorney General's Department, Ministry for the Arts, *Australian Best Practice Guide to Collecting Cultural Material*, 2015
- Australian Government, Ministry for the Arts, *Cultural Gifts Program guide*, 2013
- Convention on Biological Diversity (CBD)
- Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES) – March 1973 (and as amended 1979 and 1983)
- Environmental Protection and Biodiversity Conservation Act 1999
- Historic Shipwrecks Act 1976
- ICOM Code of Ethics for Museums, 2017
- ICOM Code of Ethics for Natural History Museums
- ICOM, International Observatory on Illicit Traffic in Cultural Goods
- ICOM, Red Lists of cultural objects at risk (18 Lists as of 2021)
- Meteorites Act 1973
- Museums Australia *Code of Ethics*
- Museums Australia, *Continuing cultures, ongoing responsibilities*, 2005
- Nagoya Protocol on Access and Benefit Sharing (2010)
- Pacific Islands Museums Association, *Code of Ethics for Pacific Museums and Cultural Centres*, 2006
- Protection of Moveable Cultural Heritage Act 1986
- Protection of Movable Cultural Heritage Regulation 2018
- Protection of cultural objects on loan: scheme guidelines, 2014
- Tasmanian Nature Conservation Act 2002
- Tasmanian Whales Protection Act 1988
- Tasmanian National Parks and Reserved Land Regulations 1999
- UNESCO Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property 1970 ('the Convention')

- Unidroit, *Convention on Stolen or Illegally Exported Cultural Objects*, 1995
- Wildlife (General) Regulations 2010

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