



DUE DILIGENCE AND PROVENANCE POLICY

SUMMARY

| Name of Policy | |
|--|--|
| Description of Policy | This policy sets out the principles by which the National Gallery conducts due diligence and investigates provenance for new acquisitions and inward loans, and on its existing collection. |
| Policy applies to | <input checked="" type="checkbox"/> National Gallery wide <input type="checkbox"/> Specific (e.g. Department) |
| Policy Status | <input type="checkbox"/> New Policy <input checked="" type="checkbox"/> Revision of Existing Policy |
| Approval Authority | Director |
| Responsible Officer | Head Curators |
| Contact area | Curatorial |
| Date of Policy Reviews* | February 2023 |
| Related Policies, Procedures, Guidelines and Local Protocols | <ul style="list-style-type: none"> ▪ <i>National Gallery Act 1975</i> ▪ <i>Public Governance, Performance and Accountability Act 2013</i> ▪ Financial Delegations ▪ <i>Vision for the National Gallery of Australia and Vision for the national collection</i> ▪ Aboriginal and Torres Strait Islander Cultural Rights and Engagement Policy ▪ Acquisitions Policy ▪ Deaccessioning Policy ▪ Inward Loans Policy ▪ Exhibitions Development Policy ▪ Fraud Control Plan and Fraud Strategy ▪ Provenance Framework ▪ <i>Copyright Act 1968</i> ▪ <i>Privacy Act 1988</i> ▪ <i>Australian Best Practice Guide to Collecting Cultural Material, 2015</i> ▪ <i>Collections Law: Legal Issues for Australian Archives, Galleries, Libraries and Museums</i> http://www.collectionslaw.com.au/contents |

*Unless otherwise indicated, this policy will still apply beyond the review date.

APPROVALS

| Position | Name | Endorsed | Date |
|----------------------|----------------|----------|-----------------|
| <i>Director</i> | Nick Mitzevich | Yes | 20 January 2023 |
| <i>Council Chair</i> | Ryan Stokes | Yes | DD Month YYYY |

TABLE OF CONTENTS

| | | |
|--|--|----|
| 1. | Purpose..... | 5 |
| 2. | Scope | 5 |
| 3. | Responsibilities..... | 5 |
| 3.1. | Curators and archivists | 5 |
| 3.2. | Senior Curator, Provenance..... | 5 |
| 3.3. | Head Curator | 5 |
| 3.4. | Director | 6 |
| 3.5. | Governance and Reporting Manager | 6 |
| 3.6. | Head of Registration..... | 6 |
| 4. | Procedures | 6 |
| 4.1. | Framework | 6 |
| 4.2. | Principles | 6 |
| 4.3. | Managing incomplete provenance | 7 |
| 4.4. | Managing provenance issues | 8 |
| 4.5. | Custody of material unsuitable for acquisition | 8 |
| 5. | Related content | 8 |
| 5.1. | National Gallery policies..... | 8 |
| 5.2. | Guidelines, procedures and associated documents..... | 9 |
| 5.3. | Legislation | 10 |
| 6. | Revision history | 11 |
| PROVENANCE FRAMEWORK AND DECISION-MAKING PRINCIPLES | | |
| 1. | Introduction | 16 |
| 1.1 | Provenance at the National Gallery | 16 |
| 1.2 | Purpose of this framework | 16 |
| 2. | Provenance assessment and decision-making principles | 16 |
| 2.1 | Premise | 16 |
| 2.2 | Guiding Principles | 17 |
| 3. | Provenance assessment and decision-making process..... | 18 |
| 3.1 | Introduction | 18 |
| 3.2 | Process | 18 |
| 3.2.1 | Who | 18 |
| 3.2.2 | How | 18 |
| 4. | Endnotes & References..... | 20 |

1. PURPOSE

The National Gallery of Australia (the National Gallery) and its functions are determined by the *National Gallery Act 1975*. The principal objectives of the National Gallery, as outlined in the Act, are to develop and maintain a national collection of works of art, and to exhibit, or to make available for exhibition by others, works of art from the national collection or that are otherwise in the possession of the National Gallery.

This policy sets out the principles by which the National Gallery conducts due diligence and investigates provenance on its existing collection and for new acquisitions and inward loans.

The objectives of this policy are to ensure that the National Gallery:

- A.** Conforms to appropriate legislation, policy and guidelines and develops, maintains and exhibits the collection and selects inward loans in a legal, ethical, responsible and accountable manner;
- B.** Applies rigorous, accountable and transparent standards when conducting due diligence and investigating the provenance of prospective acquisitions, the existing collection and inward loans;
- C.** Acquires and borrows material that is authentic and for which a reliable chain of ownership has been established and/or which is assessed through sound professional judgement to have a secure title and history of legal and ethical transactions;
- D.** Maintains its standing and reputation for implementing best practice in the public eye and the museum community, both nationally and internationally;
- E.** Does not directly or indirectly endorse or provide an incentive to the illegal or unethical trade in cultural material and avoids any act or omission that may attract legal liability, involve the National Gallery in civil or criminal proceedings or otherwise compromise the National Gallery's position and reputation.

2. SCOPE

This policy applies to all activities related to conducting due diligence and investigating provenance of the National Gallery's existing collection, acquisitions and inward loans. Collections included in the scope of this document are the national collection (referred to as the permanent collection), Study Collection (previously Art Archive) and Research Library Archive.

3. RESPONSIBILITIES

3.1. CURATORS AND ARCHIVISTS

Review and assess potential collection material and loans for title and significance and prepare acquisition and loan proposals; document in the acquisition or loan proposal, details of due diligence and provenance investigation for the consideration of the Senior Curator, Provenance, Head Curator, the Director, Council and, where necessary, the Minister responsible for the Arts.

3.2. SENIOR CURATOR, PROVENANCE

Works with curators and archivists to support due diligence and provenance investigation for prospective acquisitions and loans; evaluates due diligence and provenance investigation outcomes to clarify and assess legal and ethical risks associated with the material, if any.

3.3. HEAD CURATOR

In consultation with curators, archivists and the Director, oversees the selection of material proposed for collection and inward loan and ensures that the assessment of these proposals is undertaken in accordance with this policy and related policies, plans and procedures; approves and makes recommendations for acquisition and loan proposals based on the due diligence and provenance investigation as well as other considerations.

3.4. DIRECTOR

Reviews and approves proposed acquisitions within the Director's delegation or makes a recommendation regarding the proposed acquisition to the Collections Committee Chair, the Collections Committee, the Council Chair, Council, or, where necessary, the Minister responsible for the Arts.

3.5. GOVERNANCE AND REPORTING MANAGER

Ensures the Council acquisition process is documented.

3.6. HEAD OF REGISTRATION

Ensures all documentation of acquisitions or loans is completed.

4. PROCEDURES

4.1. FRAMEWORK

The following legislation, policies and principles frame the National Gallery's due diligence and provenance research:

- A.** The National Gallery complies with the Australian Government's *Protection of Movable Cultural Heritage Act 1986*, the *Protection of Cultural Objects on Loan Act 2013* and the *Protection of Cultural Objects on Loan Regulation 2014*.
- B.** The National Gallery recognises the UNESCO *Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property 1970* and acknowledges that Australia is a signatory to the Convention. The National Gallery is guided by the ICOM *Code of Ethics* and the *Australian Best Practice Guide to Collecting Cultural Material* and other industry documents referenced in section 5.2.2.
- C.** The National Gallery's approved collection, loan and exhibition development policies give effect to international conventions, Australian legislation and the highest standards of ethical and professional practice. All collecting and borrowing is done within the framework of these policies.
- D.** The National Gallery does not support the illicit trade in works of art, such as those appropriated by theft or other illicit means during times of civil unrest and armed conflict; obtained by destruction or defacing of ancient monuments; or stolen from individuals, communities, nations and museums or other repositories. All available measures are implemented to avoid acquiring, exhibiting or borrowing such objects, and restituting them where they are identified in the existing collection.
- E.** The National Gallery is committed to respecting cultural sensitivities in the collecting, display and publication of works of art and supports best practice protocols to inform fair, sensitive and effective consultation in dealing with First Nations artists and communities. The principles enshrined in the Reconciliation Action Plan are applied in relation to due diligence and provenance activities and are extended where practicable to all activities related to First Nations artists and communities in Australia and elsewhere.
- F.** The National Gallery recognises that some material for which provenance information is incomplete or unobtainable may deserve to be publicly displayed, preserved, studied and published because of its rarity, importance and aesthetic merit, and to ensure that it is widely published and viewed to increase the possibility of further information being offered.

4.2. PRINCIPLES

The National Gallery must conduct due diligence and investigate the provenance for all proposed acquisitions and inward loans:

- A.** When selecting material for acquisition, the National Gallery must consider the outcome of the due diligence and provenance investigation before submitting the acquisition proposal.

- B.** When selecting material for inward loan, the National Gallery must consider the outcome of the due diligence and provenance investigation before proceeding with the loan.

The National Gallery furthermore conducts ongoing provenance research for all works of art in the permanent collection. This includes works of art and other collection material that are:

- A.** Identified by the Provenance Working Group for focused research, or that are of a type that is under scrutiny globally, or where an external inquiry regarding title or other aspects of the work is made;
- B.** Under consideration for deaccessioning for any reason;
- C.** Requested for outgoing loan, or external publications;
- D.** Included in upcoming collection displays or exhibitions;
- E.** Where gaps in the known chain of ownership exist.

The National Gallery acquires or borrows materials only where:

- A.** Information about the provenance and authenticity of the material can reasonably be ascertained and independently verified;
- B.** A critical evaluation has been undertaken of any gaps in the provenance information;
- C.** The National Gallery is satisfied that the material was exported from its country of origin and any intermediary country in accordance with that country's laws and lawfully imported into Australia or is eligible to be;
- D.** Any prior disputes or wrongdoings have been assessed and evidence sought of the binding settlement, abandonment or remission of liability, or that any claim has been otherwise extinguished on binding terms and in circumstances that do not compromise the contemporary ethical status of the material;
- E.** The origin and source and the identity of any community, family or individual who may wish to assert a legal and/or customary interest or cultural right in the material have been identified in accordance with the Due Diligence and Provenance Checklist and the Reconciliation Action Plan;
- F.** Representatives of relevant communities have been consulted with in accordance with the Due Diligence and Provenance Checklist and the Reconciliation Action Plan.

4.3. MANAGING INCOMPLETE PROVENANCE

Complete and unbroken records of ownership are rare. The chain of ownership of some material may be incomplete or not verifiable through documentary evidence: possibly a past owner wanted to remain anonymous, or due to the nature of the trade or type of material there may be an absence of records, or there may not have been the requirement for the records at that time.

The National Gallery must evaluate gaps in provenance or undocumented transactions to ensure no evidence or reasonable cause for suspicion can be found about the procurement of the material by its current owner or in relation to previous transactions or exchanges.

Resolving provenance gaps—particularly those coinciding with periods of war, conflict, political upheaval or natural disaster—may be further complicated by the loss or destruction of records. Such gaps may also be an indication of illegal or unethical actions.

Where there are gaps in provenance, the National Gallery must complete a risk assessment based on known information and the historical context of the gap.

When assessing incomplete provenance, the National Gallery must assess risks taking into consideration the:

- A.** Nature of any gaps;
- B.** Contemporary and historical market for the type of object;
- C.** History of the country of origin;
- D.** Reputation of the vendor, donor or lender, and any other party associated with the material;

E. Price of the material relative to the established market;

F. Value of the material, and any other relevant factors.

The National Gallery may also contact authorities such as government, community representatives, museums, cultural centres and keeping places in the country or community of origin.

If the National Gallery proceeds with an acquisition or loan following the risk assessment, the reasons and justification for making this decision must be recorded. Where the provenance is incomplete for existing collection material, the risk assessment outcome will be the basis on which the material is prioritised for further research.

4.4. MANAGING PROVENANCE ISSUES

After approving an acquisition or loan, the National Gallery may obtain new information through internal investigation or from an external party. If this information calls into question the previously understood provenance or establishes another party's claim to title or possession, the National Gallery must investigate the matter and respond in a timely, respectful and ethical way. The National Gallery's response must be in the interest of the public and the long-term preservation of the material. This is guided by National Gallery policies and other established cultural, legal and legislative protocols. The National Gallery may also seek appropriate assistance and advice.

Where an object in the possession of the National Gallery is claimed for restitution or repatriation, the National Gallery must handle the claim respectfully and sensitively. The National Gallery's investigation of any identified provenance issue and any action based on the outcome of this investigation is determined by the legal and ethical framework and principles of best practice as outlined in this policy. This is not contingent on the rightful owner instigating a claim.

4.5. CUSTODY OF MATERIAL UNSUITABLE FOR ACQUISITION

In some circumstances, material may be borrowed or held by the National Gallery in custody or trust to protect or preserve it. The National Gallery may also enter into other arrangements where they act as a repository of last resort in accordance with the Inward Loans Policy. In these instances, title and the usual standards of provenance may not be ascertainable. If the lawful title holder is identified, the National Gallery will restore the material to the legal owner.

5. RELATED CONTENT

This policy should be read in conjunction with the following:

5.1. NATIONAL GALLERY POLICIES

Reconciliation Action Plan

Acquisitions Policy

Deaccessioning Policy

Exhibitions Development Policy

Inward Loans Policy

Outward Loans Policy

Freedom of Information Policy

Risk Management Policy

5.2. GUIDELINES, PROCEDURES AND ASSOCIATED DOCUMENTS

5.2.1. National Gallery guidelines, procedures and associated documents

Vision and collection development strategies

Ethics Framework

Code of Conduct

Fraud Strategy

Inward Loans Procedure

Outward Loans Procedure

Work of Art Claims and Inquiries Handling Procedure

5.2.2. National and international guidelines, procedures and associated documents

The National Gallery's guidelines and principles have been informed by the Australian Government's *Australian Best Practice Guide to Collecting Cultural Material* (2015), the Association of Art Museum Directors' Report of the AAMD Task Force on the Acquisition of Archaeological Material and Ancient Art (2004) and *Combating Illicit Trade: Due diligence guidelines for museums, libraries and archives on collecting and borrowing cultural material* (Department for Culture, Media and Sport, London, 2005). Other framing documents include:

Art Gallery of New South Wales, *Provenance and Due Diligence Research Policy*, 2015/2020

Art Gallery of South Australia, *Provenance and Due Diligence Research Policy*, 2019

National Museum of Australia, *Collections Development Policy*, 2014

Australian Government, Attorney General's Department, Ministry for the Arts, *Protection of Cultural Objects on Loan: Scheme Guidelines*, 2014

American Association of Art Museum Directors, *Guidelines on the Acquisition of Archaeological Material and Ancient Art*, 2013

ICOM Code of Ethics, 2013

Australia Council, *Protocols for Producing Indigenous Australian Visual Arts*, 2010

Ministry for the Arts, *Cultural Gifts Program Guide*, 2009

Indigenous Art Code

Pacific Islands Museums Association Code of Ethics for Pacific Museums and Cultural Centres, 2006

Museums Australia, *Continuing Cultures, Ongoing Responsibilities*, 2005

Department for Culture, Media and Sport, Cultural Property Unit, United Kingdom, *Combating Illicit Trade: Due diligence guidelines for museums, libraries and archives on collecting and borrowing cultural material*, October 2005

Smithsonian Institution, *Collections Management*, 2001

Museums Australia, *Code of Ethics*, 1999 (under redevelopment 2023)

Unidroit Convention on Stolen or Illegally Exported Cultural Objects, 1995

Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES) (Amendment) 1979

UNESCO Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property 1970

UNESCO, The Hague Convention 1954, First Protocol 1954 and Second Protocol 1999

ICOM Red Lists of cultural objects at risk

Art Loss Register

UNESCO, Database of National Cultural Heritage Laws

ICOM, International Observatory on Illicit Traffic in Cultural Goods

ICOM, World Intellectual Property Organisation Art and Cultural Heritage Mediation

International Foundation for Art Research

5.3. LEGISLATION

5.3.1. Commonwealth of Australia

National Gallery Act 1975

Aboriginal and Torres Strait Islander Heritage Protection Act 1984

Biosecurity (Consequential Amendments and Transitional Provisions) Act 2015

Customs Act 1901

Environment Protection and Biodiversity Conservation Amendment (Wildlife Protection) Act 2001

Personal Properties Securities Act 2009

Protection of Cultural Objects on Loan Act 2013

Protection of Cultural Objects on Loan Regulation 2014

Protection of Movable Cultural Heritage Act 1986

Protection of Movable Cultural Heritage Regulations 2018

Public Governance, Performance and Accountability Act 2013

5.3.2. Australian Capital Territory

Freedom of Information Act 2016

Public Interest Disclosure Act 2012

Information Privacy Act 2014

Financial Management Act 1996

Financial Management Regulation 2005

Sale of Goods Act 1954

Sale of Goods (Vienna Convention) Act 1987

Territory Records Act 2002

This policy is also informed by the traditions and precedents set since the establishment of the National Gallery.

6. REVISION HISTORY

| Version | Date | Responsible Officer | Comments |
|---------|---------------|---------------------|---|
| CUR3.1 | August 2017 | Council | Document created |
| CUR3.2 | November 2020 | Council | Format and content revised. |
| CUR3.2 | June 2021 | Council | <i>Provenance Framework and Decision-Making Principles</i> appended to policy |
| CUR3.3 | February 2023 | Council | Format and content revised. |

DEFINITIONS

| | |
|-------------------------|---|
| Acquisition | The process of obtaining valid title to collection material, in accordance with the Acquisitions Policy. |
| Act | <i>The National Gallery Act 1975.</i> |
| Collection | Collection material in various media that is National Gallery property and has been formally acquired. In this policy, the terms collection material, work of art, work and related terms are used interchangeably to describe all art or other material acquired for the collections covered by the scope of this policy. |
| Council | The governing Council of the National Gallery under the Act. |
| Director | The Director of the National Gallery appointed under the Act and includes a person appointed by the Minister as acting Director. |
| Due Diligence | The thorough assessment of collection material or a potential inward loan to evaluate its authenticity, ownership, legal and ethical status and provenance and to identify and assess any gaps. |
| National Gallery | The National Gallery of Australia, a statutory authority established in accordance with the Act. |
| Inward Loan | Any contracted arrangement for the transfer of possession of a work of art or other material to the National Gallery on a temporary basis under which the transferor grants a temporary right of possession to the National Gallery, in accordance with the Inward Loans Policy. |
| Material | One or more works of art or archival or study collection items in various media that have been formally acquired or are under consideration for loan. In this policy, the terms collection material, work of art, work and related terms are used interchangeably to describe all art or other material acquired for the collections or for other uses covered by the scope of this policy. |
| Outward Loan | Any contracted arrangement for the transfer of possession of a work of art or other material from the National Gallery to another party or parties on a temporary basis under which the National Gallery grants a temporary right of possession to the borrower, in accordance with the Outward Loans Policy. |
| Provenance | The history and ownership of an item from the time of its discovery or creation to the present day, used to determine authenticity and ownership. |
| Title | The legal right to ownership of property. |



PROVENANCE FRAMEWORK AND DECISION-MAKING PRINCIPLES

Version History

| Adam O'Brien | Preparation of first version – working draft | V0.1 | 15.04.2021 |
|--------------|---|------------------|------------|
| Adam O'Brien | Update following stakeholder feedback | V0.2 | 19.04.2021 |
| Adam O'Brien | Update following further stakeholder feedback | V0.3 | 21.04.2021 |
| Adam O'Brien | Update following Provenance Working Group feedback – for Senior Management Group endorsement prior to Director Approval | V1.0 | 27.04.2021 |
| Adam O'Brien | Minor updates following feedback from The Ethics Centre | V1.0 | 04.05.2021 |
| Shaune Lakin | Minor updates following feedback from Council members | V1.0 | 21.05.2021 |
| Adam O'Brien | Minor update following Council deliberations and approval. | Council Approved | 04.06.2021 |

Contents

| | | |
|--------|--|----|
| 1. | Purpose..... | 5 |
| 2. | Scope..... | 5 |
| 3. | Responsibilities..... | 5 |
| 3.1. | Curators and archivists | 5 |
| 3.2. | Senior Curator, Provenance..... | 5 |
| 3.3. | head curator | 5 |
| 3.4. | Director | 6 |
| 3.5. | Governance and Reporting Manager | 6 |
| 3.6. | Head of Registration..... | 6 |
| 4. | Procedures..... | 6 |
| 4.1. | Framework | 6 |
| 4.2. | Principles | 6 |
| 4.3. | Managing incomplete provenance | 7 |
| 4.4. | Managing provenance issues | 8 |
| 4.5. | custody of material unsuitable for acquisition..... | 8 |
| 5. | ReLATED CONTENT | 8 |
| 5.1. | national Gallery policies | 8 |
| 5.2. | Guidelines, procedures and associated documents..... | 9 |
| 5.2.1. | National Gallery guidelines, procedures and associated documents..... | 9 |
| 5.2.2. | National and international guidelines, procedures and associated documents | 9 |
| 5.3. | legislation | 10 |
| 5.3.1. | Commonwealth of Australia..... | 10 |
| 5.3.2. | Australian Capital Territory | 10 |
| 6. | Revision history | 11 |
| 1. | Introduction | 16 |
| 1.1 | Provenance at the National Gallery | 16 |
| 1.2 | Purpose of this framework | 16 |
| 2. | Provenance assessment and decision-making principles | 16 |
| 2.1 | Premise | 16 |
| 2.2 | Guiding Principles..... | 17 |
| 3. | Provenance assessment and decision-making process..... | 18 |
| 3.1 | Introduction | 18 |
| 3.2 | Process | 18 |
| 3.2.1 | Who..... | 18 |
| 3.2.2 | How | 18 |
| 4. | Endnotes & References..... | 20 |

1. INTRODUCTION

1.1 PROVENANCE AT THE NATIONAL GALLERY

The National Gallery is committed to being a model custodian of art and a responsible global citizen; and in this capacity has reinforced its position that:

Provenance at the National Gallery will be anchored by legal and ethical considerations.

Since 2014, the National Gallery has dedicated substantial effort, including commissioning two independent reviews, into identifying high-risk works of art and reviewing their provenance. This dedicated effort has resulted in the deaccessioning and repatriation of several works of art; however, it has also brought to the surface several observations and insights into the approach to provenance utilised at the National Gallery, and more generally at other leading collecting institutions.

Traditionally, there has been a reliance on a narrow and reasonably opaque legal framework to guide decision-making where a lack of confidence exists regarding the history and ownership of a work of art, from the time of its creation or discovery to the present day. The independent reviews commissioned by the National Gallery have produced enhanced clarity on the legal framework and principles to guide provenance assessment and decision-making. Ethical standards have increasingly become part of the domestic and international discourse on provenance.

1.2 PURPOSE OF THIS FRAMEWORK

Reflecting a determination made by the National Gallery Council in April 2021, this framework outlines how the National Gallery will ensure provenance is anchored in legal and ethical considerations, provides a scope for proactive and timely consideration of provenance concerns, and clarifies how it determines the fitness for the national collection of works of art where the provenance is unclear. It co-exists alongside the National Gallery's existing policies including:

- Due Diligence and Provenance Policy
- Acquisitions Policy
- Deaccessioning Policy
- Inwards Loans Policy.

2. PROVENANCE ASSESSMENT AND DECISION-MAKING PRINCIPLES

2.1 PREMISE

Provenance at the National Gallery will be anchored by legal and ethical considerations.

2.2 GUIDING PRINCIPLES

The strengthened and improved Guiding Principles below are in addition to those outlined in the Due Diligence and Provenance Policy. In assessing and making determinations about whether a work of art is fit for the collection, the National Gallery will apply the following Guiding Principles to priority works of art. Priority works of art will be identified either through internal risk assessment or external enquiries considered by the National Gallery to be enquiries of substance:

| Guiding Principle | Additional / Supporting Information |
|---|--|
| <p>The National Gallery will not adopt a one-size-fits-all approach to provenance; each assessment will be made on the unique circumstances attached to each work of art, informed by the National Gallery’s policies, ethical principles and decision-making guidance with a view to sustaining the integrity of the collection</p> | <ul style="list-style-type: none"> • There is no simple formula, no binary proposition, no ‘one size-fits-all’ resolution of every question which might arise when a museum has acquired in good faith a [work of art] of unclear provenanceⁱ • Each situation is going to be completely different, and the analysis is going to be different for each oneⁱⁱ |
| <p>Determinations will be made based on the balance of probabilities</p> | <ul style="list-style-type: none"> • A determination can only be made after research and assessment of all reasonably available information and advice identifies that it is more likely than not that the work is unfit for the collection on a legal or ethical basis, and/or that an irreparable illegal or unethical act has taken place in association with the work of art. • Where competing priorities are of equal likelihood, a determination is not proved.ⁱⁱⁱ |
| <p>The National Gallery is committed to transparency and disclosure of provenance information</p> | <ul style="list-style-type: none"> • The position of the National Gallery in response to a request to disclose the provenance of an item in the national collection will be to disclose, unless such disclosure is more likely than not to compromise a live investigation being undertaken by a legal authority or the National Gallery, and if the disclosure is within the parameters of the <i>Privacy Act 1988</i> and other relevant legislation. • The proposed or actual use of public money on the national collection supports the full disclosure of provenance information by the National Gallery. • Credit lines requiring anonymity are distinct from provenance. |
| <p>The National Gallery will exercise its ethical obligations, and not allow ethically contentious actions, when assessing provenance</p> | <ul style="list-style-type: none"> • Determinations shall not conflict with the National Gallery’s purpose, mission, values or ethical principles. • Determinations will, as far as possible: <ul style="list-style-type: none"> • produce more positive than harmful outcomes^{iv} • support the general will of the people^v • be consistent with actions the National Gallery would support as a universal law^{vi} • protect the ethical rights of those affected by the decision.^{vii} • The National Gallery will return moveable cultural objects to their country or community of origin unless it can be proven more likely than not that the removal was the subject of consent by the country of origin and/or the owner or custodian of the object at the time, or did not require such consent, or where relevant authorities have not provided consent for the continued retention of the work of art in the national collection. • The National Gallery shall consider the impact on future equitable |

| Guiding Principle | Additional / Supporting Information |
|--|---|
| <p>Effort attributed to provenance assessment shall be proportionate to the resources available to the National Gallery</p> | <p>relations with other countries of a decision not to return a moveable cultural object to its country of origin.</p> <ul style="list-style-type: none"> The National Gallery has a duty to provide the proper use and management of public resources^{viii}. The Director shall make a determination as to what should be considered a reasonable and proper devotion of time and other resources to the pursuit of provenance research. |
| <p>The National Gallery is committed to ultimately ensuring that the provenance of all works of art in the national collection meets legal and ethical considerations and standards</p> | <ul style="list-style-type: none"> The National Gallery will pursue the collection and documentation of a defensible rationale, including provenance that meets legal and ethical considerations and standards, for all works of art in the national collection. |

3. PROVENANCE ASSESSMENT AND DECISION-MAKING PROCESS

3.1 INTRODUCTION

The roles and responsibilities of National Gallery team members involved in conducting, assessing and acting on provenance are described in the Due Diligence and Provenance Policy. Further clarification on roles, responsibilities and processes for acting on compliance in a manner consistent with this framework are provided below.

3.2 PROCESS

3.2.1 WHO

It is intended that the Provenance Working Group will provide advice to the Director for the application of this framework to progress provenance recommendations to the National Gallery Council. The Provenance Working Group will refer matters to other Committees and individuals within the National Gallery, consistent with its Terms of Reference. Any decision-making shall occur in alignment with the National Gallery’s Council Instructions and Delegations Instrument.

3.2.2 HOW

Consistent with Guiding Principle 1, there is no precise formula for legal and ethical decision-making, and the process for the assessment of provenance may differ for each work of art given the unique circumstances attaching to the work of art. However, the National Gallery has adopted an approach, outlined in this document and the existing policies outlined in section 1.3, to inform provenance assessment, including from a compliance perspective and an ethical perspective anchored in reflective practice.

Guidance on how to support legal and ethical decision-making pertaining to provenance is illustrated below; however, it is important that this is used as a guide only and applied to suit the individual circumstances that exist.

1. Confirm cause(s) of problematic provenance

Consult broadly to test and confirm reasoning leading to causation of an initial suspicion of problematic provenance

Have we consulted with all relevant, available stakeholders to be confident in the reasoning supporting our suspicion of problematic provenance?

2. Conduct assessment against the Guiding Principles

Conduct an assessment against the Guiding Principles contained in the National Gallery's Provenance Framework

| Guiding Principle | Potential Questions / Considerations |
|---|--|
| The National Gallery will not adopt a one-size-fits-all approach to provenance; each assessment will be made on the unique circumstances attached to each work of art, informed by the National Gallery's policies, ethical principles and decision-making guidance with a view to sustaining the integrity of the collection | <ul style="list-style-type: none">• Have we ensured that we've considered the unique circumstances attached to the work of art in question, and not simply applied reasoning based on an assessment of provenance for another work of art? |
| Determinations will be made based on the balance of probabilities | <ul style="list-style-type: none">• Does the evidence suggest that it more likely than not that the work of art was stolen, illegally exported, obtained unethically during a period of conflict, illegally excavated or other similar legal or ethically questionable circumstance?• Based on what we know now, is it more likely than not that additional evidence will surface within a reasonable timeframe to establish provenance to the standard we require? |
| The National Gallery is committed to transparency and disclosure of provenance information | <ul style="list-style-type: none">• Have we established any defensible reason not to disclose provenance?• Have we satisfied ourselves that we have been as transparent as possible in relation to the disclosure of provenance?• Have we checked that the disclosure will not breach any applicable legislation or legal obligation? |
| The National Gallery will exercise its ethical obligations, and not allow ethically contentious actions, when assessing provenance | <ul style="list-style-type: none">• Have we assured ourselves our proposed course of action does not conflict with the National Gallery's purpose, mission, values or ethical principles?• Does our proposed course of action produce more positive than harmful outcomes?• Can we establish that it is more likely than not that the work of art was legally acquired in and exported from the country of origin and that its import meets the conditions proscribed in the <i>Protection of Movable Cultural Heritage Act 1986</i> as articulated in the <i>Australian Best Practice Guide to Collecting Cultural Material</i>?• Will the proposed course of action support or hinder future equitable relations with the object's country of origin? |
| The National Gallery is committed to ultimately ensuring that the provenance of all works of art in the national collection meets legal and ethical considerations and standards | <ul style="list-style-type: none">• Are we demonstrating the proper use and management of National Gallery resources in our proposed course of action?• Are there higher priority, value-adding activities not being completed in the pursuit of a provenance determination that on the balance of probabilities will not be resolved in a reasonable timeframe? |

3. Assessment testing

For assessments with a low level of confidence or certainty, escalate the matter to the National Gallery Collections Committee.

4. Select a course of action

In making a recommendation to the Director the Provenance Working Group considers the available options and assesses what course of action will produce the most good, the least harm, and best support the Gallery's Provenance Guiding Principles and make a determination. Such a recommendation may include:

- Continue to conduct research into the provenance of the work of art
- Make a determination that sufficient provenance has been established to remove a problematic classification from the work of art
- Recommend to the relevant Delegate that the work of art be deaccessioned
- Pause all activity relating to the provenance of the work of art and return to its assessment at a later date
- Approach an external expert or advisor for additional assistance in completing the assessment and/or forming a determination

5. Implement decision, and record the rationale behind making it

6. Evaluate decision

Did the decision address the needs and concerns of all stakeholders?

Was it successful in mitigating legal and ethical concerns?

If it happened again, would different measures be considered?

4. ENDNOTES & REFERENCES

ⁱ Crennan, Susan M. Asian Art Provenance Project, National Gallery of Australia, 2015

ⁱⁱ Griswold, William. Cleveland Museum of Art, commentary on Returning Hanuman sculpture to Cambodia by Steven Litt, May 16 2015

ⁱⁱⁱ Crennan, Susan M. Asian Art Provenance Project, National Gallery of Australia, 2019

^{iv} Utilitarianism

^v Common Good - Rosseau

^{vi} Duty Based Ethics - Kant

^{vii} Rights Approach - Locke

^{viii} Division 2, Subdivision A, Section 15 – Duty to govern the Commonwealth entity, *Public Governance, Performance and Accountability Act 2013 (Cth)*