

# **INWARD LOANS Policy**

## SUMMARY

### Inward Loans Policy

Summary description of Policy This policy sets out the principles by which the National Gallery assesses, approves and conducts inward loans for temporary exhibitions and touring exhibitions.

Policy Status  New Policy  
 Revision of Existing Policy

Approval Authority Council

Policy Steward Head of Registration

Contract area Registration

## APPROVALS

Position	Name	Endorsed/Approved	Date
Assistant Director	Natasha Bullock	Yes	20 December 2022
Director	Nick Mitzevich	Yes	20 January 2023
Council	Ryan Stokes	Yes	3 February 2023

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# 1. PURPOSE

This policy sets out the principles by which the National Gallery of Australia (National Gallery) assesses management of inward loans in accordance with legal, ethical and best practice standards.

The National Gallery will ensure that all loans are negotiated and managed on terms that are ethical, responsible, and visible to public scrutiny. By adhering to appropriate standards of due diligence the following considerations will be considered in the acceptance and approval of incoming loans:

- Provenance
- Consultation
- Conflicts of interest

For eligible international loans, the National Gallery will ensure compliance with all responding, transparency and accountability requirements under the *Protection of Cultural Objects on Loan (PCOL) Act and Regulation*.

## 1.1. SCOPE

This policy applies to all National Gallery employees (ongoing, non-ongoing, casual or otherwise) who are responsible for the research, consideration, approval and management of loans to the National Gallery for exhibition and any other purposes.

## 2. POLICY STATEMENT

### 2.1. PROVENANCE AND DUE DILIGENCE

The National Gallery undertakes to be open and transparent in its decision-making processes and procedures and will practice and demonstrate appropriate levels of due diligence research as relevant to the circumstances of the proposed loan.

- a) The National Gallery fully supports 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 has ratified the Convention. The National Gallery also recognises and is bound by the terms of the *Protection of Cultural Objects on Loan Act 2013 (Cth) (PCOL Act)*, the *Protection of Movable Cultural Heritage Act 1986 (Cth)* and the *Aboriginal and Torres Strait Islander Heritage Protection Act 1984 (Cth)*.
- b) The National Gallery adheres to Australian and international best practice, including the 2015 Ministry for the Arts' *Australian Best Practice Guide to Collecting Cultural Material*, Australian Museums and Galleries Association's *Code of Ethics* and the ICOM *Code of Ethics for Museums*.
- c) Prior to deciding whether to proceed with an incoming loan, the National Gallery will undertake due diligence regarding the lender's account of provenance in accordance with the Incoming Loans Procedures. The National Gallery will only borrow objects where it is confident that:
  - The lender is reputable.
  - The owner holds valid title to the object.
  - The object has not been illegally exported from the country of origin or any intermediary countries and relevant export licenses and permits have or will be obtained for export from the country from which it will be exported.
  - The import of the object into Australia doesn't contravene Australian import restrictions, or international treaties or conventions to which Australia is a party or signatory.
  - The object has not been obtained through illicit or unauthorised means; and
  - There are no current or outstanding third-party claims in relation to the object, and any prior wrongdoing regarding the object has been the subject of a binding settlement, abandonment or other remission of liability, or that any claim relating has been otherwise extinguished on binding terms.
- d) Where the lender is not the sole owner, the National Gallery will only borrow objects where it is confident that the lender has the legal authority to enter the loan either:
  - on behalf of the owner and/or co-owners as an agent or representative; or
  - as the party who would reasonably be expected to have possession, custody or control of the object for the period of the loan, were that arrangement not in place.
- e) The National Gallery recognises that the owner of an object may elect to have the loan negotiated and managed on their behalf by an agent or third party and/or may elect to remain anonymous. In such instances, the identity of the owner must be made known to the National Gallery and documented in the loan agreement. With the exception of this requirement and to the extent that it can do so within legislative and policy parameters, the National Gallery will comply with this request.
- f) The National Gallery will not proceed with an incoming loan if, after undertaking due diligence, there remains reasonable concerns about the object, the lender or the circumstances surrounding the loan.
- g) Provenance will be assessed and approval to proceed based on due diligence research findings will be determined in accordance with the Incoming Loans Procedures by the Curator and Head Curator. In

circumstances where requirements for further investigation are identified, further due diligence will be undertaken by the Curator and assessed by the Loans Steering Group.

- h) When undertaking an incoming loan, the National Gallery will require the lender to provide warranties and indemnities regarding their account of provenance, ownership and/or possession, and their capacity to lend the object(s) and authority to enter into the loan agreement.
- i) After undertaking due diligence and determining to proceed with an incoming loan, if, during the negotiation or conduct of the loan information emerges that has the potential to expose the National Gallery to legal entanglement or to render the loan ethically contentious, in accordance with the Incoming Loans Procedures further investigation and risk assessment will be undertaken to determine how to proceed.
- j) The National Gallery will always comply with all administrative and legal processes in place at an international, national and state level and will obtain all necessary permits or approvals and comply with all other reporting and accountability requirements in relation to the import and export of materials to and from Australia.

## **2.2. MANAGING PROTECTION OF CULTURAL OBJECTS ON LOAN (PCOL)**

The National Gallery is committed to ensuring transparency and ethical dealings in its interactions with lenders under the *Protection of Cultural Objects on Loan Act 2013* (PCOL Act) and the Protection of Cultural Objects on Loan Scheme. Part 2 of the PCOL Act applies to inward loans for collection exhibitions and other collection displays, touring exhibitions within Australia as well as temporary exhibitions.

### **2.2.1. Consulting with community groups**

Open, ethical, transparent and accountable consultation establishes and strengthens the National Gallery's relationships with its communities. When considering whether to proceed with an international inward loan, the National Gallery must consult with appropriate individuals, groups, communities or statutory bodies where the work:

- Relates to or holds particular significance for an individual, group or community in Australia or where it embodies beliefs, ideas, customs, traditions, practices or stories that are important to a particular community.
- Has been created by an Aboriginal or Torres Strait Islander artist, contains Aboriginal or Torres Strait Islander themes or content, or relates to an Aboriginal or Torres Strait Islander person or community
- Is a document or record that may be relevant to a state, territory or national archive or government records office.

Consultations about an inward loan must be conducted in accordance with Inward Loans Procedures, be outcomes-focused and be of strategic benefit. Consultations must always be respectful and meaningful to the individual and must recognise the cultural, social, spiritual and linguistic diversity of the individuals and communities involved.

The National Gallery must allocate an appropriate amount of time to consult and follow up. All parties must be made aware of the timeframe for consultation and decision-making about whether and on what terms the inward loan will proceed. This must occur regardless of whether a work has been previously borrowed by the National Gallery.

### **2.2.2. Publication of the inward loan under the PCOL Regulation**

For at least four weeks before the import of an international inward loan for temporary exhibition or any other purpose, and until it is exported from Australia, the National Gallery will publish on its public website core information and an image of the work of art. This must be done in accordance with Part 6 of the PCOL Regulation and the Inward Loans Procedures.

In exceptional circumstances, the National Gallery may seek an exemption from publication for nominated inward loans in accordance with the PCOL Regulation and the Inward Loans Procedures.

Any claims or concerns arising from the publication of works must be taken very seriously. The National Gallery must acknowledge the concern within 28 days as required by PCOL Regulation and in accordance with the work of art claims and inquiries handling procedures required by PCOL Regulation.

### 2.2.3. Extending protection under the PCOL Act

In accordance with the PCOL Act, protection is available for a maximum of two years from the date on which the work was imported into Australia, unless approval to extend is granted. If an inward loan protected under the terms of the PCOL Act is to endure beyond two years, the National Gallery may request an extension in accordance with the requirements of the Protection of Cultural Objects on Loan Scheme and the Inward Loans Procedures. This will be a minimum of six weeks before the end of the protection period.

If an extension is not requested and approved, the terms of the PCOL Act protections will automatically cease. If the protection is to expire during the course of a loan, the National Gallery must advise the lender as soon as possible before the end of the protection period in accordance with the Inward Loans Procedures.

### 2.2.1. Opting out of the PCOL Act

For any international inward loans, the National Gallery or the lender may elect to opt out of the PCOL Act as determined by the Director or delegate. Notice of this determination must be provided to the Minister of the Arts or the Minister's delegate, in accordance with the PCOL Guidelines under Section 6.1 at least 28 days before the object is imported.

Before an inward loan begins, the National Gallery must notify the lender in writing that the loan will not be protected under the PCOL Act. The grounds for the decision and the lender's agreement must be documented in accordance with the Inward Loans Procedures.

## 2.3. APPROVING INWARD LOANS

The Director approves inward loans for temporary or touring exhibitions. All inward loans for purposes other than temporary exhibition must be endorsed by the Director, to ensure that funds are available to cover all associated costs of the inward loan.

Once an inward loan has been approved by the Director, the Director must make a formal request in writing to the lender.

In deciding whether to approve an inward loan, the National Gallery must consider:

- The *National Gallery Act 1975*
- The terms of this policy
- The outcomes of due diligence and provenance investigations, conducted in accordance with the Provenance and Due Diligence Policy
- Outcomes and recommendations arising from any community consultations.

The grounds for approval of any inward loans that do not accord with the considerations outlined in this policy must be recorded in accordance with the documentation of incoming loans section of this policy.

## 2.4. DOCUMENTATION OF INCOMING LOANS

The National Gallery will document all incoming loans by way of written loan agreements, the terms and conditions of which will include:

- The rights and responsibilities of each party;
- Appropriate warranties and indemnities, particularly in relation to the lenders authority to lend the object and enter into the loan agreement, the account of provenance provided for the object and the legal export of the object from any country.

Where the National Gallery is responsible for issuing the Loan Agreement, inward loans will be formalised using the National Gallery's Inward Loan Agreement which outlines the standard terms. Amendments may be negotiated in accordance with the Inward Loans Procedures. Where the lender's Loan Agreement is used, the National Gallery must:

- Assess the conditions to ensure they are consistent with the principles outlined in this policy and the National Gallery's Inward Loan Agreement
- Negotiate any amendments or additional clauses.

Loan Agreements for inward loans for temporary exhibitions and any other purpose, including touring exhibitions, are approved and endorsed by the Director or the Assistant Director.

## **2.5. MANAGING RISK**

The decision to borrow and the terms of the inward loans must be based on a rigorous appraisal and risk assessment of the information obtained. The National Gallery must maintain thorough records of the process of proposing, investigating and making decisions regarding the inward loan.

The National Gallery must not accept an inward loan on terms that require it to:

- Suppress reasonable misgivings about the work of art or transact the loan if the provenance is flawed
- Compromise its standing, integrity, or freedom to act conscientiously
- Act in any way that is unethical or contrary to the public interest.

When borrowing works of art by living artists, the National Gallery must do its best to involve the artists so that they know how their work is being presented and interpreted.

The National Gallery must always remain vigilant to all potential risks of legal and ethical controversy in connection with the loan and respond promptly to any legal, ethical, and social propriety matters.

## **2.6. CONFLICTS OF INTEREST**

All loans of objects from National Gallery Council members, employees and associated parties including National Gallery volunteers must be disclosed and documented at all stages of the process of endorsement and approval of the loan.

Council Members and employees must exclude themselves from any discussion or decision the National Gallery Senior Management Group or Council have in relation to loans in which they or related parties are involved. Any such exclusions will be documented in accordance with the Conflicts of Interest Policy.

Loans from National Gallery Council members, employees and volunteers will be acknowledged as from a 'Private Collection'. This approach ensures National Gallery associates are not obtaining any perceived or real benefit through their association with the National Gallery.

## **2.7. MANAGING NON-CONFORMING LOANS (REPOSITORY OF LAST RESORT)**

The National Gallery acknowledges that there may be circumstances where a strict application of due diligence is not feasible, for example where the incoming loan will enable further provenance research to be undertaken or when the National Gallery acts as a "repository of last resort" including to protect an object from destruction or deterioration or where sensitive and significant cultural material is placed with the National Gallery at the request of traditional owners or rightful custodians.

In considering the incoming loan in such circumstances, the National Gallery will consult with representatives of appropriate communities or groups, the professional museum community and/or relevant government bodies and where relevant will be guided by the First Nations Advisory Group regarding objects of significance or importance to Aboriginal or Torres Strait Islander peoples.

The National Gallery will enter such arrangements based on sound, considered professional and ethical judgement. Such loans will be undertaken only in specific circumstances and the National Gallery will only



enter such arrangements in instances where the object is not being borrowed primarily for temporary exhibition purposes.

Such loans will be assessed and approved in accordance with this policy. The basis for the decision and any variations to the terms of the standard loan agreement will be documented in accordance with this Inward Loans Policy and associated Inward Loans Procedures.

In circumstances where the National Gallery is unable to administer such arrangements in accordance with the terms of this policy, they will be managed as custodial arrangements, in accordance with the National Gallery's Acquisitions Policy.

## **2.8. RECORD KEEPING**

In addition to publication requirements specific to inward loans protected under the terms of the *PCOL Act*, the Director must ensure that a list of all inward loans to the National Gallery is published in the National Gallery's annual report. Where anonymity of ownership is preferred for privacy reasons, the credit line must acknowledge the loan as being from a 'private collection'.

In accordance with established procedures, staff must maintain records (paper-based and/or electronic) for each inward loan, including inward loans that are not approved. The records must document relevant information and decision-making.

### 3. ROLES, RESPONSIBILITIES AND AUTHORITIES

<b>Roles</b>	<b>Responsibilities and authorities</b>
Director	Reviews and formally approves requests for incoming loan.
Assistant Director, First Nations Engagement	Reviews and endorses requests for incoming loans of indigenous cultural property or other objects proposed for loan that may have relevance to Aboriginal or Torres Strait Islander peoples and provides guidance on consultation in accordance with the ICIP Protocol.
Head Curators	Oversees the operation of the Curatorial team with regard to incoming loan management and endorses requests for incoming loan
Head of Registration	Ensures that incoming loans are managed in accordance with this policy, related legislation, policies, plans and procedures and accepted best practice standards; and endorses requests for incoming loan.
Associate Registrar, Loans and Exhibitions	Oversees the operation of the Registration team with regard to incoming loan management and endorses requests for incoming loan.
Registrars	Manages the incoming loan program and ensures a commitment to the highest legal and ethical standards of due diligence.
Curators	Negotiate incoming loans with potential lenders and ensure a commitment to the highest legal and ethical standards of due diligence

## 4. REVISION HISTORY

Version	Date	Policy Steward	Comments
V.1	November 2017	Head of Registration	New Policy
V.2	December 2020	Head of Registration	Minor updates and formatting
V.3	February 2023	Assistant Director, Collections and Exhibitions	Full review of policy conducted and benchmarked for best practice.

## 5. DEFINITIONS

Term	Definition
<b>Act</b>	<i>National Gallery Act 1975.</i>
<b>Approved Borrowing Institution</b>	An institution approved under Part 3 of the <i>Protection of Cultural Objects on Loan Act 2013</i> by the Minister for the Arts, or the Minister’s delegate.
<b>Collection exhibition</b>	An exhibition of works of art that is largely drawn from the national collection and may include inward loans and/or commissions.
<b>Council member</b>	A member of the National Gallery’s governing Council appointed in accordance with the Act.
<b>Director</b>	The Director of the National Gallery appointed under the Act and includes a person appointed by the Minister as acting Director.
<b>Due diligence</b>	The thorough assessment of a work of art to evaluate its authenticity, ownership and provenance and to identify and assess any gaps.
<b>Exhibition Program</b>	The forward program and schedule of temporary, national collection and touring exhibitions.
<b>National Gallery</b>	The National Gallery of Australia, a statutory authority established in accordance with the Act.
<b>International</b>	Any loan arrangement where a work of art enters Australia from a country outside Australia with the consent of a party ordinarily resident or incorporated outside Australia who grants a temporary right of possession to the work(s) of art to the National Gallery for a specified period.
<b>Inward loan</b>	<p>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. It therefore includes loans in the strict legal sense of gratuitous bailments; bailments that arise from contracts that expressly benefit both the National Gallery and the party transferring possession; and other sharing arrangements, such as a scheduled rotation of possession among co-owners.</p> <p>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 inward loan or any related terms may apply to proposed, contemplated, potential, approved or realised loan arrangements. The terms do not apply to transfers of possession to the National Gallery where the National Gallery is the sole owner of the object and retains the sole right of possession.</p>
<b>Loan agreement</b>	A formal, legally binding written contract between the lender, who may be the owner of the work(s) of art subject to the loan, or their agent, and the National Gallery as borrower, specifying the work(s) of art and outlining the conditions and terms of the loan and the responsibilities of each party.

<b>Loans Steering Group</b>	Strategically reviews and endorses requests of incoming loan prior to formal approval by the Director.
<b>Loans Working Group</b>	Operationally assesses the outcomes of the Loans Steering Group for incoming loans.
<b>National collection</b>	Works of art in various media that are National Gallery property and have been formally accessioned. In this policy, the terms work of art, work and related terms are used interchangeably to describe all art or other material accessioned into the national collection. In this policy, the national collection does not include the Study Collection.
<b>Owner</b>	The party or parties who lawfully possess title to the work of art.
<b>Protection of Cultural Objects on Loan (PCOL)</b>	In this policy refers to the <i>Protection of Cultural Objects on Loan Act 2013</i> , <i>Protection of Cultural Objects on Loan Regulation 2014</i> and Protection of Cultural Objects on Loan Scheme.
<b>Provenance</b>	The history of ownership of an item from the time of its discovery or creation to the present day, from which authenticity and ownership are determined.
<b>Temporary exhibition</b>	An exhibition of works of art on display at the National Gallery including inward loans and/or commissions and may include works drawn from the national collection.
<b>Title</b>	The legal right to ownership of property.
<b>Touring exhibition</b>	An exhibition of work(s) of art that may include works drawn from the national collection, inward loans and/or commissions that the National Gallery tours to other venues.

## 6. GUIDELINES AND LEGISLATION

### 6.1. NATIONAL AND INTERNATIONAL GUIDELINES, PROCEDURES AND ASSOCIATED DOCUMENTS

This policy should be read in conjunction with, but not limited to, the following:

#### International

- 1970 UNESCO Convention on the Means of Prohibiting and Preventing the Illicit Import and Export and Transfer of Ownership of Cultural Property
- *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.
- International Council of Museums (ICOM) *Code of Ethics*, 2017
- ICOM, *International Observatory on Illicit Traffic in Cultural Goods*
- ICOM Red Lists of cultural objects at risk
- *Pacific Islands Museums Association Code of Ethics for Pacific Museums and Cultural Centres*, 2006
- *Unidroit Convention on Stolen or Illegally Exported Cultural Objects*, 1995
- UNESCO Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property, 1970
- UNESCO, *Database of National Cultural Heritage Laws*
- UNESCO, *The Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict 1954, First Protocol 1954 and Second Protocol 1999*
- United Nations – United Nations Declaration of the Rights of Indigenous Peoples 2007
- American Association of Art Museum Directors, *Guidelines on the Acquisition of Archaeological Material and Ancient Art*, 2013
- *Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES) (Amendment) 1979 and 2019*

#### Australia

- *Australian Best Practice Guide to Collecting Cultural Material* (2015)
- *Report of the AAMD Task Force on the Acquisition of Archaeological Material and Ancient Art* (2004)
- Australia Council, *Protocols for Producing Indigenous Australian Visual Arts*, 2010
- Museums Australia, *Continuing Cultures, Ongoing Responsibilities*, 2005

#### National Gallery policies

- Exhibitions Policy
- Conflicts of Interest Policy
- Provenance and Due Diligence Policy
- Provenance Framework

### 6.2. LEGISLATION

#### Commonwealth of Australia

- Protection of Movable Cultural Heritage Act 1986.
- 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
- Freedom of Information Act 1982
- Income Tax Assessment Act 1997
- National Gallery Act 1975
- Personal Properties Securities Act 2009
- Privacy Act 1988

- 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 Interest Disclosure Act 2013
- Public Governance, Performance and Accountability Act 2013
- Aviation Transport Security Act 2004 Aviation Transport Security Regulations 2005

#### **Australian Capital Territory**

- *Financial Management Act 1996*
- *Financial Management Regulation 2005*
- *Sale of Goods Act 1954*
- *Sale of Goods (Vienna Convention) Act 1987*
- *Territory Records Act 2002*
- *Uncollected Goods Act 1996*