

MAAS Incoming Loans Policy

Draft Policy for comment: 27 June 2016

Date Approved: 21 July 2016

Date for Review: July 2018

1. Policy Statement

This Policy provides a framework for the Museum of Applied Arts and Sciences (MAAS) management of Incoming Loans. MAAS is committed to undertaking all Loan transactions within its Policy and procedural framework and thereby ensuring a commitment to the highest legal and ethical standards of Due Diligence. The power to approve Incoming Loans for MAAS is vested in the Director.

2. Application

This Policy relates to the Incoming Loan of objects for exhibition and public program purposes. It covers the range of Loans from single objects to travelling exhibitions of a large number of objects borrowed for display, interactive installation and public programs use.

3. Provenance and Due Diligence

- 3.1 Pursuant to s14 of the *MAAS Act 1945* (NSW) and s12 of the MAAS Regulation, MAAS has the authority to accept Loans of objects from any person or body for display and exhibition. Incoming Loans will be made in accordance with this Policy and the Incoming Loans Procedures.
- 3.2 MAAS 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.
- 3.3 MAAS 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. MAAS 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).
- 3.4 MAAS adheres to Australian and international best practice, including the Ministry for the Arts' *Australian Best Practice Guide to Collecting Cultural Material*, Museum Australia's *Code of Ethics* and the ICOM *Code of Ethics for Museums*.
- 3.5 MAAS will only borrow objects where it is confident that:
 - 3.5.1 The Lender is reputable;
 - 3.5.2 The Owner holds valid Title to the object;
 - 3.5.3 Where the Lender is not the sole Owner, the Lender has the legal authority to enter into the Loan either:
 - 3.5.3.1 on behalf of the Owner and/or co-Owners as an agent or representative; or
 - 3.5.3.2 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.
 - 3.5.4 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;
 - 3.5.5 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;
 - 3.5.6 The object has not been obtained through illicit or unauthorised means; and
 - 3.5.7 There are no current or outstanding third-party claims in relation to the object, and any prior wrongdoing in regard to 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.
- 3.6 MAAS 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 MAAS and documented in the Loan Agreement. With the exception of this requirement and to the extent that it is able to do so within legislative and Policy parameters, MAAS will comply with this request.
- 3.7 Prior to deciding whether to proceed with an Incoming Loan, MAAS will undertake Due Diligence regarding the Lender's account of Provenance in accordance with the Incoming Loans Procedures.

- 3.8 MAAS 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.
- 3.9 Provenance will be assessed and approval to proceed on the basis of Due Diligence research findings will be determined in accordance with the Incoming Loans Procedures by the Curator and Head of Curatorial. In circumstances where requirements for further investigation are identified, further Due Diligence will be undertaken by the Curator and assessed by the Collection Development Review Committee.
- 3.10 When undertaking an Incoming Loan, MAAS 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.
- 3.11 After undertaking Due Diligence and determining to proceed with an Incoming Loan, if, in the course of the negotiation or conduct of the Loan information emerges that has the potential to expose MAAS 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 in order to determine how to proceed.
- 3.12 MAAS 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 MAAS 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 MAAS at the request of traditional Owners or rightful custodians.
- 3.12.1 In considering the Incoming Loan in such circumstances, MAAS 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 Aboriginal and Torres Strait Islander Collection Management Reference Group regarding objects of significance or importance to Aboriginal or Torres Strait Islander peoples.
- 3.12.2 MAAS will enter into such arrangements on the basis of sound, considered professional and ethical judgement. Such Loans will be undertaken only in specific circumstances and MAAS will only enter into such arrangements in instances where the object is not being borrowed primarily for Temporary Exhibition purposes.
- 3.12.3 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 Incoming Loans Policy and associated Incoming Loans Procedures.
- 3.12.4 In circumstances where MAAS 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 Collection Management Policy.
- 3.13 MAAS will at all times 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.

4. Consultation – Aboriginal or Torres Strait Islander Cultural and Intellectual Property

- 4.1 MAAS recognises the importance of consultation in the fulfilment of its obligations under the *MAAS Act 1945 (NSW)* and MAAS Regulation. MAAS aims to establish relationships of recognition and reciprocity with individuals, groups and communities that retain a connection to objects on Incoming Loan to MAAS. Consultation assists in ensuring the historical, social, spiritual and intellectual property significance of the objects in the MAAS Collection and in the care of MAAS are considered and acknowledged.
- 4.2 Where relevant and in accordance with the PCOL Regulation, MAAS will undertake consultation with appropriate individuals, groups, communities or statutory bodies as part of the assessment for an International Incoming Loan for Temporary Exhibition. Consultations will inform the decision making as to whether MAAS will proceed with a proposed Loan.
- 4.3 MAAS will undertake consultation where the object was created by an Aboriginal or Torres Strait Islander artist, designer, individual or group, or contains Aboriginal or Torres Strait Islander themes,

representations or content, relates to an Aboriginal or Torres Strait Islander community or to the traditional knowledge, cultural expressions or beliefs of Aboriginal or Torres Strait Islander peoples.

- 4.4 Consultations will be structured and undertaken in a manner consistent with the Incoming Loans Procedures and the Indigenous Cultural and Intellectual Property Protocol.
- 4.5 MAAS acknowledges that Aboriginal and Torres Strait Islander objects may hold special value, significance and meaning for individuals and communities and will adhere to the United Nations *Declaration of the Rights of Indigenous Peoples 2007* in particular in relation to consultation, participation and prior informed consent in relation to Incoming Loans that may impact on Indigenous people.

5. Approval of Incoming Loans

- 5.1 Loans are approved by the Director or her/his delegate.
- 5.2 In deciding whether to approve an Incoming Loan, consideration will be given to:
- 5.2.1 the terms of this Policy
 - 5.2.2 the findings of Due Diligence investigations; and
 - 5.2.3 outcomes and recommendations arising from community consultations, if relevant.
- 5.3 The grounds for approval of any Incoming Loans that do not accord with this Policy will be recorded in accordance with the Documentation of Incoming Loans section of this Policy.

6. International Loans for Temporary Exhibitions

- 6.1 MAAS recognises the significant obligations and responsibilities afforded to Approved Borrowing Institutions under the terms of the PCOL Act. MAAS will comply with the terms of the PCOL Act and Regulation in order to enable the subjects of eligible International Incoming Loans for Temporary Exhibition to access the available immunity from suit and seizure in accordance with Part 2 of the PCOL Act.
- 6.2 In accordance with the Incoming Loans Procedures, MAAS will comply with all reporting, transparency and accountability requirements under the PCOL Act and Regulation.
- 6.3 MAAS acknowledges that there may be circumstances where MAAS may not want protection under the PCOL Act to apply to a certain object or exhibition imported for temporary Incoming Loan due to the managed nature of the risks or a willingness on the part of the Lender and MAAS to forego the protections. In such cases, in accordance with the PCOL Act and the Incoming Loans Procedures, MAAS will:
- 6.3.1 Consult with the Lender regarding the decision to opt-out. The Lender will be advised in writing prior to the Incoming Loan commencing that the Loan will not be afforded PCOL protections. The grounds for the decision and the Lender's agreement will be documented in accordance with the Incoming Loans Procedures.
 - 6.3.2 Where it is agreed to opt-out of protections, MAAS will give relevant notice to the Minister for the Arts, or the Minister's delegate, in accordance with the PCOL Scheme.
- 6.4 Loans for which protections have been waived in accordance with this section are not subject to any of the other requirements of section 5 of this Policy.

6.5 Community Consultation

- 6.5.1 Further to and informed by s4 of this Policy and the Indigenous Cultural and Intellectual Property Protocol, MAAS recognises the importance of consultation in the fulfilment of its obligations under the PCOL Act and Regulation.
- 6.5.2 MAAS will undertake consultation with appropriate individuals, groups, communities or statutory bodies as part of the assessment for an International Incoming Loan for Temporary Exhibition. Consultations will inform the decision making as to whether MAAS will proceed with a proposed Loan.
- 6.5.3 MAAS will undertake consultation where the object:
 - 6.5.3.1 relates to or holds particular significance for an individual, group or community in Australia;
 - 6.5.3.2 was created by an Aboriginal or Torres Strait Islander artist, designer, individual or group, or contains Aboriginal or Torres Strait Islander themes, representations or

- content, relates to an Aboriginal of Torres Strait Islander community or to the traditional knowledge, cultural expressions or beliefs of Aboriginal or Torres Strait Islander peoples; or
 - 6.5.3.3 is a document or record that may be relevant to a State, Territory, National Archive or Government Records Office.
- 6.5.4 Consultations will be structured and undertaken in a manner consistent with the Incoming Loans Procedures and, where relevant, the Indigenous Cultural and Intellectual Property Protocol and this Policy.
- 6.5.5 MAAS will undertake consultation in a manner that is outcomes focussed in relation to the Incoming Loan in question and meaningful to a sustainable longer-term relationship between MAAS and its various communities and stakeholders. Accordingly, consultation will be undertaken in an appropriate form to the circumstances of the Loan and the participants in the consultation. Consultations will be conducted in an informed, respectful, ethical, transparent and accountable manner, recognising at all times the cultural, social, spiritual and linguistic diversity of the individuals, groups and communities involved.
- 6.5.6 MAAS will ensure that an appropriate amount of time is allocated for consultation and further follow-up and will ensure that all parties are aware of the timeframe for consultation and decision making about whether and on what terms the Incoming Loan may proceed.
- 6.5.7 MAAS will follow up consultation with information concerning the outcomes of the approval process.
- 6.5.8 Where relevant and acceptable to the participants, MAAS will acknowledge the participation of consultants and stakeholders in relation to approved Incoming Loans.
- 6.5.9 Where relevant, consultation will be undertaken for an object proposed for Incoming Loan for Temporary Exhibition on each occasion of Loan, irrespective of whether the object has been previously borrowed.

6.6 Publication

- 6.6.1 In accordance with Part 6 of the PCOL Regulation and the Incoming Loans Procedures, MAAS will publish on its public website identifying details and an image of the object(s) imported for International Incoming Loan for Temporary Exhibition. The publication shall commence at least four weeks prior to the import and will remain until export from the country.
 - 6.6.2 In exceptional circumstances MAAS may seek an exemption from publication for nominated Incoming Loans in accordance with the PCOL Regulation and Incoming Loans Procedures.
 - 6.6.3 Any claims or concerns arising from the publication of an object protected under the PCOL Act will be taken very seriously and will be handled in a timely manner. All matters involving claims handling will be managed in accordance with the PCOL Regulation and the Claims Handling Procedures.
- 6.7 The PCOL Act affords protection for a maximum of two (2) years from the date on which the object is imported into Australia, unless approval to extend the protections is granted. In the event that an Incoming Loan protected under the terms of the PCOL Act will endure beyond the two year period, MAAS may request an extension in accordance with the requirements of the PCOL Act and the Incoming Loans Procedures at a minimum of six (6) weeks prior to the end of the protection period. If an extension is not requested and approved, MAAS recognises that under the terms of the PCOL Act, protections will cease. In the event that protection will expire during the course of a Loan, MAAS will advise the Lender at the earliest possible convenience prior to the end of the protection period in accordance with the Incoming Loans Procedures.

7. Documentation of Incoming Loans

- 7.1 MAAS will document all Incoming Loans by way of written Loan Agreements, the terms and conditions of which will include:
 - 7.1.1 the rights and responsibilities of each party;
 - 7.1.2 appropriate warranties and indemnities, particularly in relation to the Lender's 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.

7.2 Loan Agreements are approved and endorsed under the delegated authority of the Director by the Registration Manager.

8. Conflicts of Interest

8.1 All Loans of objects from MAAS Trustees, employees and associated parties including MAAS volunteers must be disclosed and documented at all stages of the process of endorsement and approval of the Loan.

8.2 Trustees and employees must exclude themselves from any discussion or decision the MAAS Executive or Board of Trustees have in relation to Loans in which they or related parties are involved. Any such exclusions will be documented.

8.3 Loans from MAAS Trustees, employees and volunteers will be acknowledged as 'Private Collection'.

9. Record Keeping

9.1 In accordance with the Records Management Policy and associated procedures, MAAS will maintain records for all Loans including proposed Incoming Loans that are not approved. These records will include information on approval processes and decision making in relation to the relevant Loan. All records will be kept securely and permanently by MAAS.

10. Roles and Responsibilities

Director: Reviews and formally approves requests for Incoming Loan.

Director, Curatorial, Collections and Exhibitions: Reviews and endorses requests for Incoming Loan.

Head of Strategic Collections: 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.

Head of Curatorial: Oversees the operation of the Curatorial unit with regard to Incoming Loan management and endorses requests for Incoming Loan.

Registration Manager: Oversees the operation of the Registration unit with regard to Incoming Loan management and endorses requests for Incoming Loan.

Registrars: Manage the Incoming Loan program and ensure 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.

ATSI Collection Management Reference Group: Provides high level expertise, guidance and endorsement regarding the negotiation, consultation and conduct of Incoming Loans of Indigenous Cultural Property or other objects proposed for Loan that may have relevance to Aboriginal or Torres Strait Islander peoples.

Collection Development Review Committee: Reviews Due Diligence research and risk assessment for proposed Incoming Loans in situations where the initial Due Diligence assessment has identified the need for further investigation.

11. Definitions

Approved Borrowing Institution: A cultural institution approved by the Minister for the Arts under the PCOL Act.

Board of Trustees: Comprising nine Trustees, the Board is established and its powers, authorities, duties and functions defined under the MAAS Act.

Director: The Director of the Museum of Applied Arts and Sciences or a person with the delegated authority of the Director.

Due Diligence: For the purposes of this Policy, Due Diligence is a thorough assessment of an object to evaluate its Ownership, Provenance and authenticity and to identify and assess any gaps in these.

Incoming Loan: Incoming Loan means any contracted arrangement for the transfer of possession of an object(s) or other material to MAAS on a temporary basis under which the transfer grants a temporary right of possession to MAAS. It therefore includes Loans in the strict legal sense of gratuitous bailments, bailments that arise from contracts that expressly benefit both MAAS and the party transferring possession and other sharing arrangements, such as a scheduled rotation of possession among co-Owners. 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. The terms do not apply to transfers of possession to MAAS where MAAS is the sole Owner of the object and retains the sole right of possession.

Incoming Loan Agreement or Loan Agreement: A formal, legally binding written contract between the Lender, who may be the Owner of the object/s subject to the Loan or their agent, and MAAS as Borrower, specifying the object/s and outlining the conditions and terms of the Loan and the responsibilities of each party. Includes but is not limited to MAAS Incoming Loan Agreements, the Lender's Agreement or an exhibition contract.

Incoming Loan for Temporary Exhibition: An Incoming Loan made for a finite period for the primary purpose of display at MAAS venues or in a travelling exhibition.

MAAS: The Museum of Applied Arts and Sciences.

MAAS Collection or Collection: The acquired Collection of material and objects owned by MAAS.

Museum of Applied Arts and Sciences Act: The Museum of Applied Arts and Sciences Act 1945 (NSW).

Owner: The party or parties that legally possess Title to the object.

PCOL Act: Protection of Cultural Objects on Loan Act 2013 (Cth).

PCOL Regulation: Protection of Cultural Objects on Loan Regulation 2014 (Cth).

Provenance: The history and Ownership of an object from the time of its discovery or creation to the present day, which assists in the assessment of authenticity and Ownership.

Temporary Exhibition: An exhibition of objects including Incoming Loans and/or commissions and may include objects drawn from the MAAS Collection displayed for a defined period of time.

Title: The legal right to Ownership of property.

Trustee: A person appointed as a member of the Board of Trustees in accordance with the MAAS Act.

12. Related Museum plans, policies and/or procedures

- Aboriginal and Torres Strait Islander Repatriation Policy

- Acquisition and Accession Policy
- Australian Indigenous Cultural and Intellectual Property (ICIP) Protocol
- Collection Management Policy
- Conservation Policy
- Outgoing Loans Policy
- Restitution Policy
- Claims Handling Procedures
- Incoming Loans Procedures
- Acquisition Due Diligence Checklist
- Incoming Loans Due Diligence Checklist
- Incoming Loans Further Investigation Due Diligence Checklist
- MAAS Reconciliation Action Plan
- MAAS Strategic Vision 2020

The latest version of any Policy or legislation referred to will apply.

13. Relevant legislation and external context

This Policy should be read in conjunction with the following:

- Australian Government, Attorney General's Department, Ministry for the Arts, *Australian Best Practice Guide to Collecting Cultural Material* 2014
- International Council of Museums (ICOM) – *Code of Ethics* 2006
- *Museum of Applied Arts and Sciences Act 1945* (NSW)
- Museums Australia – *Code of Ethics* 2006
- *Protection of Cultural Objects on Loan Act 2013* (Cth)
- *Protection of Cultural Objects on Loan Regulation* 2014
- *Protection of Cultural Objects on Loan Scheme Guidelines* 2015
- *Protection of Movable Cultural Heritage Act 1986* (Cth)
- UNESCO – *Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property* 1970
- United Nations – *United Nations Declaration of the Rights of Indigenous Peoples* 2007

The latest version of any Policy or legislation referred to will apply.

14. Responsible Officer

Registration Manager

15. Responsible Department and Unit

Curatorial, Collections & Exhibitions department, Strategic Collections Team

16. Amendment history

| Version | Date issued | Notes | By |
|---------|-------------|-------|-----------|
| 1 | 02/04/2012 | | Executive |
| 2 | 21/07/2016 | | Executive |