

# Due Diligence and Provenance Policy

## Summary

Due Diligence and Provenance Policy	
Description of policy	This policy sets out the principles the Gallery adheres to and the factors it considers when assessing and conducting due diligence and provenance research that informs and guides the Gallery's decision-making when considering acquisitions, loans and matters relating to the collection.
Policy applies to	<input checked="" type="checkbox"/> NGA 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	Assistant Director, Artistic Programs
Contact area	Artistic Programs
Date of policy review*	June 2022
Related policies, procedures, guidelines and local protocols	<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</i> <i>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 <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> <a href="http://www.collectionslaw.com.au/contents">http://www.collectionslaw.com.au/contents</a>
*Unless otherwise indicated, this policy will still apply beyond the review date.	

## Approvals

Position	Name	Endorsed	Date
Assistant Director, Artistic Programs	Natasha Bullock	Yes / No	
Director	Nick Mitzevich	Yes / No	
Council Chair	Ryan Stokes	Yes / No	

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## 1. Purpose

The Gallery and its functions are determined by the *National Gallery Act 1975*. The principal objectives of the Gallery, as outlined in section 6 of 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 Gallery. The objectives of this policy are to ensure that in carrying out these functions the Gallery:

- (a) conforms to appropriate legislation, policy and guidelines and develops, maintains and exhibits the collections and selects inward loans in a legal, ethical, responsible and accountable manner;
- (b) applies rigorous, accountable and transparent standards in the undertaking of due diligence research and assessment of provenance in relation to 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; and
- (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 Gallery in civil or criminal proceedings or otherwise compromise the Gallery's position and reputation.

## 2. Scope

This policy applies to all activities relating to conducting due diligence and the investigation of provenance in the development and management of the collections and inward loans. Collections included in the scope of this document are the national collection of art (also

referred to as the permanent collection), Study Collection (previously Art Archive) and Research Library Archive.

### 3. Definitions

**Acquisition** means the process of obtaining valid title to collection material, in accordance with the Acquisitions Policy.

**Act** means the *National Gallery Act 1975*.

**Collection** means collection material in various media that is Gallery property and has been formally acquired. For the purposes of 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** means the governing Council of the Gallery under the Act.

**Director** means the Director of the Gallery appointed under the Act and includes a person appointed by the Minister as acting Director.

**Due Diligence** means 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.

**Gallery** means the National Gallery of Australia, a statutory authority established in accordance with the Act.

**Inward Loan** means any contracted arrangement for the transfer of possession of a work of art or other material to the Gallery on a temporary basis under which the transferor grants a temporary right of possession to the Gallery, in accordance with the Inward Loans Policy.

**Material** means one or more works of art or archival or collection study items in various media that have been formally acquired or are under consideration for loan. For the purposes of 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** means any contracted arrangement for the transfer of possession of a work of art or other material from the Gallery to another party or parties on a temporary basis under which the Gallery grants a temporary right of possession to the borrower, in accordance with the Outward Loans Policy.

**Provenance** means the history and ownership of an item from the time of its discovery or creation to the present day, from which authenticity and ownership may be determined.

**Title** means the legal right to ownership of property.

## 4. Responsibilities

Gallery staff involved in conducting, assessing and acting on provenance and due diligence research are bound by the Gallery's Ethics Framework and other relevant Gallery documents, including but not limited to the Code of Ethics, Professional and Personal Conduct Guidelines, Fraud Strategy and Record-Keeping Policy.

**Curators and archivists:** review and assess potential collection material and loans for title and significance and prepare acquisition and loan submissions that include a due diligence and provenance investigation for the consideration of the Curator, Provenance, Assistant Director, Artistic Programs, the Director, Council and, where necessary, the Minister responsible for the arts.

**Curator, Provenance:** works with curators and archivists to identify prospective acquisitions and loans that require due diligence and provenance research, providing support and evaluating research outcomes to clarify and assess legal and ethical risks associated with the material, if any.

**Assistant Director, Artistic Programs:** 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. Responsible for acquisition and loan submissions, including approving and making recommendations based on the due diligence and provenance investigation.

**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, or, where necessary, the Minister responsible for the arts.

**Governance and Reporting Manager:** ensures Council acquisition process is documented.

**Head of Registration:** ensures all documentation of acquisitions or loans is completed.

## 5. Procedures

### 5.1 Principles

The following principles regarding due diligence research and provenance inform the Gallery's decision-making when considering acquisitions, inward loans and other matters relating to the collections:

- (a) The 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 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 Gallery is guided by the *ICOM Code of Ethics*, the *Museums Australia Code of Ethics*, the *Australian Best Practice Guide to Collecting Cultural Material* and other industry documents referenced in section 6.2.2.
- (c) The Gallery's approved acquisition strategies and 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 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.

- (e) The 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 Indigenous artists and communities. The principles enshrined in the Aboriginal and Torres Strait Islander Cultural Rights and Engagement Policy are applied in relation to due diligence and provenance activities and are extended where practicable to all activities related to Aboriginal and Torres Strait Islander artists and communities and Indigenous artists and communities in and from other countries.
- (f) The 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.

## **5.2 Due diligence guidelines for acquisitions and loans**

An assessment of provenance and the outcome of due diligence investigations is taken into account when selecting material for acquisition or inward loan prior to submission to the appropriate delegate for approval. Provenance is re-examined prior to the publication, display or outward loan of existing collection material. Curators and archivists are responsible for researching the provenance of material already acquired as well as material under consideration for acquisition or loan.

To gather information, the Gallery makes inquiries of prospective donors, vendors, lenders and third parties and conducts extensive research. The present owner is made aware that in the event of a substantiated claim against the work of art or other

collection material, the Gallery will comply with relevant Australian legislation and industry guidelines.

### **5.2.1 Objectives**

The objectives of due diligence research include, but are not limited to, establishing:

- (a) authenticity;
- (b) title;
- (c) a history of legal trade, export and import;
- (d) a history of ethical trade;
- (e) that the material is appropriate for the Gallery's collections or exhibitions program and is not an object of significance to an Aboriginal or Torres Strait Islander community or Indigenous or other community in or from another country that is required by law or the principles of best practice to be returned to its country or community of origin.

### **5.2.2 Research and evaluation**

These objectives are accomplished by evaluating aspects of the history of the material, including, but not limited to:

- (a) the artist, cultural association of the creator, place of creation or archaeological point of origin;
- (b) date of creation;
- (c) ownership history;
- (d) countries in which it has been located and when;
- (e) exhibition history;
- (f) publication history;

- (g) whether claims to ownership have been made;
- (h) the nature of the material and the market for it;
- (i) whether it appears in relevant databases of stolen or contested works;
- (j) the reputation and personal circumstances of current and previous owners and other people or entities associated with the material; and
- (k) the circumstances under which it is being offered.

In addition, the Gallery requires the seller, donor or lender to provide warranties and indemnities as to their account of title or possession.

### **5.2.3 Consultation and documentation**

The Gallery implements a range of measures in the conduct of due diligence and verification of provenance. These include, but are not limited to:

- (a) obtaining documentation with respect to the history of the material, including import and export documents where relevant;
- (b) requiring vendors, donors, lenders and their representatives to provide all available evidence and documentation regarding the origins and provenance of material offered for acquisition or loan;
- (c) in the case of auction sales, seeking documentary proof of provenance from the vendor via the auction house in addition to conducting independent research on the material;
- (d) where appropriate, consulting authorities (for example: government, community representatives, museums, cultural centres and keeping places) in the country of origin regarding relevant cultural heritage and export legislation;

- (h) considering cultural sensitivities in the collecting, display and any other use of material, including online, and where appropriate and possible actively consulting with relevant persons, communities, community representatives, government authorities, museums, cultural centres and keeping places.
- (i) resources drawn upon in the conduct of due diligence research include, but are not limited to:
  - i. public records, archives and published and unpublished sources;
  - ii. professional networks and specialist consultants; and
  - ii. physical and/or scientific examination of the material.

The results of the curator's or archivist's due diligence research are recorded in the Due Diligence and Provenance Checklist, which is assessed by the Curator, Provenance, then submitted with the loan or acquisition submission to the Assistant Director, Artistic Programs, for approval prior to the commencement of any arrangements to acquire or borrow the material. The documents are placed on the relevant file. A chain of ownership, expressed and interpreted in line with the Gallery's provenance style guide, along with other relevant information, is entered into the relevant fields of the Collection Management System, *Provenance Internal* and *Provenance Public* (redacted as appropriate).

#### **5.2.4 Outcome of investigations**

The Gallery only acquires or borrows materials 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 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; and
- (e) the origin and source and the identity of any community, family or individual that may wish to assert a legal and/or customary interest or cultural right in the material have been identified and representatives of relevant communities have been consulted with in accordance with the Due Diligence and Provenance Checklist and the Aboriginal and Torres Strait Islander Cultural Rights and Engagement Policy.

### **5.3 Guidelines in the event of incomplete provenance**

The Gallery recognises that complete and unbroken records of ownership are rare and the chain of ownership of some material may be incomplete or not verifiable through documentary evidence. There are many reasons for such gaps, ranging from a past owner's desire for anonymity to an absence of records of transactions arising from the nature of the trade in such material, or the transactions' predating the requirement for such records. The Gallery will 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 pertaining to any prior 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 and the acquisition or loan should be assessed for risk based on known information and the historical context of the gap.

This risk assessment on the acquisition of the material takes into account the nature of any gaps, the contemporary and historical market for the type of object, history of the country of origin, the reputation of the vendor, donor or lender, the price of the material relative to the established market, the value of the material, and any other relevant factors. The Gallery may also contact authorities such as government, community representatives, museums, cultural centres and keeping places in the country or community of origin.

If on the basis of this risk assessment the Gallery proceeds with the acquisition or loan, the reasons and justification for making this decision will be recorded.

#### **5.4 Guidelines in the event of provenance issues**

Subsequent to acquisition or approval of a loan information may be obtained through internal research or supplied by an external party that calls into question the previously understood provenance or establishes another party's claim to title or possession. The Gallery will investigate and respond in a timely, respectful and ethical manner in accordance with the public interest and the long-term preservation of the material, as guided by Gallery policies and other established protocols, cultural, legal and legislative factors, seeking appropriate assistance and advice.

Where an object in the possession of the Gallery is claimed for restitution or repatriation such claims are handled with respect and sensitivity according to the guidelines outlined above. The 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 and is not contingent on the rightful owner instigating a claim.

#### **5.5 Custodianship of material unsuitable for acquisition**

In some circumstances, material may be borrowed or held by the Gallery in custody or trust in order to protect or preserve it, or in other arrangements under which the

Gallery is acting as a repository of last resort in accordance with the Inward Loans Policy. The Gallery recognises that in such instances, title and the usual standards of provenance may not be ascertainable and should the lawful title holder be identified, will restore the material to the legal owner.

## **6. References**

This policy should be read in conjunction with the following:

### **6.1 Gallery policies**

- Aboriginal and Torres Strait Islander Cultural Rights and Engagement Policy
- Acquisitions Policy
- Exhibitions Development Policy
- Inward Loans Policy
- Outward Loans Policy
- Freedom of Information Policy
- Record-Keeping Policy
- Risk Management Policy

### **6.2 Guidelines, procedures and associated documents**

#### **6.2.1 Gallery guidelines, procedures and associated documents**

- Acquisitions Strategy
- Professional and Personal Conduct Guidelines
- Ethics Framework
- Code of Ethics
- Fraud Strategy
- Inward Loans Procedure
- Outward Loans Procedure

- Work of Art Claims and Inquiries Handling Procedure

### **6.2.2 National and international guidelines, procedures and associated documents**

The 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
- *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

## 6.3 Legislation

### 6.3.1 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*

#### 6.3.2 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 Gallery.

## 7. Policy review date

December 2022

## 8. Revision history

<b>Amended</b>	<b>Version #</b>	<b>Description of Amendments</b>	<b>Approval of Amendments</b>
<b>August 2017</b>	1	Document created	National Gallery of Australia Council
<b>November 2020</b>	2	Format and content revised	Pending



# Provenance Framework & Decision-Making Principles

## Version History

Name	Description / Update / Changes	Version	Date
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

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## 1. Introduction

### 1.2 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:

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

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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.

### 1.3 Purpose of this framework

Reflecting a determination made by the National Gallery Council in April 2021, this new 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

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

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### 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
<b>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</b>	<ul style="list-style-type: none"> <li>• 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 provenance<sup>i</sup></li> <li>• Each situation is going to be completely different, and the analysis is going to be different for each one<sup>ii</sup></li> </ul>
<b>Determinations will be made based on the balance of probabilities</b>	<ul style="list-style-type: none"> <li>• 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.</li> <li>• Where competing priorities are of equal likelihood, a determination is not proved.<sup>iii</sup></li> </ul>
<b>The National Gallery is committed to transparency and disclosure of provenance information</b>	<ul style="list-style-type: none"> <li>• 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.</li> <li>• The proposed or actual use of public money on the national collection supports the full disclosure of provenance information by the National Gallery.</li> <li>• Credit lines requiring anonymity are distinct from provenance.</li> </ul>
<b>The National Gallery will exercise its ethical obligations, and not</b>	<ul style="list-style-type: none"> <li>• Determinations shall not conflict with the National Gallery's purpose, mission, values or ethical principles.</li> </ul>

Guiding Principle	Additional / Supporting Information
<p><b>allow ethically contentious actions, when assessing provenance</b></p>	<ul style="list-style-type: none"> <li>• Determinations will, as far as possible:               <ul style="list-style-type: none"> <li>○ produce more positive than harmful outcomes<sup>iv</sup></li> <li>○ support the general will of the people<sup>v</sup></li> <li>○ be consistent with actions the National Gallery would support as a universal law<sup>vi</sup></li> <li>○ protect the ethical rights of those affected by the decision.<sup>vii</sup></li> </ul> </li> <li>• 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.</li> <li>• The National Gallery shall consider the impact on future equitable relations with other countries of a decision not to return a moveable cultural object to its country of origin.</li> </ul>
<p><b>Effort attributed to provenance assessment shall be proportionate to the resources available to the National Gallery</b></p>	<ul style="list-style-type: none"> <li>• The National Gallery has a duty to provide the proper use and management of public resources<sup>viii</sup>. 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.</li> </ul>
<p><b>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</b></p>	<ul style="list-style-type: none"> <li>• 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.</li> </ul>

### 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"> <li>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?</li> </ul>
Determinations will be made based on the balance of probabilities	<ul style="list-style-type: none"> <li>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?</li> <li>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?</li> </ul>
The National Gallery is committed to transparency and disclosure of provenance information	<ul style="list-style-type: none"> <li>Have we established any defensible reason not to disclose provenance?</li> <li>Have we satisfied ourselves that we have been as transparent as possible in relation to the disclosure of provenance?</li> <li>Have we checked that the disclosure will not breach any applicable legislation or legal obligation?</li> </ul>
The National Gallery will exercise its ethical obligations, and not allow ethically contentious actions, when assessing provenance	<ul style="list-style-type: none"> <li>Have we assured ourselves our proposed course of action does not conflict with the National Gallery’s purpose, mission, values or ethical principles?</li> <li>Does our proposed course of action produce more positive than harmful outcomes?</li> <li>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>?</li> <li>Will the proposed course of action support or hinder future equitable relations with the object’s country of origin?</li> </ul>
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	<ul style="list-style-type: none"> <li>Are we demonstrating the proper use and management of National Gallery resources in our proposed course of action?</li> <li>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?</li> </ul>

Guiding Principle	Potential Questions / Considerations
standards	

### 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?*

## Endnotes & References

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- <sup>i</sup> Crennan, Susan M. Asian Art Provenance Project, National Gallery of Australia, 2015
- <sup>ii</sup> Griswold, William. Cleveland Museum of Art, commentary on Returning Hanuman sculpture to Cambodia by Steven Litt, May 16 2015
- <sup>iii</sup> Crennan, Susan M. Asian Art Provenance Project, National Gallery of Australia, 2019
- <sup>iv</sup> Utilitarianism
- <sup>v</sup> Common Good - Rosseau
- <sup>vi</sup> Duty Based Ethics - Kant
- <sup>vii</sup> Rights Approach - Locke
- <sup>viii</sup> Division 2, Subdivision A, Section 15 – Duty to govern the Commonwealth entity, *Public Governance, Performance and Accountability Act 2013 (Cth)*