

ATTACHMENT DISTRIBUTED UNDER SEPARATE COVER

**CCL 28/09/21 – NEWCASTLE ART GALLERY FOUNDATION –
MEMORANDUM OF UNDERSTANDING**

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Memorandum of Understanding

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Memorandum of Understanding

Between:

CITY OF NEWCASTLE ABN 25 242 068 129 (“CN”)

And

NEWCASTLE ART GALLERY FOUNDATION ABN 57 001 547 968 as Trustee for the Newcastle Art Gallery Foundation Trust (“the FOUNDATION”)

Collectively called “The Parties”

Background

- A. CN is a local government authority established under the *Local Government Act 1993* (NSW).
- B. CN is the owner of the Newcastle Art Gallery bounded by Darby Street, Queen Street and Laman Street, Newcastle NSW (“**the Gallery**”) and is responsible for the management of the Gallery, including implementing plans to expand the Gallery (“**the Expansion**”).
- C. The FOUNDATION is the trustee of the Newcastle Art Gallery Foundation Trust (“**the Trust**”) which holds funds raised from members of the public for a charitable purpose (*arts and culture*). The Trust is a charity registered with the Australian Charities and Not For Profit Commission. The trust fund is a Public Ancillary Fund within the meaning of the *Income Tax Assessment Act 1997* (Cth) and as a result is endorsed with deductible gift recipient status (capable of receiving tax deductible donations). The FOUNDATION is also the constructive trustee of funds donated by the public and raised by the former Lady Mayoress Cathy Tate and provided to the Foundation to manage on the express understanding that the funds are to be applied towards the Expansion (“**the Constructive Trust Funds**”).
- D. In accordance with the terms of this Memorandum of Understanding (“**MoU**”), CN and the FOUNDATION agree to recognise and acknowledge the:
 - a) historical and cultural importance of the Gallery to the local community.
 - b) work undertaken by CN to preserve the Gallery;
 - c) commitment of CN to the ongoing financial, promotional, management support and operation of the Gallery;
 - d) commitment of CN and the FOUNDATION towards the advocacy of the Gallery as a major cultural asset for NSW with the most valuable art collection in regional Australia;
 - e) commitment of CN and the FOUNDATION to deliver the best outcomes for the Gallery; and
 - f) commitment of the FOUNDATION to expend trust funds in accordance with its legal obligations and the terms of the Trust Deed.

Objectives

1. The objectives of CN and the FOUNDATION as Parties to the MoU are to:
 - a) establish a framework for the continuing joint interaction of CN and the FOUNDATION for mutual benefit and for the benefit of the communities that they serve;

- b) ensure the protection and preservation of the Gallery;
- c) explore opportunities and synergies for improving the Gallery for community service delivery and tourism opportunities which could generate revenue streams to benefit ratepayers and the Gallery;
- d) recognise and encourage the ongoing contribution of the FOUNDATION and its Board members and volunteers to both the Gallery and the local community;
- e) maintain strong and collaborative working relationships between CN and the FOUNDATION;
- f) strategically plan and ensure the governance of the Gallery operations through this MoU, and all other documents or terms of reference relevant to the Gallery (collectively, the “**Gallery Documents**”);
- g) promote, interpret and preserve the cultural and historical significance of the Gallery and its moveable artistic and cultural heritage through art form and visual arts and heritage tourism best practice; and
- h) foster a passion and curiosity for the visual arts and the Gallery’s nationally significant collection thus enabling the Gallery to build on its acknowledged reputation as one of Australia’s leading Art Galleries.

Term

2. This MoU supersedes any existing MoU between the Parties and will continue until superseded by another document or terminated pursuant to clause 7.

Joint Obligations

3. The Parties will:
 - a) keep each other informed of key projects, activities and strategies that have the potential to affect the service provision of the Gallery (including strategic planning activities, tourism activities, major events, projects and maintenance works on infrastructure assets), or any joint project activities or investigations.
 - b) ensure they perform their respective obligations under this MoU in compliance with all relevant laws, including work health and safety laws.
 - c) ensure financial governance and evidence-based decisions for the preservation of the Gallery including ensuring the Gallery Documents are accurate and updated.
 - d) promote the Gallery as a cultural tourism destination, for the benefit of members of the public and to support major events and projects;
 - e) openly share relevant information with each other as required; and
 - f) work respectfully together as key stakeholders at all times.

CN’s Obligations

4. CN agrees to (so far as is reasonably practicable and subject to the operational needs and requirements of CN and any applicable laws):

- a) provide the FOUNDATION during operating hours or by agreement with a suitable meeting space for its Board and Board sub-committee meetings if available;
- b) collaborate on the opening of the Gallery outside agreed opening hours with the FOUNDATION to facilitate private bookings, tours, tourism opportunities or for major events;
- c) inform the FOUNDATION of exhibition and public programs;
- d) recognise the FOUNDATION as a key supporter in marketing and promotional material and other relevant public communications;
- e) acknowledge the contribution of the FOUNDATION where a monetary or acquisition contribution has been made;
- f) assist the FOUNDATION to apply annual funding through the Gallery's acquisition and de-accession process and other Gallery initiatives each financial year in order to meet its legal obligations;
- g) ensure CN Councillor and staff representation on any committees relevant to the operation of the Gallery;
- h) arrange venue hire for the FOUNDATION to host events each financial year, subject to availability and in accordance with normal booking procedures of the Gallery; and
- i) keep the Foundation informed of key milestones relating to the Expansion and work with the Foundation in order to develop a 'Funding Agreement' relating to the provision of Foundation funds for the Expansion.

THE FOUNDATION Obligations

5. The FOUNDATION agrees to (so far as is reasonably practicable and subject to the operational needs and requirements of CN and any applicable laws):
 - a) support, advocate and promote the Gallery publicly in consultation with the Director of the Gallery for the benefit of the collection and the community;
 - b) ensure representation on any committees relevant to the operation and strategy of the Gallery including acknowledging the FOUNDATION constitution providing for an elected CN Councillor as a corporate member representative and Gallery Director as an invited guest;
 - c) acknowledge that the Art Gallery Acquisition Committee is responsible for all decisions on the acquisition and de-acquisition of works of art held in the Gallery collection;
 - d) collaborate with CN to develop strategic planning for the maintenance, interpretation, marketing, fundraising and tourism promotion and opportunities of the Gallery;
 - e) support the growth of the collection and the Expansion through fundraising events, donations, and monetary or acquisition contributions through the FOUNDATION's dedicated membership;
 - f) obtain and maintain all approvals, authorisations, licenses, and permits required for the activities carried out by the FOUNDATION;

- g) maintain complete and accurate records concerning activities conducted by the FOUNDATION in accordance with all legislation and provide CN and its representatives access to inspect those records at all reasonable times;
- h) fund all expenses associated with the FOUNDATION events held at the Gallery;
- i) comply with all relevant legislation, regulations and Australian Taxation Office requirements concerning not for profit organisations;
- j) cooperate with CN in any audit of the Gallery or the FOUNDATION records concerning the operations on the Gallery;
- k) perform its obligations under this MoU with due skill, care and in a respectful and professional manner; and
- l) at all times act in the best interest of the Gallery.

Financial Governance

6. The Parties acknowledge and agree that financial governance will be administered as follows:
 - a) The FOUNDATION must comply with all rules in the Public Ancillary Fund Guidelines, including distributing a minimum amount of the market value of its net assets per annum towards its charitable purpose (unless the Commissioner for Taxation agrees otherwise);
 - b) As a charity the FOUNDATION must comply with its charitable purpose which in supporting “arts and culture” is defined as the “promotion advancement and development” of the Gallery in all its forms;
 - c) The FOUNDATION must ensure compliance with all relevant legal obligations including but not limited to the *Australian Charities and Not-for-profits Commission Act 2012* and regulations made under that Act;
 - d) As a constructive trustee the FOUNDATION must comply with the terms of the constructive trust in managing and expending the Constructive Trust Funds;
 - e) The FOUNDATION has a responsibility to ensure that funds held under trust are expended in accordance with its legal obligations and the terms of the Trust Deed as amended from time to time;
 - f) The FOUNDATION funds are invested under a strategy to provide a balance of capital protection, growth and investment returns;
 - g) The FOUNDATION will contribute \$10 million from existing trust funds (including the Constructive Trust Fund) towards the Expansion. This amount will be contributed progressively in instalments over the Expansion construction period, on a schedule to be agreed between CN and the FOUNDATION in a separate funding agreement;
 - h) The FOUNDATION will make every effort to raise an additional \$2.5million towards the Expansion through fundraising;
 - i) CN will provide funds for the operational expenses of the Gallery as part of its annual budget;

- j) CN will provide monthly financial reporting of CN's Gallery budget and annual reporting of service asset planning for the Gallery;
- k) CN will retain all income from commercial activities at the Gallery which are generated through, venue hire, events or functions including major event functions; and
- l) CN will retain all income from the sale of goods through its shop, sponsorships, grants and donations and its fundraising activities.

Termination

- 7. CN or the FOUNDATION may terminate this MoU immediately if:
 - a) The FOUNDATION ceases to be a not for profit organisation registered with the Australian Charities and Not-for-profits Commission;
 - b) The FOUNDATION suffers an insolvency event including:
 - i) the suspension or cessation of its business activities;
 - ii) the liquidation or insolvency of the FOUNDATION;
 - iii) the appointment of a receiver or trustee in respect of its property;
 - iv) the assignment of any rights or other property, or making of any arrangements by the FOUNDATION for the benefit of its creditors; or
 - v) any other act which shows that the FOUNDATION is insolvent.
 - c) CN or the FOUNDATION commits a breach of the MoU and fails to remedy the breach within 14 days after notice in writing from the other Party specifying the breach and requiring its remedy;
 - d) CN or the FOUNDATION commits a breach of the MoU and in the reasonable opinion of the other Party the breach is not capable of remedy; or
 - e) CN or the FOUNDATION carries out its obligations under this MoU in a manner which presents a health or safety hazard to its stakeholders, volunteers or the public and fails to take reasonable steps to correct such events after receiving notice from the other Party or any relevant government authority.
- 8. Termination of this MoU will not prejudice the rights of the Parties with respect to any prior breach of this MoU nor affect any obligation or liability of a Party arising before termination.

Dispute Resolution

- 9. Any dispute that may arise in connection with this MoU will initially be tabled at the FOUNDATION Board meeting for consensus. Should a consensus not be reached the following CN officers may be called upon to assist in resolving the dispute:
 - a) Director Newcastle Art Gallery;
 - b) Director of City Wide Services;
 - c) CEO; or
 - d) Elected Councillor member.

10. If after having complied with the requirements of clause 9, the Parties have not been able to resolve the dispute, then either Party may require by service of a written notice that the dispute be referred to an independent third party for dispute resolution.
11. The Parties will within 14 days of the notice referred to in clause 10 nominate the process for resolution of the dispute and make all relevant and necessary arrangements to appoint the independent third party and a time for the process to be undertaken.
12. If the Parties cannot agree on the appointment of an independent third party then the Parties will request the President of the NSW Law Society nominate and appoint the independent third party.
13. Despite the resolution, determination or other outcomes of the dispute, the Parties will share equally the costs of the independent third party.

Non-Binding

14. The Parties acknowledge and agree that the terms in this MoU are not binding upon CN or the FOUNDATION, unless and until such time that the Parties execute a legally binding document to the effect that the obligations in this MoU are now binding upon the Parties. .

Variation

15. A provision of this MoU can only be varied by a later written document executed by or on behalf of the Parties and in accordance with a Council resolution.

No Assignment

16. The FOUNDATION cannot assign or otherwise transfer its rights or obligations under this MoU.

Waiver

17. Delay by a Party in exercising a right or remedy in this MoU does not constitute a waiver of that right or remedy.

Costs

18. Each Party must bear its own costs of preparing, negotiating and executing this MoU.

No Merger

19. The rights and obligations of the Parties under this MoU do not merge on completion of any transaction contemplated by this MoU.

Interpretation

20. References in this MoU to a document are references to that document as abridged or updated from time to time.
21. Including and includes are not words of limitation.

Relationship

22. This MoU does not create a relationship of employment, trust, agency or partnership between the Parties.

Governing Law and Jurisdiction

23. The laws applicable in New South Wales govern this MoU.

24. The Parties submit to the non-exclusive jurisdiction of the courts of New South Wales and any courts competent to hear appeals from those courts.

Signed for and on behalf of Newcastle Art Gallery Foundation as Trustee for the Newcastle Art Gallery Foundation Trust by its authorised representative	Signed for and on behalf of City of Newcastle by its authorised representative
Name: Susan Galwey	Name: Jeremy Bath
Position: Newcastle Art Gallery Foundation Board Chair	Position: Chief Executive Officer
Signature:	Signature:
Date:	Date: