

CHAPTER EIGHT: IMPORT AND EXPORT OF COLLECTION MATERIAL

1. Introduction¹

It is not uncommon for collecting institutions to acquire new collection material from overseas. Sometimes the material is donated by a person who is resident overseas. Most times, it is purchased. Either way, it is an import.

Unless it is a repatriation of non-Australian human remains, when collecting institutions export cultural material, it is usually only a temporary export – one that is associated with a loan, whether of individual pieces or of an entire exhibition.²

Before the commencement of the *Protection of Movable Cultural Heritage Act 1986* (“PMCH Act”) on 1 July 1987,³ Australia controlled the import and export of cultural material by regulations made under the *Customs Act 1901*. The only restrictions on import were on the import of cultural property from Papua New Guinea.⁴ In such cases, importers were obliged to produce the written consent of the Trustees of the Papua New Guinea Public Museum and Art Gallery, to the export or removal of the goods from Papua New Guinea.⁵ Restrictions on export were far more comprehensive,⁶ but just as ineffective.

The system of export and import control by means of Customs Regulations proved to be profoundly inadequate.⁷ Those empowered to enforce the Customs Regulations found it difficult to define the categories of prohibited exports and to identify objects that were subject to restrictions. There was no consultative machinery whereby officers could get speedy expert advice as to the nature or significance of objects being exported. Failure of the Regulations to provide for review or redress to persons refused an export permit, or for the retrieval of illicitly exported material, was an incentive for those with valuable material to use illegal means of export.⁸

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² Because it is uncommon for an institution to permanently export cultural property, the principal focus of the export discussion is temporary export.

³ Although the PMCH Act was assented to on 13 May 1986, it didn’t come into operation until proclaimed to commence on 1 July 1987 (see Commonwealth Gazette, 1987, No. S138).

⁴ *Customs (Prohibited Imports) Regulations*, Third Schedule, Item 9A.

⁵ For Papua New Guinea legislation, see the *National Cultural Property (Preservation) Act, Ch. No. 156*.

⁶ *Customs (Prohibited Exports) Regulations*, Second schedule; item nos 113, 2, 5, 5A, 5B, 5c, 14; Twelfth Schedule item nos 1, 2, 3, 5, 6.

⁷ For example, it did not prevent the export in 1981 of a rare Spitfire MK 8 MV 154, which was illegally taken out of the country as aluminium junk – just one of an estimated seventy vintage aircraft that have flown the jurisdiction.

⁸ For a US analogy, see ‘Theoretical Thefts, Real Claims’, *Art News*, March 1983 pp.11–13.

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That all changed in 1986 when the Australian parliament passed the PMCH Act - a comprehensive legislative system of import and export control of heritage material. This legislation gave effect to the 1970 UNESCO *Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Material* and introduced a system that included:

- a procedure for the classification and assessment of cultural material;
- a procedure for the granting or refusing of permits;
- redress for people affected by the refusal of permits or confiscation of innocently obtained cultural property; and
- provision for recovery and return of illegally exported cultural material.

2. The legislation

The main features of the PMCH Act may be summarised as follows:

2.1 The National Cultural Heritage Control List

The PMCH Act defines “movable cultural heritage” as:

objects that are of importance to Australia ... for ethnological, archaeological, historical, literary, artistic, scientific or technological reasons, being objects falling within one or more of the following categories:

(a) objects recovered from

(i) the soil or inland waters of Australia;

(ii) the coastal sea of Australia or the waters above the continental shelf of Australia; or

(iii) the seabed or subsoil beneath the sea or waters referred to in subparagraph (ii);

(b) objects relating to members of the Aboriginal race of Australia and descendants of the indigenous inhabitants of the Torres Strait Islands;

(c) objects of ethnographic art or ethnography;

(d) military objects;

(e) objects of decorative art;

(f) objects of fine art;

(g) objects of scientific or technological interest;

(h) books, records, documents or photographs, graphics, film or television material or sound recordings;

(i) any other prescribed categories.

Schedule 1 of the regulations made under the PMCH Act then set out more detailed parameters as to what falls within the above categories – a list that is referred to as the “National Cultural Heritage Control List” (NCHL).

While earlier export controls focused on the protection of Indigenous relics, the current legislation includes the significant, if more recent, effects of European colonisation, settlement and development. Thus, for example, early examples of farm and mining machinery may well be of significance to the heritage of a country whose economic

development has been based on farming and mining, just as early film and sound recordings, books, paintings and craft objects have heightened significance to a country that has come to a quite recent appreciation of the social, aesthetic and economic impact of its arts industries.

The stated criteria for inclusion in the NCHL include factors such as age, rarity, quality, monetary value and extent of inclusion in public collections. The PMCH Act and the NCHL distinguish between:

- **Class A** material (those objects so rare and important as to be considered inalienable from Australia and which may not be exported at all); and
- **Class B** material that, in certain circumstances, may (and perhaps often will) be given an export permit.⁹

Given the wide ambit of Class B material, such objects must meet additional criteria such as age, monetary value and significance to Australia before their export is subject to assessment.

Both in drawing up the NCHL and in exercising the discretion to grant export permits, the Minister is advised by the National Cultural Heritage Committee, which receives advice from expert examiners. The Committee is made up of four representatives from different collecting institutions, an academic, a nominee of the Minister administering a particular piece of Indigenous land rights legislation¹⁰, and four other people who have '*experience relevant to the cultural heritage of Australia*'.¹¹

2.2 Age thresholds

The Act recognises that the age of an object can affect its cultural significance. Just because something is old does not mean that it is significant,¹² and similarly, something quite new may have huge significance. A thirty-year threshold applies to Aboriginal and Torres Strait Islander (ATSI) heritage objects, non-Indigenous fine or decorative art, applied science objects, objects of documentary heritage and objects of historical significance. A lower threshold of twenty years applies to Indigenous art objects. Archaeological objects must have been at least fifty years in the place from which they were removed.

There are no age thresholds for natural science objects, nor for numismatic and philatelic objects.

2.3 Monetary thresholds

One of the ways of judging an object's significance is to look to its market value. If the system of export control did not take into account the monetary value of the objects described in such encyclopaedic terms, the system (and the public's patience) would be overwhelmed. That said, market values are often uncertain and unstable. These thresholds require regular review to take into account the depreciation of money over time and the rise in the market for particular categories of cultural property.¹³

2.4 Significance

One of the criteria required in six of the nine categories is 'significance, to Australia'.

'Significance to Australia', for an object, means the object is of Australian origin, has substantial Australian content, or has been used in Australia, and:

⁹ The objects currently included in Class B are: (i) certain objects of Aboriginal and Torres Strait Islander heritage, (ii) archaeological objects, (iii) natural science objects, (iv) objects of applied science or technology, (v) objects of fine or decorative art, (vi) objects of documentary heritage, (vii) numismatic objects, (viii) philatelic objects, and (ix) objects of historical significance.

¹⁰ The legislation is the *Aboriginal Land Grant (Jervis Bay Territory) Act 1986*, so the relevant Minister will almost invariably be the Minister for Indigenous Affairs. Note also that the Minister's nominee must be Aboriginal or Torres Strait Islander (or of Aboriginal or Torres Strait Islander descent).

¹¹ While the Committee is supposed to be comprised of ten people, at the time of writing, there were only eight appointees, and the number on the Committee has fluctuated below this at times.

¹² This is a difficult concept for aging lawyers to accept.

¹³ In *BC Galleries (Vic) Pty Ltd v Commonwealth of Australia* [2012] FMCA 742, the Court found that, in respect of a range of Chinese Han Dynasty items that were subject to a forfeiture action for unlawful import, the relatively modest prices at which the items had been sold in Hong Kong mitigated against them having been subject to export restrictions under relevant Chinese laws. In coming to this conclusion, the Court looked to the values set out in the PMCH in relation to the export of Australian cultural heritage.

(a) is associated with a person, activity, event, place or business enterprise, notable in history; or

(b) has received a national or international award or has a significant association with an international event; or

(c) represents significant technological or social progress for its time; or

(d) is an object of scientific or archaeological interest.¹⁴

2.5 Australian protected object

If an object is of the nature described in the NCHL, and fulfils the necessary criteria, it is called an 'Australian protected object'.

2.6 Australian Movable Cultural Heritage Prohibited Exports Register

In addition to the NCHL, reference should also be made to the Australian Movable Cultural Heritage Prohibited Exports Register. This register includes objects that have been defined in the NCHL as Class A objects and those Class B objects for which export permits have been denied.

Examples of Class A objects are: Ned Kelly's armour, any Victoria Cross won by Australian defence personnel and Aboriginal and Torres Strait Islander heritage including sacred and secret ritual objects, bark and log coffins used as traditional burial objects, human remains, rock art and carved trees (the technical name for the last of which is 'dendroglyphs').

Examples of objects falling within Class B for which export permits have been denied include: an 1880s Gulmari shield from Queensland; the Pascoe Ichthyosaur fossil; the Binya meteorite; a Moore Road Machinery diesel locomotive; a hand-written tonic book used by the trainer of Phar Lap in the 1930s; and a particular Krupp machine gun from circa 1916.

3. Export permits

Lawful export of an Australian protected object requires a permit.¹⁵ This is a three-stage process. Each application for an export permit is reviewed by an Expert Examiner who both determines whether the material is an Australian protected object and recommends whether an export permit should be granted. This recommendation is reviewed by the National Cultural Heritage Committee, which in turn makes a recommendation to the Minister. It is the Minister (or the Minister's delegate – such as a senior person within his or her Department) who makes the final decision.

The majority of applications for export permits fall within certain categories such as Indigenous art, fossils, agricultural or other vehicles and military objects. By contrast, objects in the documentary, numismatic, archaeological and Indigenous heritage categories have been the subject of fewer applications.

There have also been a number of applications in the fine art and decorative art categories relating to Indigenous art (often made by auction houses) and in relation to jewellery. Applications for objects of historical significance (a broad category that includes objects at least thirty years old that are not represented in at least two public collections) have almost exclusively concerned military and sports-related objects. Similarly, in applied science or technology, most applications relate to agricultural machinery and road or rail transport.¹⁶

4. Unlawful import

The unlawful import of cultural material that has been illegally exported from its country of origin attracts heavy penalties. Moreover, such objects are liable to be detained by Customs upon entry to the country or later seized by

¹⁴ Sub-regulation 2 (1) of the *Protection of Movable Cultural Heritage Act Regulations 1987*.

¹⁵ The application form for an Export Permit is available at: www.arts.gov.au/what-we-do/cultural-heritage/movable-cultural-heritage/exporting-cultural-property-australia. Note that at that site there are also details of the streamlined procedure for expert assessment of fossils and meteorites to determine which specimens require an export permit. This involved a preliminary assessment by an expert selected from a list provided by the Department.

¹⁶ For a list of objects denied export permits, see: www.arts.gov.au/what-we-do/cultural-heritage/movable-cultural-heritage/exporting-cultural-property-australia/movable.

the police or the Commonwealth. If it then proves that they have been illegally imported, they are liable to forfeiture. For this reason, it is essential that, when considering the purchase of cultural material that originates from another country (whether or not that other country is a signatory to the Convention), the institution undertake a rigorous due diligence process.

No Minister will be amused to receive a request from a foreign government for the return of its cultural property from an institution and the media scandal that would attend such a request will damage the institution's delicate relationship with its donors and sponsors.¹⁷

To commence the forfeiture process, the Australian Government must receive a formal request for the return of the object from the relevant foreign government.¹⁸ The request for return must be from government to government. Private initiatives are not within the contemplation of the Act. It is this request that is the basis of the power to search for and seize the property, to lay charges, or forfeit the property.

Where the object is forfeited, ownership in the object vests in the Commonwealth of Australia and the costs incurred in transporting or disposing of the object are deemed to be a recoverable debt due to the government.

5. Unlawful export

Where a person illegally exports an Australian protected object, the object is forfeited.

In contrast, when such illegal export is only attempted, or when a person imports cultural property that has been illegally exported from its country of origin, the object is only *liable* to forfeiture. In such cases, the onus is on the owner, or the person who had possession, custody or control of the object immediately before it was seized, to bring court action for the recovery of the object. If the person fails to do so, or fails in those recovery proceedings, the object will be forfeited.

Once material has left the country illegally, any proceedings to recover it would usually be commenced either by the owner or a person entitled to possession.¹⁹ Where ownership is forfeited, title automatically vests in the government under the Australian law, thus giving it *locus standi* to demand return of its property. Whether or not this standing is recognised, however, will be a matter for the law of the country where proceedings are commenced.

Where an object is recovered, it will be disposed of in accordance with the directions of the Minister. This is a significant power for the Minister may, for example, direct that a nominated institution hold the object or in the case of aboriginal relics, perhaps order that the objects be handed over to their traditional owners rather than persons with more recent claim to title.

6. National Cultural Heritage Account

Any system of export control is an infringement upon the individual's normally accepted rights of property ownership. It is a system that is based on the principle that, in any balancing between the interests of the nation and those of the individual, the national interests must prevail. That is not to say that the individual must suffer harshly.

Most permanent exports of culturally significant material from Australia are for the purpose of resale i.e. financial profit. Thus the Act established the National Heritage Fund to facilitate the purchase and public display of objects prohibited from export. Notwithstanding this, both federal and state governments failed to provide any allocation to the Fund until 1999 when its name (and charter) was varied. Now known as the National Cultural Heritage Account, it receives an allocation of \$500,000 from the federal government. Essentially, the fund is intended to help Australian cultural organisations acquire Australian protected objects (as defined by the Act) that they could not otherwise afford, with the intention that they be preserved and made accessible to the public.²⁰ Although the state

¹⁷ For evidence of that, one need only turn to the consequences that followed the discovery that the National Gallery of Australia had been the victim of fraud when it purchased an Indian Chola-period bronze from an established dealer who later turned out to be heavily involved in trading in stolen and improperly exported items.

¹⁸ See section 41 of the PMCH Act.

¹⁹ See *Attorney-General of New Zealand v Ortiz* [1983] 2 WLR 809 at 817.

²⁰ Importantly, the Account is not a compensation fund for owners who are denied export permits for their objects.

governments have not contributed to the Account, they contribute to its overall purpose.²¹ So far, the majority of the acquisitions made by the Account have been completed in partnership with (and with financial contribution from) a state collecting institution.²²

In allocating the money, priority is given to the following Australian protected objects:

- Class A objects in Australia and overseas
- Class B objects that have been denied an export permit
- Class B objects that have been granted an export permit on condition that they be available at fair market value for purchase by an eligible cultural organisation
- Class B objects that are overseas.

7. Enforcement

Part V of the Act sets out the statutory enforcement provisions. If legislation is to be effective, it must be effectively enforced. If it is not, the legislation is at best, mere window-dressing and at worst, can actually interfere with the public benefit.

There are some obvious issues. For example, the enforcement mechanisms under the Act are much more limited than those in Part 17 of the *Environment Protection and Biodiversity Conservation Act 1999* ('EPBC Act'). Also, the focus of the PMCH Act is on criminal enforcement mechanisms and criminal offences (which must be proved beyond reasonable doubt, a high standard of proof, making the securing of convictions very difficult).

By way of comparison, a 2009 review of the PMCH Act noted that the EPBC Act:

- provides for certain provisions to be civil penalty provisions, which generally require a lower standard of proof, being proof on the balance of probabilities, and
- allows the Federal Court to order a person to pay the Commonwealth a pecuniary penalty on the application of the Minister in relation to a contravention of a civil penalty provision;
- provides for the Minister or another interested person to apply to the Federal Court for an injunction to restrain certain action, or require certain action to be taken, in relation to a contravention of the Act;
- allows the Federal Court to make a remediation order to repair or mitigate damage in certain circumstances;
- gives inspectors powers to act without search warrants in certain circumstances;
- provides for infringement notices as an alternative to prosecution in certain circumstances;
- allows enforceable undertakings to be given to the Minister in certain circumstances;
- gives the Minister information gathering powers in certain circumstances; and
- allows the Minister to publicise contraventions.

In his review of the PMCH Act in 2015, Shane Simpson noted that the current enforcement provisions "*fail to provide a coherent range of tools to assist law enforcement officers to prevent the illicit trade in cultural material*".²³

²¹ The States and Territories have the ability to contribute under s.25A of the PMCH Act, but as far as we are aware, have not done so to date.

²² For use that has been made of the Account click on "Who We've Funded" at www.arts.gov.au/funding-and-support/national-cultural-heritage-account

²³ Shane Simpson AM, *Borders of Culture: Review of the Protection of Movable Cultural Heritage Act 1986*, Final Report (Canberra, Ministry for the Arts, 2015) at 141 (available for download at www.arts.gov.au/departmental-news/final-report-review-protection-movable-cultural-heritage-act-1986-released).

In particular, the review noted that inspectors have no power to seize material on suspicion so that material can be safeguarded until its status is confirmed and that there be a proper legal underpinning for seizure of cultural objects discovered during the course of a raid or search conducted for other purposes.

There is little doubt that the Act should be amended and improved to make the choice of procedures and sanctions more flexible, as well as easier to enforce.

8. International ramifications of the legislation

The passing of the PMCA Act permitted Australia to accede to the 1970 UNESCO Convention. Some 131 countries have signed the Convention and many of these are countries that have suffered enormous loss of cultural material.²⁴ This reflects upon the effectiveness of the Convention for its effectiveness is largely dependent on the reciprocity offered by its members. Of the signatories, only the United States of America, the United Kingdom and, to a lesser extent, Canada, have large collections of culturally significant material imported from other countries.

However, the international importance of preventing the illicit trade in cultural heritage (and, particularly, antiquities) has been heavily underscored by the burgeoning trade in items from war-torn areas of the world such as Syria and Iraq and the role that this trade may play in relation to the funding of terrorist groups and oppressive regimes.

9. Where to next?

In 2015, Shane Simpson was commissioned by the Federal Minister for the Arts to conduct an independent review of the PMCH Act, including issues such as:

- the categories and types of Australian cultural objects that should be protected;
- appropriate thresholds and definitions of significance;
- the levels of protection to be extended to foreign material;
- how Australia's international obligations are fulfilled (including not only by reference to the UNESCO Convention already discussed in this chapter, but also the UNESCO *Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict* 1954; and'
- how protection should be administered.

The Report, *Borders of Culture*,²⁵ was delivered to the Minister in September 2015 and made public in February 2016. It was critical of the existing system by which Australia protects its significant cultural material. It recommended the introduction of a new, streamlined model - "*practicable*" and "*robust*" - designed to ensure that decisions are made more efficiently, quickly, cheaply and transparently, while more effectively protecting Australia's most significant material.

The Report was positively received both by the sector and by government and we understand that work towards its implementation is being undertaken.

²⁴ The list of States that are party to the Convention is available at www.unesco.org/eri/la/convention.asp?KO=13039&language=E&order=alpha.

²⁵ The report is available for download available for download at www.arts.gov.au/departmental-news/final-report-review-protection-movable-cultural-heritage-act-1986-released.