

CHAPTER NINE: REPATRIATION OF CULTURAL MATERIAL¹

1. Introduction

To start a discussion about repatriation, a touch of lexicological candour may be helpful, as not everyone agrees what 'repatriation' is. There seem to be two different approaches: one is to focus on the subject matter of the claim; the other is to focus on the legal rights that underwrite the claim.

In Australia, we typically use the word when referring to the return of human remains and sacred objects and other objects to their place of origin or to their original community, having been taken from those places or communities in circumstances that, today, we would view as less than ethically sound. For example, this may include items that have been illegally excavated and exported, looted or otherwise illicitly acquired through war or the exercise of colonial power. Some would say that the return of human remains and sacred objects is 'repatriation' while the return of other objects is really 'restitution'.²

As you will see from the discussion that follows, there is one kind of claim that is quite different from the others, in that it is dependent on proving which party has the superior claim to legal ownership. If the argument is really about property rights, the claim is more properly described as one of 'restitution' rather than 'repatriation'.

Still, because most learned commentators seem to use these terms interchangeably, this chapter first describes repatriation in its broadest sense³ before concentrating on the repatriation exercises most likely to be experienced by Australian institutions – those involving Indigenous human remains and sacred objects. True repatriation.

2. Types of repatriation claim

Many different types of material may be the subject of a claim. At its simplest, it is useful to distinguish between at least three kinds of material:

- property that was legally obtained or collected but where the circumstances of collection breach traditional beliefs or current ethical principles;
- property that has been legally obtained but disposed of illegally; and

¹ First published on 22 September 2009, updated December 2016 by Shane Simpson and Ian McDonald.

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² For the section on repatriation of human remains and sacred objects we have had the benefit of the knowledge of Dr Michael Pickering, Program Director: Aboriginal and Torres Strait Islander Program & Repatriation Program at the National Museum of Australia. The insights into institutional process and attitude are his.

³ That is, claims made by representatives of previous owners against present owners, for the return of cultural material.

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- property that has been illegally obtained or collected but is legally held.⁴

Each of these can be broken down into sub-categories and indeed it may be useful to do so. These classifications are important because there is no reason why all claims for different types of material should be treated the same. Indeed, if each claim is to be dealt with in the most effective manner, they should not be.

Planning effective strategies requires that each repatriation event be considered individually, for repatriation is only a generic term for a range of demands and a range of desired outcomes. Accordingly, it is useful to unpick what we mean by the word 'repatriation' in each individual circumstance so that we can adopt the most appropriate strategy for handling it. The following is just one way of analysing these claims:

2.1 Type I repatriation claims

This occurs where the material was legally obtained or collected but where the circumstances of collection breach traditional beliefs or current ethical principles.⁵

The most obvious examples of this category are the collections of human remains held within collections. Most of these will have entered the collection when there was no question as to the legality of the means by which they were either gathered or acquired. It is just that the ethics of collection acquisition and management have evolved: what was viewed by the collectors and the institutions as socially, morally or scientifically appropriate has become inappropriate.⁶

The managers of collections containing human remains and sacred objects face the consequences of this ethical evolution in their daily practice: What is it appropriate to hold? What is it appropriate to display or use? All that the lawyer can reliably say is that these kinds of collection management issues are not really legal in nature but rather, ethical.

(a) *Human remains*

Is it possible for material to have been illegally collected but legally obtained? Well, yes and no. Or more precisely: it depends.

(i) *Legal argument*

As you can see from the discussion of 'legal title' in our earlier chapter, "Acquisition of Collection Items", the general rule is that no one can pass on to another better title than he or she enjoys. There are various statutory exceptions to the rule and any legal dispute about the ownership and restitution of chattels⁷ will canvass these. In the case of human remains, the general position is more complex.

Once a corpse is buried, the general rule is that it 'forms part of the land in which it is buried and the right of possession goes with the land'.⁸ It is non-property.

Three important lines of authority qualify the general rule:

⁴ For example, where Aboriginal human remains were removed from graves in breach of the British *Anatomy Act* (1832) but have gone through a series of hands, today it would be reasonable to state that institutions have legal title to them. See 'A Scandalous Act: Regulating Anatomy in a British Settler Colony, Tasmania 1869', Helen MacDonal, *Social History of Medicine* 2007 20; <http://shm.oxfordjournals.org/cgi/content/abstract/20/1/39>. Another example is William Ramsay Smith, the infamous SA Coroner, who secretly dissected bodies and sent remains overseas without consent.

⁵ In some cases, the material was collected legally but the circumstances of collection no longer comply with modern standards of ethics (if they ever did); in other cases, the collection was traded with free and informed consent but in violation of traditional beliefs; in still other examples, individuals may have been coerced inappropriately or struck a deal with white people when they had no right to do so on behalf of the group. In some situations, the perceived wrongdoer is the collector of the material; in the others, it is the person disposing of it.

⁶ There is little doubt that the Indigenous people found offence, then as now, in the idea that the collection of ancestral remains was ever socially, morally or scientifically appropriate.

⁷ For example, arguments about the ownership and return, or restitution, of stolen artworks.

⁸ *Doodeward v Spence* (1908) CLR 406 at 412, per Griffith CJ. And see *Bone v Clancy* (1881) 2 LR (NSW) (L) 176; *Williams v Williams* (1882) 20 Ch D 659; *R v Sharpe* (1856-1857) Dears & Bell 160; 169 ER 959.

- There are several cases that establish that the executor⁹ (or where there is none, the deceased's spouse or parents)¹⁰ has the right to possession of a body for the purposes of its proper disposal.¹¹ This is not a right of ownership; rather it is one more akin to guardianship, but it has little to do with ownership.
- As a result of the grisly history of burial site abuse, all Australian jurisdictions have statutes that control burial sites and confer various consent rights on executors and heirs – but they don't give them ownership of the human remains.¹²
- In *Doodeward v Spence*, the High Court held a corpse could be treated as property in certain circumstances:

*When a person who has by the lawful exercise of work or skill so dealt with a human body or part of a human body in his lawful possession that it has acquired some attributes differentiating it from a mere corpse awaiting burial, he acquires a right to retain possession of it, at least as against any person not entitled to have it delivered to him for the purpose of burial, but subject, of course, to any positive law which forbids its retention under the particular circumstances.*¹³

Similarly, in England, a court held that body parts may be property if they 'have acquired different attributes by virtue of the application of skill, such as dissection or preservation techniques, for exhibition or teaching purposes'.¹⁴ It is this third reservation to the general rule that has resonance for museums, in that this is the basis upon which they are able to claim legal ownership of their collections of human remains. This is a characteristic of Type I repatriation claims – assuming the museum is able to withstand a claim that it acquired the collection material unlawfully, then the only basis for the return is one based on Ethics, not Law.

(ii) *Ethical argument*

Is there is a valid distinction to be made between ancient human remains and modern remains?¹⁵ Should we treat Egyptian mummies the same as we treat human remains from the 19th and early 20th centuries? In other words, does the proximity of the deceased to his or her living family members make any legal or moral difference to the way that a repatriation claim should be treated? It may usefully be argued that the younger the remains, the lesser the right to treat them as collection objects and the greater the right of relatives and communities to obtain their return and deal with them in accordance with belief, tradition, and love.

Perhaps all we can really say is that the moral claim of those seeking repatriation of non-ancient human remains is the strongest, and that there is some, undefinable line in the sand¹⁶ at which we are more inclined to say that the claim has become weaker.

But if we substitute Mungo Man¹⁷ for the Egyptian mummy, does our answer change? If Mungo Man were in the British Museum, would we view it like the mummies and say that it should stay in that collection, far from its place

⁹ See Professor Patrick O'Keefe, "Maoris Claim Head" (1992) 2 *International Journal of Cultural Property* 393, noting the New Zealand case of the Maori tattooed head which was advertised for sale by London auctioneers. The President of the New Zealand Maori Land Council applied to the High Court of New Zealand and was granted letters of administration of the estate of the deceased.

¹⁰ As to disputes between the spouse and the parents as to burial, see *Jones v Dodd* [1999] SASC 458; and dispute between the birth mother and the adoptive parent: *In the Estate of Dayne Kristian Childs, Buchanan v Milton*, 27 May 1999; (2000) 53 BMLR 176.

¹¹ See *In the Matter of Warren Andrew Gray* [2000] QSC 390; *Wuridjal v the Northern Territory Coroner* [2001] NTSC 99.

¹² See the excellent discussion of legal regulation of burial sites in 'Resting in Peace? A Comparison of the Legal Control of Bodily Remains in Cemeteries and Aboriginal Burial Grounds in Australia', Prue Vines, [1998] *SydLRev* 3 available at <http://www.austlii.org/au/journals/SydLRev/1998/3.html#6>.

¹³ *Doodeward v Spence* (1908) CLR 406 at 414, per Griffith CJ.

¹⁴ *R v Kelly* [1998] 3 All ER 741. Note that this was a case involving theft (and thus the argument was whether the body parts were legally capable of being stolen; see too *Dobson and another v North Tyneside Health Authority* [1996] 4 All ER 474.

¹⁵ A rule of thumb applied by many institutions – unwritten – is that it is acceptable to display remains when the originating country also displays those kinds of remains, that is, mummies.

¹⁶ Or temporal distance between the living and the dead.

¹⁷ Mungo Man was discovered at Lake Mungo, NSW, in 1974. The body, dated as being 40,000 years old, was sprinkled with red ochre, demonstrating sophisticated burial practice. Lady Mungo (Mungo I) is one of the earliest

of discovery; its home? Does a 40,000-year age difference allow us to think of them differently? Perhaps we subconsciously distinguish between them on the basis that one is packaged as art history or beautiful social history whereas the other is so starkly devoid of embellishment.¹⁸

Perhaps it is more profound than that: perhaps it is because Australian Indigenous people have a continuous living culture based on continuity of ancestry, place and traditions whereas this is not the case for most Old World burials which have occurred in parts of the world that have seen waves of conquest and cultural change.

Indeed, the Australian government views the process of repatriation for Indigenous ancestral remains and sacred and secret objects as an important means of promoting healing and reconciliation.¹⁹

(b) *Sacred and significant objects*

Objects that are sacred or otherwise culturally significant are also frequently subject to Type I repatriation claims. The return of these objects is perhaps less easily argued than that of human remains. After all, the essential character of the latter is easily established: the remains are either human or they are not.²⁰ With sacred or significant objects it is not so easy. Degrees of sacredness are subtle matters. Objects may fall anywhere along a cline of sacredness, from secret sacred (therefore highly restricted and usually not to be viewed by a general audience), through to sacred but public (which is the bulk of sacred objects, used in public ceremony), and finally to secular. Repatriation is mostly concerned with restricted secret/sacred objects.

How are we to gauge 'sacredness'? With Indigenous material we can ask those for whom it is sacred. But is there a difference in the sacredness of a Mesopotamian god-form, a mediaeval chalice or crucifix, and an Aboriginal churinga?

If so, on what is that difference based? Is it the temporal distance between use of the object as sacred object and its use as collection object?²¹ Is it the geographical distance between the place of sacred use and the location of the collection? Perhaps the degree of cultural separation between the source culture from the collection culture? Even the political or diplomatic pressures of any particular age? Whatever the reason, sacredness is not a constant quality.

Indeed, some objects are not sacred at all but are hugely significant and are accordingly treated with similar respect. Commonly, these are objects that gain their significance because of their association with a particular place, person or event. The Elgin Marbles are not sacred but they are certainly significant.

Type I repatriation claims can rarely be based on legal principles; nor can their solution. The issue is one that will be largely determined by the degree of respect that the owner accords to the claimant's spiritual or cultural beliefs.

In Type I claims:

- ownership is commonly not in contest (it is usually acknowledged by the claimant that the institutional owner is the legal owner);
- claims are based on a recognition of rights that is ethics-based, not law-based; and

examples of a cremation. The bones were unconditionally returned to the Paakanji, the Mathi Mathi and the Ngiyampaa in 1992.

¹⁸ Helena of Constantinople (246/50-330) was laid to rest in a large purple-hued, porphyry sarcophagus, decorated with reliefs. When the sarcophagus was moved from the Mausoleum of Santa Costanza, to the Vatican Museum, what was happening? Had the nature of the tomb and its contents changed aesthetically, culturally or spiritually? Had the essential character of the object been transformed into an object of art?

¹⁹ See page 2 of the document entitled "Australian Government Policy on Indigenous Repatriation", released in September 2016 and available on the website of the Department of Communication and the Arts at: <https://www.arts.gov.au/what-we-do/cultural-heritage/indigenous-repatriation>.

²⁰ But see footnote 18, concerning Helena of Constantinople's sarcophagus, for an example of transformation of character.

²¹ Certainly, contemporary religious significance is a value. Churinga are still used and where not used any more are still recognised as powerful objects to be respected and kept secret. Even strongly Christian groups will observe the restricted nature of the objects. Also, levels of restriction originally applied are important – a chalice is typically sacred – unrestricted, while a churinga is secret-sacred.

- although a financial component of the claim may constitute part of the claim, claims are not really about monetary compensation – rather, they are about things for which monetary compensation makes little sense, because they are about the soul rather than the value.

2.2 Type II repatriation:

Type II repatriation occurs where property has been stolen and/or exported illegally from its country of origin and then imported into Australia.

Most of the countries that signed the 1970 UNESCO Convention²² have legislation that seeks to control or inhibit the export of culturally significant material. Many of these laws date back to colonial times (though these laws have generally been updated in light of the Convention). Such legislation generally overrides the rights of the current ‘owner’ of the property.

As discussed in the previous chapter, in Australia, the relevant legislation is the *Protection of Movable Cultural Heritage Act 1986* (‘PMCH Act’). It gives foreign governments the right to request the Australian government to seize and return movable cultural heritage objects that were illegally exported. This is the case whether or not the objects were stolen, either by the person exporting the objects or by someone else.

The PMCH Act only came into operation on 1 July 1987 and accordingly, the right to request return only applies to material that entered Australia after that date. But that is not the end of the matter, as it is not clear as to what date one should apply for the illegal export of the objects from their country of origin. Arguments can be made that the earliest potential date is 14 November 1970.²³

Leaving that issue aside, important points to note about PMCH Act claims include that:

- current legal ownership is irrelevant;
- they are based on international treaty obligations as implemented by the local legislation (accordingly, legal argument is restricted to the applicability of the Act and compliance with its terms and not on examining ownership);
- the claims are nation-to-nation and cannot be brought by individuals; and
- they are not about monetary compensation – they are about protecting cultural patrimony.²⁴

(i) *Examples of type II repatriation*

The PMCH Act has importance for every collecting institution. As we discussed in the previous chapter, this legislation allows the government to seize material that has been stolen or illegally exported from another country in contravention of the cultural heritage laws of that country. No collection manager, CEO or board member, wants to be advised that the acquisition of a collection item was tainted by illegality and that the material is to be removed from and lost to the collection. It is the stuff that can affect the good standing of the institution and the professional reputation of those responsible for the acquisition.

Just in the past ten years, hundreds of kilograms of illegally imported dinosaur, mammal and reptile fossils have been returned to the Chinese government; 130 kilograms of dinosaur and plant fossils illegally exported from Argentina were returned; 16 Dayak Skulls returned to Malaysia; and an Asmat human skull from Papua returned to Indonesia. In 2008, the Australian Government returned a rare 15th century Ulm Ptolemy map of the world, stolen

²² UNESCO *Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Material* (1970).

²³ See, for example, the discussion by Mrs Susan Crennan in her Review (at pages 13 to 18), commissioned by the National Gallery of Australia into objects of concern in its South East Asian collection, and available at: nga.gov.au/collections/asia/default.cfm?mnuid=prov.

²⁴ There are many international examples of such repatriations. Of course, these do not relate to the PMCH Act but rather, other bilateral treaties or agreements between the countries involved. For example, the San Diego Museum of Art was required to return an 18th century painting to Mexico that had been stolen from a small church in San Juan Tepemazalco. The return was pursuant to the 1971 bilateral agreement between the USA and Mexico by which the USA is required to return any works from the colonial period found to have been illegally exported after 1971: *The Art Newspaper*, No. 155, February 2005 at 15.

from the National Library of Spain, to the Spanish government and in 2015, the Australian Government returned two sculptures to India.²⁵

These few examples illustrate the need for undertaking rigorous due diligence as to provenance before agreeing to the acquisition of collection material. The dangers can be subtle: it is not likely that you will be approached by a man in a pub and offered hundreds of kilos of dinosaur fossils. Often, by the time the offer is made to the collecting institution, the origins of the material have been coated with a veneer of respectability. We want the story to be true but unless we are prepared to lose the object to a claim under the PMCH Act, due diligence is essential.²⁶

2.3 Type III repatriation

Type III Repatriation cases occur where (i) there is some illegality that affects the chain of title in the property, thus affecting the present owner's right to claim ownership, and (ii) the PMCH Act does not apply.

These cases are complex because they are an application of traditional legal analysis of property rights. They may be brought by governments²⁷ or by individuals.²⁸ In such claims, amongst many other things, the claimant must show that:

- the property was stolen, looted or otherwise unlawfully acquired;²⁹
- the claimant has the right to bring the claim;³⁰ and
- there are no procedural or other bars in bringing the claim.³¹

Perhaps the best-known examples of these claims are the so-called 'despoliation cases', but these claims go far beyond those arising from armed conflict. Type III repatriation cases potentially affect every acquisition that turns out to be stolen, notwithstanding that it may have passed through several hands and been the subject of due diligence as to provenance.

In these claims:

- ownership is commonly in contest (it is rarely acknowledged by the claimant that the institutional owner is the legal owner);
- the claims are based on the application of the law of property rights;³² and
- they are often about monetary compensation.

The last of these points is particularly important when individuals bring the proceedings rather than communities or nations. In these cases, the main driver is often monetary rather than cultural benefit. If there were to be a law passed that no repatriated cultural material may be resold, we would see which of these cases was about the

²⁵ See, for example, archival copies www.environment.gov.au/about/publications/annual-report/07-08/pubs/vol2-movable-heritage.pdf and press releases such as www.attorneygeneral.gov.au/MediaReleases/Pages/2015/FirstQuarter/5-March-2015-Culturally-significant-Chinese-stature-returns-home.aspx. For an insight into repatriation of objects from other countries, see www.unesco.org/new/en/culture/themes/illicit-trafficking-of-cultural-property/recent-restitution-cases-of-cultural-objects-using-the-1970-convention and www.unesco.org/new/en/culture/themes/restitution-of-cultural-property/successful-restitutions-in-the-world.

²⁶ See the preceding chapter for more information on this topic.

²⁷ For example, the cases brought by the Iraqi government for the return of material looted from public collections since the invasion of that country in 2002.

²⁸ For example, the actions brought by individuals seeking the return of artworks and other assets unlawfully seized from them (or their family) by the Germans during World War II.

²⁹ Note that the burden of proof is on the plaintiff and the standard of proof is "on the balance of probabilities".

³⁰ For example, as the owner who was deprived of his/her rights or as the heir of such owner.

³¹ For example, proceedings may be barred because of the passage of time (so-called 'laches' or 'limitation of actions').

³² Many of these cases are determined by rules relating to the acquisition of title by purchasers with or without notice. These are laws that vary from jurisdiction to jurisdiction. The old '*nemo dat*' rule by which a party is unable to give better title than he or she enjoys, has been eroded to various extents in various jurisdictions. (It has nothing to do with *Finding Nemo*. That is a film about a fish.)

money and which were about cultural and spiritual significance. The point is not that one is better or worse than the other: simply, they are different – and as such require different policy approaches.

Because of the various characteristics described above, Type III repatriation cases are more properly referred to as examples of restitution rather than repatriation. Learned commentators seem to use the terms casually but it might be more helpful if we were careful to distinguish Type III claims from the others.

(i) *An example of type III repatriation*

Let's illustrate this by looking at a non-despoliation hypothetical. Museum A holds Indigenous human remains. It acquired them in 1947. A claimant seeks the return of those remains. She is doing so on ethical and moral grounds and is not seeking financial restitution. What would she have to prove?

If it is a type III claim, the road will be hard. At the very least, she will have to prove beyond reasonable doubt:

- the identity of the remains;
- that she is the lawful heir or legal representative of that person;
- that she has a better legal right to the ownership of the remains than the museum;³³ and
- that she is not procedurally time-barred from bringing action.

This is not an action with high prospects of success if pursued as a Type III claim. It is most probable that the claimant will lose if she approaches it as a legal claim. It is really a Type I claim and is best treated by both parties as such. This is an issue that is more likely to be resolved by understanding and negotiation than by litigation. If litigated, the museum would likely win – but the core ethical or moral issue will not be resolved.

3. Role of law in resolving repatriation claims

3.1 *Introduction*

Two initial and over-arching legal questions confront every organisation facing a repatriation claim:

- Ownership: Is the institution the legal owner of the material? Can it prove its ownership of the material? Or – perhaps more correctly – does the evidence of its ownership outweigh any contradictory evidence that the claimant can adduce in court?
- Power: Does the institution have the legal power to deaccession the material from its collection and hand over the legal ownership of the material to the claimant?³⁴

What follows rather depends on the type of restitution claim it is. When faced with any claim of repatriation, it is important that the institutional owner quickly considers what type of repatriation claim it faces. This will help determine the appropriate strategy. Types I and II are 'lawyer-lite'. Type III is 'lawyer-max'.

3.2 *Role of lawyers in Type I repatriation claims*

When we look at the three characteristics of Type I repatriation claims, we see that the problem is essentially not a legal one. Provided that the rights of ownership are established and it can be proved that the institution has the right to deaccession and transfer legal ownership, in Type I repatriation there are really very few legal issues. While lawyers may be useful as part of the back-up team, in Australia the core issues to be resolved are ethical, not legal.

The notable exception to this is when the claimant chooses to adopt a legal strategy. It is unusual, because it requires the claimant to mount its claim on grounds that permit it to overcome the obvious ownership hurdle. It

³³ No easy task given that the preponderance of authority is of the view that the executors and heirs have few rights over the body once it is buried.

³⁴ For example, the material may have been donated to the organisation and that donation may have been conditional upon certain prohibitions against deaccessioning or transfer or they may be subject to a trust. Further, for many European and British museums (where collection material is treated as an asset of the State) deaccessioning may be only possible if there is specific legislation to permit the deaccessioning and repatriation.

requires finding another ground upon which to fight, and the cultural property statutes provide the most obvious opportunities.³⁵

3.3 Role of lawyers in Type II repatriation claims

From the four characteristics of Type II repatriation claims it can be observed that there is a preliminary role for the institution's lawyers – but this is really restricted to issues concerning the applicability of the legislation. The owner's lawyers may be very involved in determining whether the Act applies and the request is properly made but once these matters are established, the issue is an inter-government one.

3.4 Role of lawyers in Type III repatriation claims

Type III claims are very different. The problem is essentially legal. At its heart, it is nothing more than a dispute about the legal ownership of property. Lawyers will be, and need to be, involved as soon as the claim arises. Lawyers will be central to the analysis, passage and resolution of the claim. The administration should not take any steps without doing so in accordance with the advice of their legal experts.

3.5 The Dja Dja Wurrung claim

In 2004, the Melbourne Museum mounted an exhibition called 'Etched on Bark 1854'. Included in the show were three objects on loan from the Royal Botanic Gardens, Kew and British Museum. One was a ceremonial emu figure made from river red gum and decorated with red and white ochres, and there were two etchings on Box Bark, one showing a hunting scene and the other, slightly larger, showing men dancing in a ceremony.³⁶ These were secular, not sacred, objects that had been obtained with free and informed consent and by means that did not violate tradition.

The Museum's Aboriginal Cultural Heritage Advisory Committee was consulted before negotiations began with the overseas museums, and the Museum's 'Roving Curator' and other staff had a number of more informal discussions with members of the Dja Dja Wurrung and other community groups.³⁷ As is usual, under the loan agreements, at the end of the loan period, the borrower was required to return the objects to their owners.

The objects entered Australia with Certificates of Exemption under the *Protection of Movable Cultural Heritage Act 1986 (Cth)*.³⁸

In an attempt to prevent the re-export of the material, the Dja Dja Wurrung people of Victoria applied to the under section 12 of the *Aboriginal and Torres Strait Islander Heritage Protection Act 1984 (Cth)* requiring the Minister to return the remains to their traditional (rather than the legal) owners.

The legislative history that produced the anomaly that permitted this claim is fascinating – but its telling can wait for another time. Politics had caused the original legislation to be amended in 1987 to make a particular exception for Victoria.³⁹ It was this that provided the basis of the claim – a claim that could not have been brought in any jurisdiction other than Victoria.⁴⁰ The claimants sought and obtained a series of rolling court orders forbidding the export of the artefacts.⁴¹ Eventually, these claims were dismissed.

³⁵ See the following discussion of the Dja Dja Wurrung claim.

³⁶ Elizabeth Willis, 'The law, history and politics – the case of Etched on Bark', 2006 ARC Conference, 'Risky Business: Managing Responsibilities & Solutions', Hobart: www.tandfonline.com/doi/abs/10.2104/ha070013.

³⁷ Elizabeth Willis, 'The law, history and politics – the case of Etched on Bark', 2006 ARC Conference, 'Risky Business: Managing Responsibilities & Solutions', Hobart: www.tandfonline.com/doi/abs/10.2104/ha070013.

³⁸ Certificates of Exemption – issued under section 13 of the PMCH Act – allow Australian protected objects, including Class A objects, which are currently overseas to be imported into Australia and subsequently re-exported. Overseas owners of Australian protected objects are encouraged to repatriate them to Australia for exhibition or sale but the Certificate of Exemption provides security that the objects will be able to be re-exported on completion of the exhibition, or if a sale to a resident of Australia is unsuccessful.

³⁹ *Aboriginal and Torres Strait Islander Heritage Protection Amendment Act 1987*, No. 39 of 1987, section 3.

⁴⁰ As follows:

Section 7 of the Principal Act is amended:

(a) by inserting in subsection (1) 'except Part IIA,' after 'This Act'; and

(b) by inserting after subsection (1) the following subsection:

(1A) Part IIA is not intended to exclude or limit the operation of:

The Dja Dja Wurrung Native Title Group asked the Minister to use his powers under the Commonwealth legislation to make a declaration of preservation over the artefacts, to prevent their return to Britain and to compulsorily acquire them. He declined to do so, based on advice that no overseas museums would be likely to lend to Australian collections if the power was exercised in this way.

Although the legal case was lost, some small benefits were politically delivered: The Victorian government announced that it would establish a \$250,000 fund to help buy back cultural material held in private hands and that it would provide \$50,000 to fund a feasibility study to investigate a Boort Dja Dja Wurrung Cultural Interpretive Centre. Not a big win. Elizabeth Ellis, the curator at the centre of the controversy, managed to articulate a positive analysis of the consequences:

*'What are some of the results of the Barks case? The London museums have been alerted, in a very dramatic way, to the significance of their collections from Indigenous Australians. The Dja Dja Wurrung have become aware of an artistic cultural tradition that they had not known about before, and young Aboriginal artists have begun making bark etchings in a similar style to that of their ancestors. The community at Boort, both Aboriginal and non-Aboriginal, have re-discovered a part of their local history, and plan a new Interpretation Centre to tell Indigenous and settler stories. And I hope to be able to continue to work at discovering the provenance of early Indigenous collections, and to tell histories which may contribute, perhaps only in a tiny way, to healing and reconciliation.'*⁴²

Indeed, a glass half full.

On the other hand, after the Dja Dja Wurrung litigation many overseas collections expressed the view that they would be reluctant to lend Aboriginal material to Australian institutions for fear that they would be subjected to similar treatment. In response, in 2006, the Commonwealth government amended the *Aboriginal and Torres Strait Islander Heritage Protection Act* to repeal the anomalous Victorian exception that had permitted the action to be brought⁴³ and to provide that a Ministerial declaration under section 12(1) of that Act could not prevent the export of an object where there is a Certificate of Exemption in force under section 12 of the *Protection of Movable Cultural Heritage Act* authorising its export.⁴⁴

Because of this, it would be impossible to mount the action again – but some overseas owners don't worry about fine legal distinctions: They remember the aggravations suffered by the lenders in this case and are reluctant to walk into what they perceive to be a foreseeable ambush.

This was a legal action doomed to failure. The claim was treated as though it were a Type III claim whereas it was always a Type I claim. This case illustrates that a defendant institution has little control over the tactics of the plaintiff party, but it also illustrates that if a party wrongly analyses the nature of the claim (or deliberately adopts a litigious approach for essentially political purposes), the result is enormous financial expense and, perhaps more importantly, the feeding of fearful and recalcitrant positions and the destruction of much trust and good-will.

(a) any provision of the Archeological and Aboriginal Relics Preservation Act 1972 of Victoria in so far as it applies to or in relation to an entry made in a register, or a declaration made, under that Act before the commencement of the Aboriginal and Torres Strait Islander Heritage Protection Amendment Act 1987; or (b) any other law of Victoria (other than a law for the preservation or protection of Aboriginal cultural property within the meaning of Part IIA) except as referred to in paragraph (a); that is capable of operating concurrently with that Part.'

⁴¹ For full analysis of the case, see LV Prott, 'The Dja Dja Wurrung Bark Etchings Case', *International Journal of Cultural Property* (2006) Vol. 13 No.2 at pp 241-246, Cambridge University Press.

⁴² Elizabeth Willis, 'The law, history and politics – the case of Etched on Bark', 2006 ARC Conference, 'Risky Business: Managing Responsibilities & Solutions', Hobart: www.tandfonline.com/doi/abs/10.2104/ha070013.

⁴³ *Aboriginal and Torres Strait Islander Heritage Protection Amendment Act* 2006, No. 152 of 2006.

⁴⁴ See the new section 12 (3A) of the *Aboriginal and Torres Strait Islander Heritage Protection Act* (Cth). Note that s.12 of the *Protection of Movable Cultural Heritage Act* allows a person intending to import an Australian protected object for temporary purposes in circumstances where the person may wish subsequently to export the object to apply to the Minister for a certificate authorising the exportation of the object.

4. Repatriation of human remains and sacred material⁴⁵

In Australia, the repatriation of Aboriginal and Torres Strait Island human remains and sacred objects is informed and influenced by government legislation and funding programs, museum profession ethical guidelines, and institutional policies – but the courts have played no part in it. In this section, where we consider the way that Australian museums handle claims for the repatriation of this kind of material, it is important to remember that these are Type I repatriation claims: situations which are not resolved by legal analysis and disputation but rather by the resolution of competing public interests.

4.1 *The resolution of competing public interests*

Even where the claimant can establish a strong moral basis for repatriation, there is inevitably a competing public interest claimed by those objecting to the repatriation. For example, when the repatriation of human remains is sought, the argument of the claimant is that the remains should be handed over to their family or community so that they can be treated with respect in accordance with their own customs and beliefs. For the owner-institution the argument usually is to the effect that '*the collection should be available for scientific research that will contribute knowledge as to the sociology, geography, anatomy and physiology of humans generally or of particular classes of humans*'. These are both valid, although competing, community interests.

If this conundrum is to be resolved, it is important that **both** sides recognise that there is no law or science on the side of those seeking repatriation of human remains and sacred objects: the claim is ethical and moral. It is unhelpful for the institutional owners to argue that the claimants have no legal right over the material. Everyone already knows that. To argue the Law is to miss the point and to miss the opportunity to find alternate ways to resolve the dilemma.

Indeed, it is important that the owner avoids falling into the trap of conceiving of such claims as a 'legal dispute'. Such categorisation will inevitably create a psychology whereby the matter is treated by litigators rather than negotiators.

As for owners who resist repatriation on scientific grounds, they must acknowledge that any strength of their position is dependent upon the value of the science delivered. For example, if the collection has been collected in a manner that makes reliance on the data unsafe, what is its scientific value? Sometimes it is argued that the value of a collection of human remains lies in its potential: The material will be available if and when the decision is made to undertake scientific testing, or if and when new technologies are invented that will permit different kinds of examination. This argument may have merit but is often the resort of institutions that have never actively planned such investigation, have no clearly articulated thesis that they wish to test, and have no peer-approved or community-endorsed strategy as to how it should be done.⁴⁶

The difficulty faced by both the claimant and the owner is that there is no single, correct, answer. There is 'right' in the claims of both sides.

Each side can argue that its public interest should get precedence over the other – and where that is the approach taken, the status quo will be retained by the party that can prove legal ownership of the material (usually the institution) and the dispute will continue to burn like fire in a peat forest. In dealing with claims for repatriation, listening skills are more important than forensic skills; mutual respect and the adoption of creative strategies to achieve common goals, are more effective than either litigation or passive aggression.

4.2 *Attitudes to repatriation in the museum sector*

It is important to understand that the attitude of Australian museum professionals to repatriation is not necessarily the same as those of their European colleagues. From the perspective of a 'source country', many European institutions are reluctant to hand back human remains, either to the families, peoples or governments from which they were originally taken. It would seem that they consider human remains to be an important part of science and

⁴⁵ Thanks to Dr Michael Pickering, Program Director: Aboriginal and Torres Strait Islander Program & Repatriation Program at the National Museum of Australia, for his insights into institutional process and attitude.

⁴⁶ It should also be remembered that the scientific examination and testing of human remains is, these days, subject to rigorous protocols imposed by legislation, professional organisations and funding bodies. It is not easy to obtain these approvals.

history collections and should be retained so that the museum has the capacity to undertake scientific examination and experiments.⁴⁷

The Australian and New Zealand approach is in stark contrast. In our region, there is a widespread belief that the arguments in favour of maintaining collections of human remains are difficult to sustain.⁴⁸ Notwithstanding that the existence of the collections may permit an institution to scientifically examine the remains, in fact, very little such examination is done. Most of the remains sit undisturbed on their shelves for year after year and decade after decade.

There are good reasons for this:

- very few of the remains were more than 150 years old at time of collection;⁴⁹
- in many cases, there will be no reliable information as to where or how the remains were collected;
- in any case, the means by which most of them were collected will have been scientifically biased and unreliable; and
- the ethical underpinnings of their collection is often incompatible with today's ethical and social standards.

Consequently, over the past twenty years in Australia there has developed an institutional culture by which it is assumed that the return of human remains to their kin or skin group, or at least an appropriately affiliated cultural group, is to be preferred over holding them within the storerooms of the museums on the off-chance that they might later be useful.

It is significant that the Australian approach to repatriation of human remains and sacred objects is primarily governed by industry practice not Law: the State and Federal laws provide no explicit assistance to the museums which are custodians of human remains and which either wish to conduct scientific experimentation on them, or wish to return them to their original community.⁵⁰ Indeed, in many ways, legislation is a hurdle to both. As a consequence, while the codes of ethics and practice that have developed as to repatriation are consistent with Australia's treaty obligations and local legislation, they have really developed independently of any legislative guidance.

4.3 The existing statutory framework

The statutory framework is one that will be familiar to many jurisdictions. The relevant statutes can be divided into various categories:

- those that control the protocols of handling of dead bodies;⁵¹ and
- those that prohibit or lay down protocols for transplantation of, or experimentation on, human tissue.⁵²

⁴⁷ For a lucid description of the differing attitudes to repatriation within the museum community see Prof. Michael F. Brown's address to the 2008 conference proceedings, *From Anatomic Collections To Objects Of Worship* at the Museum Quai Branly, in a session entitled 'Repatriating Human Remains: Why, For Whom, Under Which Conditions?': www.borderlands.net.au/vol7no2_2008/pickering_lost.pdf.

⁴⁸ See M. Pickering, "Repatriation, Rhetoric, and Reality: The Repatriation of Australian Indigenous Human Remains and Sacred Objects", *Journal of the Australian Registrars Committee*, June 2002: 15-19, 40-41.

⁴⁹ Using the time of collection rather than the age calculated from the current year is significant for as time rolls on, remains get older. In the UK some museums have placed a 100-year age limit on what remains they will consider returning – but the age is determined by the current year. Consequently, in the not too distant future no remains will be eligible for return and the status quo of 20 years ago will be re-established. The date of collection should be the trigger.

⁵⁰ Australia voted against the Declaration on the Rights of Indigenous Peoples adopted by the General Assembly on Thursday September 13 2007, by a majority of 144 states in favour, 4 votes against (Australia, Canada, New Zealand and the United States).

⁵¹ See the various Coroners Acts in each State: NSW: *Coroners Act* 1980; QLD: *Coroners Act* 2003; ACT: *Coroners Act* 1956; *Coroners (Consequential Provisions) Act* 1997; SA: *Coroners Act* 2003; VIC: *Coroners Act* 1985; WA: *Coroners Act* 1996; NT: *Coroners Act*; TAS: *Coroners Act* 1995.

⁵² Relevant legislation includes the following: ACT: *Transplantation and Anatomy Act* 1978; *Crimes Act* 1900; *Guardianship and Management of Property Act* 1991; *Medical Treatment Act* 1994; *Powers of Attorney Act* 1956; SA: *Transplantation and Anatomy Act* 1983; *Consent to Medical Treatment and Palliative Care Act* 1995; *Criminal Law Consolidation Act* 1935; *Death Definition Act* 1983; *Family Relationships Act* 1975; *Guardianship and*

None of these contain exceptions that give museums any particular rights to conduct scientific testing on human remains in their collections. Indeed, although they do not act to exclude museums from such activity, these general statutes act as inhibitors of any such scientific work in museums as they include onerous requirements of consent – from the deceased, the relatives of the deceased, the executor,⁵³ the coroner (or various combinations of all of the foregoing); They are based on the assumption that the subject is either living or fairly recently deceased. They make no exceptions that might meet the needs of museums whose collections include human remains; they provide no exceptions to permit scientific experimentation or testing by museums; they provide no explicit right to maintain such collections and nor do they impose any duty of repatriation.⁵⁴

The difficulty of complying with the statutory consent obligations means that little real research is carried out on these collections and is one of the practical underpinnings of the practice of repatriation. If scientific examination is not carried out on the remains, and is discouraged (if not prohibited) by statute, then the case for continued custodianship of the remains is greatly lessened. In short, even if the change of cultural and ethical values were not sufficient to stimulate repatriation, science and economics would.

4.4 Sectoral and professional codes of ethics

The museum sector has done much work establishing codes of practice in relation to the custody, treatment and repatriation of human remains held in their collections. Archaeologists have a Code of Ethics⁵⁵ as do anthropologists⁵⁶ and there are several investigations and reports that give guidance in the area.⁵⁷

The over-arching philosophy and approach is set out in Museums Australia's 2005 document *Continuing Cultures, Ongoing Responsibilities: Principles and Guidelines for Australian Museums working with Aboriginal and Torres Strait Islander Cultural Heritage* from 2003:

Repatriation

1.4.3 The community from which the ancestral remains originated needs to be involved in deciding what will happen to remains repatriated by museums.

1.4.4 Museums are to seek out the rightful custodians of ancestral remains and ask them whether they wish the remains to be repatriated to the community or held by the museum on behalf of the community.

1.4.5 If rightful custodians ask for the return of ancestral remains museums should agree. All requests for the repatriation of Aboriginal and Torres Strait Islander ancestral remains should be promptly and sensitively dealt with by museums, who must at all times respect the materials' very sensitive nature.

Administration Act 1993; Natural Death Act 1983; NSW: Human Tissue Act 1983; Human Tissue Regulation Act 2000; Anatomy Act 1977 ; QLD: Transplantation and Anatomy Act 1979, Criminal Code Act 1899; VIC: Human Tissue Act 1982; Human Tissue (Prescribed Institutions) Regulations 1997; WA: Anatomy Act 1930; Criminal Code Compilation Act 1913; Guardianship and Administration Act 1990; Human Tissue and Transplant Act 1982; TAS: Anatomy Act 1964; Criminal Code Act 1924; Guardianship and Administration Act 1995; Human Tissue Act 1985; NT: Criminal Code Act 1983; Human Tissue Transplant Act 1995; Natural Death Act 1988; Natural Death Regulations 1989.

⁵³ Either a legally appointed executor or a person or group determined by the court to be entitled by tradition or custom to manage the estate of the deceased (including remains).

⁵⁴ Note that these provisions are not particularly useful to determine whether a particular person or group has a right to make a claim for repatriation of the remains, rather they are focussed on who is capable of giving consents for particular activities to be carried out on or with the remains.

⁵⁵ *Code of Ethics of the Australian Archaeological Association*, Australian Archaeological Association, December 2004: www.australianarchaeologicalassociation.com.au/about/code-of-ethics/.

⁵⁶ *Code of Ethics of the Australian Anthropological Society* (2003, most recently revised in 2012): www.aas.asn.au/about-aas/code-of-ethics.

⁵⁷ *Continuous Cultures Ongoing Responsibilities*, Museums Australia, 2004; *Guidelines for Ethical Research in Indigenous Studies*, AIATSIS, 2004; *National Statement on Ethical Conduct in Research Involving Humans*, National Health and Medical Research Council, 2004; *Report of the UK Working Group on Human Remains*, UK Department of Culture Media and Sport, 2003.

1.4.6 *Museums must not place conditions on communities with regard to the repatriation of ancestral remains.*⁵⁸

Although this code of conduct is not legally binding on museums, it sets out the basic approach of Australian museums:

- involvement of the relevant community;
- an obligation on museums to be pro-active and seek out rightful custodians and to ask them as to what should happen to the material;
- an emphasis on the sensitiveness that should characterise such discussions; and
- the prohibition of museums putting conditions on the return (after all, it is the view of the rightful custodians that is paramount.)

This work by Museums Australia was an important initiative because it spelled out for the first time these basic principles by which the profession was expected to operate when faced with repatriation issues. As a result of this work, some repatriation questions were more likely to be answered according to consistent principle instead of moral positions adopted by individual decision-makers.⁵⁹

4.5 *Institutional policies*

All institutions that hold human remains have individual policies, governed by statute and informed by sectoral codes of ethics that set down the protocols that govern the day-to-day activity of staff. Some of these will be general institutional policies that affect all parts of the collection (such as policies relating to deaccessioning and disposal) while others will be more particular to the holding and treatment of sacred/sacred and private material and to the return or repatriation of cultural material.⁶⁰ Indeed:

*'Australian State and Territory Museums have been returning ancestral remains and sacred objects to Aboriginal and Torres Strait Islander people for over twenty-five years (although with varying degrees of willingness in the early years). Most repatriation exercises were responses to unsolicited requests from Indigenous groups. Repatriation events were few and far between and handled on a case-by-case basis. Since the late 1990s however, federal, state and territory Museums have had the opportunity to be more pro-active in repatriation exercises through the provision of extra state and federal funding programs.'*⁶¹

These policies will differ from collection to collection as the historical reasons for acquiring the material, the circumstances in which it was collected, the reasons that it still holds such collections, will differ from institution to institution.

For example, as Dr Pickering has observed in relation to the National Museum of Australia:

... the National Museum of Australia holdings of human remains and sacred objects derive from many sources. Most of the remains are from the old 'Australian Institute of Anatomy' collections, transferred to the NMA in 1985 following the Institute's closure. The Institute was established in the 1930s and made large collections of human and animal biological specimens, as well as an enviable collection of other cultural objects now held by the National Museum of Australia.

The Museum has also become the unofficial repository and repatriation service provider for some collections from overseas. For example, collections from Edinburgh University, the Royal College of

⁵⁸ There is a similar principle in respect of sacred/secret objects.

⁵⁹ It was also important because it was the basis of the development of the hugely significant Return of Indigenous Cultural Property (RICP) Program. This is discussed below.

⁶⁰ For example, at the National Museum these issues are governed by (i) the Deaccessioning and Disposal policy, (ii) the "Aboriginal and Torres Strait Islander Human Remains Policy", (iii) the 'Policy on the Aboriginal and Torres Strait Islander secret/sacred and private material 1996'; and (iv) the Return of Cultural Objects Policy 1996. See, generally, www.nma.gov.au/history/aboriginal-torres-strait-islander-cultures-histories/repatriation.

⁶¹ M. Pickering, "Despatches from the Front Line? Museum Experiences in Applied Repatriation", an unpublished paper delivered at *The Meanings and values of Repatriation: a Multidisciplinary Conference*, 8-10 July 2005, ANU, Canberra.

Surgeons, Manchester and Horniman Museums in the UK, the Bishop Museum and Michigan University in the US, and from the Museum of Ethnography in Sweden. While all of these remains have been temporarily deposited with the Museum, the actual advocacy that resulted in the returns was primarily carried out by Indigenous representatives and/or Indigenous representative bodies. These include the Aboriginal and Torres Strait Islander Commission (ATSIC), Aboriginal and Torres Strait Islander Services (ATSIS), the Office of Indigenous Policy Coordination (OIPC), the Foundation for Aboriginal and Torres Strait Islander Research Action (FAIRA), and the Aboriginal Legal Rights Movement (ALRM).

The Museum's holdings of secret/sacred objects similarly derive from the Institute of Anatomy ethnographic collections, collections that were held by the Federal Government pending the establishment of a National Museum, collections subsequently acquired by transfer or purchase, and by donations.⁶²

4.6 Government policy and support

Although the statutory basis for repatriation of human remains and sacred objects is, at best, sparse, it would not be correct to infer from that, that the government has not supported the process. The repatriation process could not have been as effective as it has, had governments of various political persuasion not provided the funding that underwrites the National Repatriation Program and the processes undertaken by owners and claimants:⁶³ In particular, over the years the Australian Government provided support through various programs, including the International Repatriation Program, funding for Keeping Places under the Indigenous Heritage Program and, through the Cultural Ministers Council, the Return of Indigenous Cultural Property Program.

While no longer operative, the principles that governed the Return of Indigenous Cultural Property Program (RICP) (which supported Australia's major government-funded museums to do various things) are instructive. In particular, support was provided to:

- identify the origins of all ancestral remains and secret sacred objects held by museums where possible;
- notify communities of ancestral remains and secret sacred objects held in museums;
- appropriately store ancestral remains and secret sacred objects if this is requested by communities; and
- arrange for repatriation where and when it is requested.

Through the program, the Australian Government, state and territory governments and the museums sector collaborated to resolve issues relating to Australian collections of ancestral remains and secret sacred objects. Crucially, it provided financial support to both the museum sector⁶⁴ and to Indigenous communities⁶⁵ to meet the costs associated with repatriation. Funds were provided to Indigenous communities through the museums (but no such support was given to private or university collections, or to holdings overseas).⁶⁶

The RICP Program was overseen by a Management Committee of museum and Indigenous representatives from each state, the Northern Territory and Museums Australia.

The eight museums eligible to participate in the program were: Australian Museum; Museum and Art Gallery of the Northern Territory; Museum Victoria; National Museum of Australia; Queensland Museum; South Australian

⁶² *Despatches from the Front Line? Museum Experiences in Applied Repatriation*, M. Pickering, an unpublished paper delivered at 'The Meanings and values of Repatriation: a Multidisciplinary Conference', 8-10 July 2005, ANU, Canberra. The National Museum of Australia makes both its *Aboriginal and Torres Strait Islander Human Remains Policy* and its *Procedures for the Care and Management of Aboriginal and Torres Strait Islander Remains*, publicly available from the museum's website.

⁶³ On 4th July 2000, the Australian Prime Minister, John Howard and the English Prime Minister, Tony Blair publicly committed their governments and countries to increased effort to repatriate human remains. It was an important official step for both countries. The commitment was made at the highest level and was internationally noted.

⁶⁴ The Museum Support sub-program. The Museum Support sub-program funds are primarily for the preparation of collections and employment of specialist consultants.

⁶⁵ The Community Support sub-program. These funds are for community use only.

⁶⁶ See M Truscott 2006, 'Repatriation of Indigenous cultural property', paper prepared for the 2006 Australian State of the Environment Committee, Department of the Environment and Heritage, Canberra (available at www.environment.gov.au/node/22561).

Museum; Tasmanian Museum and Art Gallery; Australian Museum. The Australian Capital Territory does not hold collections of Indigenous remains and secret sacred objects, so did not participate in the program.⁶⁷

The RICP program was a formal enunciation of repatriation policy in Australia. The principles that it articulated were the result of extensive discussion and negotiation between state and Commonwealth governments, the museum sector and Indigenous community representatives. The Principles were based on the Museums Australia's *Continuous Cultures, Ongoing Responsibilities* but were expanded and elucidated and, crucially, backed with financial resources.⁶⁸

As at the date of this revision of this chapter, the Commonwealth Department of Communications and the Arts was facilitating the unconditional return of Aboriginal and Torres Strait Islander ancestral remains both from overseas and domestically, taking advice from an Advisory Committee for Indigenous Repatriation.⁶⁹

The Program supports:

- inventory and provenance research;
- community visits in Australia by relevant museum staff;
- consultants to help communities coordinate returns;
- museum visits by community representatives to identify ancestral remains and secret sacred objects;
- travel within Australia for community representatives to collect ancestral remains and secret sacred objects;
- travel for community representatives to collect ancestral remains from overseas; and
- the preparation, packing, transport and freight of ancestral remains and secret sacred objects for return.

In September 2016, the Department published the *Australian Government Indigenous Repatriation Policy*, setting out both policy objectives and how the policy would be implemented. Of particular interest in Part IV, setting out protocols that should be adhered to, including in relation to community consultation and how research and study should be carried out.⁷⁰

4.7 *The effect of the principles*

Underlying the principles enunciated in *Continuous Cultures, Ongoing Responsibilities* and the *Australian Government Indigenous Repatriation Policy* is recognition of the moral, rather than the legal, authority of the Indigenous people or communities to which this material belonged and from which it was taken. Each stage of the repatriation process is based on consultation with, and empowerment of, the other side – an approach that is quite different from the traditional adversarial legal approach.

Indeed, it is fundamental to the repatriation process that the repatriation event is not seen as a dispute (although of course disputes do arise), but rather as an opportunity to achieve ethical and useful community outcomes.

Accordingly, there is no place in the process for litigators or even passive-aggressive museum officials. The practical tools of the repatriation process are respect, acknowledgement and negotiation.

⁶⁷ See archived copies of the Ministry's website, www.arts.gov.au/indigenous/return.

⁶⁸ The RICP program is jointly funded by state and Commonwealth governments. In the 2007-08 Budget the Australian Government committed \$4.716 million over four years as part of its contribution to continue the RICP Program.

⁶⁹ See, generally, www.arts.gov.au/what-we-do/cultural-heritage/indigenous-repatriation.

⁷⁰ The Policy is available for download at www.arts.gov.au/what-we-do/cultural-heritage/indigenous-repatriation.

5. The repatriation process

This is not the place for a full description of the issues underlying the repatriation of human remains and secret and sacred objects. There are some excellent descriptions of this subject matter and the issues that arise.⁷¹

Each individual repatriation process, however, shares a generic structure:

- investigation of the provenance of the remains;
- inquiry as to the most appropriate custodian;
- formal request for return and proof of a right of custodianship;
- engagement;
- decision;
- return or other management.

5.1 Investigation of the provenance of the remains

Where the material is held in overseas museums, identification and the establishment of provenance is usually achieved as a result of the efforts of the claimant groups. Examples of repatriation being pro-actively initiated by the foreign institution are rare.⁷²

In contrast, where the material is held in an Australian museum, repatriation is most often commenced by proactive investigation by the holding organisation.

5.2 Inquiry as to the most appropriate custodian

It is important that the repatriating organisation undertakes a transparent and inclusive process to identify the appropriate custodians. At the National Museum of Australia, the repatriation process is usually proactive: The Repatriation Unit, having established the geographic or cultural provenance of the remains, does not take on itself to decide who is the most likely appropriate custodian.

Rather, it consults with:

relevant government heritage authorities to assist in the identification of formally recognised representative organisations and/or individuals; and

Indigenous representative bodies, established by legislation or government funding, that have a responsibility to represent custodians, traditional owners, and Native Title holders.

As Dr Pickering observes:

“The identification of such individuals and groups based on cultural, anthropological, as well as legislative, criteria is their day-to-day business. Access to this information – achieved through their endorsement of a repatriation claimant, ... assists the Museum in fast tracking the repatriation process to the benefit of custodians. At the same time, such engagement provides some protection for Museums when they are required to describe whom they dealt with and the basis for their accepting that individual or group as being the appropriate custodians for repatriated items.”

A lawyer might note that the museum is undertaking valuable risk management in adopting such a consultative and seemingly passive role: whereas it might have immediately made its own conclusions as to the appropriate persons or group, it chooses not to do so and instead, consults both with the government sector and the non-government Indigenous bodies. It is using a well-proven technique for conflict avoidance in such situations: involve all of the

⁷¹ See D. Kaus, “The Management of Restricted Aboriginal Objects by the National Museum of Australia”, *reCollections*, 2008, vol. 3, no. 1.

⁷² However, the Government, at first through FAHCSIA and now through the Department of Communications and the Arts, is taking a primary advocacy role and liaising between claimants and overseas holding institutions.

bodies that have a bona fide interest in the transaction and whose adverse views might either derail the process or impugn the outcome.

Once a prospective custodian, custodial group, or representative body has been identified, it is advised in writing of the nature of the remains or objects available for return.

5.3 *Formal request for return and proof of a right of custodianship*

Each institution will have a formal procedure that the claimant must follow to make a claim.

This is a sensitive stage: sometimes the community may be embarrassed that it was not aware that remains and objects were being held. It may be reticent because it doesn't know how to proceed. Accordingly, how this first contact is dealt with can affect the eventual success of the repatriation event: The institution must acknowledge the right of the Aboriginal or Torres Strait Islander group to be consulted in respect of the material and must treat the claimant and their enquiries or demands with respect.

The communities cannot be treated as though they are middle-class, urban and Euro-educated. Communities need to confer amongst themselves to determine what to do. They often lack financial resources and this consultation process often requires considerable financial and logistical support to organise and implement these meetings and discussions.⁷³

Many such groups do not have experience in such formal matters and will need assistance. The institution will need to help them understand what it needs to verify the claim and what it considers constitutes proof of custodial rights. For example, at the National Museum of Australia, the potential custodians will be given a document entitled 'Advice to Applicants' that details how to apply for the return of material. This asks prospective custodians for any information that assists in supporting their application for repatriation, including:

- the identities of the persons, groups, or community on whose behalf the application is made;
- the description of the specific remains/objects requested;
- letters of support for the application from local representatives organisations such as Land Councils, Native Title Representative Bodies, Legal Services, Government Indigenous or heritage bodies, or other community organisations;
- where an organisation is making the application, a statement of support from members of the relevant group.
- a statement that the applicants are entitled by the traditions and customs of their community to make application for the remains/objects.

Such requirements can be intimidating and complex and the officers of the institution will often need to assist the claimant with an application. The information sought from the applicant can appear daunting but it is not compulsory: At the National Museum of Australia, although such information is desirable, the decision as to custodianship is often made without such information, based on the museum's own research as to provenance together with the information supplied by the government and Indigenous organisations.

5.4 *Engagement*

The institution engages with the applicants, describing the process and listening to the applicants' case. The application is considered, the options discussed with the applicants, other groups consulted, and where relevant, any competing claims are considered.

When more than one group makes application for the return of the materials, the museum must try to determine which has the better claim. Although museums try to be impartial and would prefer the disputant factions to come to some agreement themselves, in most cases one group better satisfies the criteria of endorsed representation⁷⁴

⁷³ The repatriation initiatives could not possibly be as successful as they are if the claimants were not able to access government funding to assist them in the processes described in this chapter.

⁷⁴ Endorsement by state territory or Aboriginal and Torres Strait Islander representative bodies.

and so the museum deals with that group. The museum must adopt a transparent process and this not only alleviates the suspicion and distrust that can accompany such negotiations, it also promotes reasonableness on the part of the claimants.

5.5 Decision as to the application

The museum then considers the information that it has gathered – that obtained through its own provenance investigations; that supplied by the representative organisations it has consulted; and that provided by the claimant community itself – and makes its decision as to custodianship.

There are two main possible outcomes:

- the institution responds positively and agrees to the return of materials – an explicit acknowledgement of the applicants' right to be primary custodians for the purpose of repatriation; or
- where the group has failed to prove its rights to exclusive custodianship of the materials, the application for return of the materials will be refused.⁷⁵

5.6 Return or other management

There are levels of physical return, ranging from the specific to the generic: 'return to site'; 'return to descendants'; 'return to 'country''; 'return to region'; 'return to state' and 'return to Australia'.⁷⁶

The legal formalities of return are few. With the exception of signing a receipt for remains, the return of remains and secret/sacred objects is unconditional.⁷⁷ Custodians may do with them as they see fit.

For the institution, the receipt is the legal proof that the benefits and burdens of ownership of the material have passed to the new owners,

For the new owners, legal and physical return will not be an end but a new beginning. With return (and gaining of legal title), comes responsibility and these pressures are keenly felt.

As Dr Pickering has observed:

Few communities have the financial or logistical resources to take possession of materials. The treatment of human remains may require ceremonies that require transport of participants and catering, burial that requires ceremonies, a grave site, excavation, grave marker, or the construction and maintenance of a suitably secure and culturally acceptable storage facility. Similarly, the receipt of sacred objects may require special transport protocols, ceremonies and specialised secure storage facilities. All of this costs money and many of the applicants have little enough of it.

On a number of occasions, people have expressed the concern that, if returned, sacred objects might be stolen or interfered with. Communities need secure storage facilities in which materials may be stored. Because of the secret nature of the materials stored the repositories must also be inconspicuous and of low profile. As well as initial set up costs, such facilities require long-term maintenance and management. This requires a long-term commitment of human and financial resources.⁷⁸

For this reason, the museum is often asked to continue to store the material on behalf of the Indigenous community. Where this occurs, the presence of the materials in the museum is legitimate, as it has been endorsed by the Indigenous owners of the materials.

⁷⁵ This is rare but when it does occur it is often because of an application by an alternative group of the same cultural affiliation but with a stronger claim and greater community support.

⁷⁶ And each one is a successful outcome: see M. Pickering, "Define success: repatriation of Aboriginal and Torres Strait Islander Ancestral Remains and Sacred Objects", *Museum National*, February 2003.

⁷⁷ At least this is so when the material is being transferred by Australian institutions. It is not necessarily so when the repatriator is an overseas institution.

⁷⁸ For example, in 1992, the remains of Mungo 1 (Mungo Lady) were repatriated and are held in a locked vault in the Mungo National Park Exhibition Centre. Two locks protect it: one key is held by the Aboriginal custodians and the other by archaeologists.

When one of the applicant groups is formally recognised as the moral and legal owners of the materials, one outcome is the hand-over of items. Another outcome is the request that the institution continues to hold the materials at the request of the community. Thus, a physical act of transport and handover may not occur and indeed, is not necessary as a measure of a successful repatriation exercise. What has happened is that both authority and ownership have been returned – the institution may continue to hold materials but this is under the clear recognition that the claimant community is the owner and manager of the material.⁷⁹

5.7 What is success?

From a legal perspective, a successful repatriation event occurs when a cogent process has resulted in the formal, documented transfer of ownership and responsibility. However, this approach is too limited.

The criteria for defining a successful repatriation event should not be restricted to the physical return of materials. Rather, the criteria for defining success should include the recognition that both authority and ownership has been returned to the community. This, as well as the development of closer relations between the repatriators and the custodians, may prove to be the most significant achievement of the repatriation process.⁸⁰

⁷⁹ See M. Pickering, "Repatriation, Rhetoric, and Reality: The Repatriation of Australian Indigenous Human Remains and Sacred Objects", *Journal of the Australian Registrars Committee*, June 2002

⁸⁰ See Pickering, *Repatriation, Rhetoric, and Reality: The Repatriation of Australian Indigenous Human Remains and Sacred Objects*, M. Pickering, *Journal of the Australian Registrars Committee*, June 2002 at 13-14.