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PANEL OF EXPERTS

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PART C: COLLECTIONS

CHAPTER 11. IMPORT AND EXPORT OF COLLECTION MATERIAL

INTRODUCTION

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

When collecting organisations export cultural material, unless it is a repatriation of non-Australian human remains, it is usually only a temporary export – one that is associated with a loan, whether of individual pieces or of an entire exhibition.¹

Prior to the commencement of the Protection of Movable Cultural Heritage Act 1986 (PMCH Act) on 1 July 1987², Australia controlled the import and export of cultural material by regulations made

¹ Because it is uncommon for an institution to permanently export cultural property, the principal focus of the export discussion is limited to temporary export.

under the Customs Act 1901. The only restrictions on import were on the import of cultural property from Papua New Guinea.³ 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.⁴ Restrictions on export were far more comprehensive,⁵ but just as ineffective.

The system of export and import control by means of Customs Regulations proved to be profoundly inadequate.⁶ 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.⁷

Australia did not introduce a comprehensive legislative system of import and export control of heritage material until 1987.

The Legislation

Any effective system must include:

- (1) a procedure for the classification and assessment of cultural material;
- (2) a procedure for the granting or refusing of permits;
- (3) redress for persons affected by the refusal of permits or confiscation of innocently obtained cultural property; and
- (4) provision for recovery and return of illegally exported cultural material.

² 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).

³ Customs (Prohibited Imports) Regulations, Third Schedule, Item 9A

⁴ For Papua New Guinea legislation, refer to *National Cultural Property (Preservation) Act*, Ch. No. 156.

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

⁶ 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.

⁷ For US analogy see 'Theoretical Thefts, Real Claims', *Art News*, March 1983 pp.11–13.

In 1986 Federal Parliament passed the *Protection of Movable Cultural Heritage Act 1986*, which came into force on 1 July 1987.⁸ This 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*.

The main features of this legislation may be summarised as follows:

(a) Structure

National Cultural Heritage Control List

The Regulations⁹ set out the National Cultural Heritage Control List (NCHL). The NCHL includes:

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;

⁸ Its approach was not novel; it is similar in scheme to the Canadian *Cultural Property Export and Import Act* (R.S., 1985, c.C-51).

⁹ *Protection of Movable Cultural Heritage Regulations* 1987.

- (i) any other prescribed categories.

Whilst earlier export controls focused on the protection of Aboriginal 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 control list distinguishes between:

- (1) **Class A** material, namely, those objects so rare and important as to be considered inalienable from Australia and which may not be exported;¹⁰ and
- (2) **Class B** material that, in certain circumstances, may (and perhaps usually will) be given an export permit.¹¹ Given the wide ambit of Class B material, such objects must meet additional criteria such as age, monetary value and significance to Australia.

Both in drawing up the NCHL and in exercising the discretion to grant export permits, the Minister is advised by a committee known as the National Cultural Heritage Committee, which receives advice from expert examiners. This group is made up of four museum representatives, an academic, a nominee of the Minister for Aboriginal Affairs, and four other persons 'having experience relevant to the cultural heritage of Australia'.

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

¹⁰ The objects currently included in Class A are: (i) Victoria Cross medals awarded to Australian service personnel, (ii) each piece of the suit of metal armour worn by Ned Kelly at the siege of Glenrowan, Victoria in 1880, and (iii) Aboriginal and Torres Strait Islander objects being sacred and ritual objects, bark and log coffins used as traditional burial objects, human remains, rock art, and dendroglyphs (carved trees).

¹¹ The objects currently included in Class B are: (i) certain objects of Aboriginal and Torres Strait Islander heritage, (ii) archeological 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.

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.

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.

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:

- (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.¹³*

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'**.

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

¹³ Sub-regulation 2 (1) of the *Protection of Movable Cultural Heritage Act Regulations* 1987.

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 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.

(b) Export Permits

Lawful export of an Australian protected object requires a permit.¹⁴ This is a three-stage process. Each application for an export permit is reviewed by an Expert Examiner who:

- (1) determines whether the material is an Australian protected object, and
- (2) 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 who makes the final decision.

SUMMARY OF RECENT PERMIT APPLICATIONS, PERMISSIONS AND REFUSALS¹⁵

Financial year	Export permit applications received	Permanent export permits issued	Temporary export permits issued	Export permits refused
2006-07	90	20	12	8
2005-06	28	17	9	5
2004-05	200	27	72	5
2003-04	270	51	22	9

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 few or no applications. Almost all of the applications in the fine art and decorative art categories have been made by auction houses and relate to indigenous art. 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

¹⁴ The application form an Export Permit is found at: http://www.arts.gov.au/movable/exporting_cultural_heritage_objects. 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.

¹⁵ Review of the *Protection of Movable Cultural Heritage Act 1986* and Regulations, Discussion Paper, DEWHA, 2009, p. 9.

applied science or technology, most applications relate to agricultural machinery and road or rail transport.¹⁶

(c) 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 the Police. 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 a country that 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.

To commence the forfeiture process, the Australian Government must receive a formal request for the return of the object from the relevant foreign government.¹⁷ 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.

(d) 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.

Proceedings to recover illegally exported material must be commenced either by the owner or a person entitled to possession.¹⁸ But where ownership is forfeited, title automatically vests in the government, thus giving it the necessary *locus standi* to demand return of its property.

¹⁶ Ibid.

¹⁷ Section 41.

¹⁸ See *Attorney-General of New Zealand v Ortiz* [1983] 2 WLR 809 at 817.

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.

(e) 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. Although the state governments have not contributed to the Account¹⁹, they contribute to its overall purpose: 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.²⁰

In allocating the money, priority is given to the following Australian protected objects:²¹

- 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

¹⁹ The States and Territories have the ability to contribute under s.25A of the PMCH Act, but have not done so to date.

²⁰ For use that has been made of the Account see: <http://www.arts.gov.au/movable/the_national_cultural_heritage_account/use_of_the_national_cultural_heritage_account>.

²¹ For further information see:

<http://www.arts.gov.au/movable/the_national_cultural_heritage_account>.

- Class B objects that are overseas.

The current review of the Act is considering whether or not donations to the Account should be made deductible. It is difficult to see what advantage this might bring given that a donor can already facilitate an acquisition by making a gift to the institution seeking to purchase the object and get his or her deduction through the Cultural Gifts Program or the Register of Cultural Organisations scheme²².

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. Whether it is effective in this case is part of the Review being currently undertaken. There are some obvious issues:

The enforcement mechanisms under the PMCH Act are much more limited than those in Part 17 of the *Environment Protection and Biodiversity Conservation Act 1999* (EPBC Act). The focus of the PMCH Act is on criminal offences (which must be proved beyond reasonable doubt, a high standard of proof, making the securing of convictions very difficult) and criminal enforcement mechanisms. The Review discussion paper actually compares the enforcement powers of the Act with that of the EPBC Act. For example, it points out 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;

²² Although larger collecting institutions are likely to be on the Register of Cultural Organisations this is not necessarily the case for smaller, regional organisations. The Cultural Gifts Program does not cover gifts of money.

- allows the Minister to publicise contraventions.

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

International ramifications of the legislation

The Act permitted Australia to accede to the 1970 UNESCO Convention. Only fifty-four countries have signed the Convention and most of these are countries that have suffered enormous loss of cultural material. 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 and, to a lesser extent, Canada, have large collections of culturally significant material imported from other countries. Others, such as Britain, are notably absent. This is difficult to understand, for membership of the UNESCO Convention does not affect material that was obtained prior to accession. The treaty is not retrospective. It is not an undertaking to give back all fruits of wrongdoing; it is a promise to do the right thing in the future.

The relationship between Britain and Australia remains significant to the ex-colony not only because Britain retains important collections of Australian heritage material gathered in the nineteenth and early twentieth century, but also because London remains the most important international market place for such Australian material. It may be argued that London plays this dominant market role in the cultures of all ex-British colonies, and may explain why only seven other members of the British Commonwealth have bothered to become signatories to the Convention,²³ in spite of the fact that thirty two Commonwealth countries have legislation relating to the protection of cultural heritage.

Bangladesh	<i>Antiquities Act 1968</i>
Belize	<i>Ancient Monuments and Antiquities Ordinance</i>
Botswana	<i>Monuments and Relics Act 1970</i>
Brunei	<i>Antiquities and Treasure Trove Enactment 1967</i>
Canada	<i>Cultural Property Export and Import Act 1985</i>
Cyprus	<i>Antiquities Law 1935</i>

²³ Canada, Cyprus, India, Mauritius, Nigeria, Sri Lanka and Tanzania.

Gambia	<i>Monuments and Relics Act 1974</i>
Ghana	National Museums Decree 1969
India	<i>Antiquities and Art Treasures Act 1982</i>
Kenya	<i>Antiquities and Monuments Act 1963</i>
Lesotho	<i>Historical Monuments, Relics, Fauna and Flora Act 1967</i>
Malawi	<i>Monuments Act 1965</i>
Malaysia	<i>Antiquities Act 1976</i>
Malta	<i>Antiquities (Protections) Act 1925</i>
Nauru	<i>Nauru Antiquities Ordinance 1935</i>
New Zealand	<i>Antiquities Act 1975</i>
Nigeria	<i>Antiquities Ordinance 1952</i> <i>Antiquities (Prohibited Transfers) Decree 1974</i>
Papua New Guinea	<i>National Cultural Property (Preservation) Act 1965</i>
St Vincent and the Grenadines	<i>Preservation of Historical Buildings and Antiquities Act 1976</i>
Seychelles	<i>National Monuments Act 1979</i>
Sierra Leone	<i>Monuments and Relics Ordinance 1947</i>
Solomon Islands	<i>Protection of Wrecks and War Relics Act 1980</i>
Sri Lanka	<i>Antiquities Ordinance 1940</i>
Swaziland	National Trust Commission Act
Tanzania	<i>Antiquities Act 1964</i>

Tonga	<i>Preservation of Objects of Archaeological Interest Act 1969</i>
Uganda	<i>Historical Monuments Act 19670</i>
United Kingdom	Export of Goods Control Ordinance
Vanuatu	Joint Regulation No. 11 of 1965
Western Samoa	Samoan Antiquities Ordinance 1954
Zambia	<i>National and Historical Monuments and Relics Act 1948</i>
Zimbabwe	<i>National Museums and Monuments of Rhodesia Act 1972</i>