

BORDERS OF CULTURE

REVIEW OF THE PROTECTION OF
MOVABLE CULTURAL HERITAGE ACT 1986

FINAL REPORT 2015

SHANE SIMPSON AM

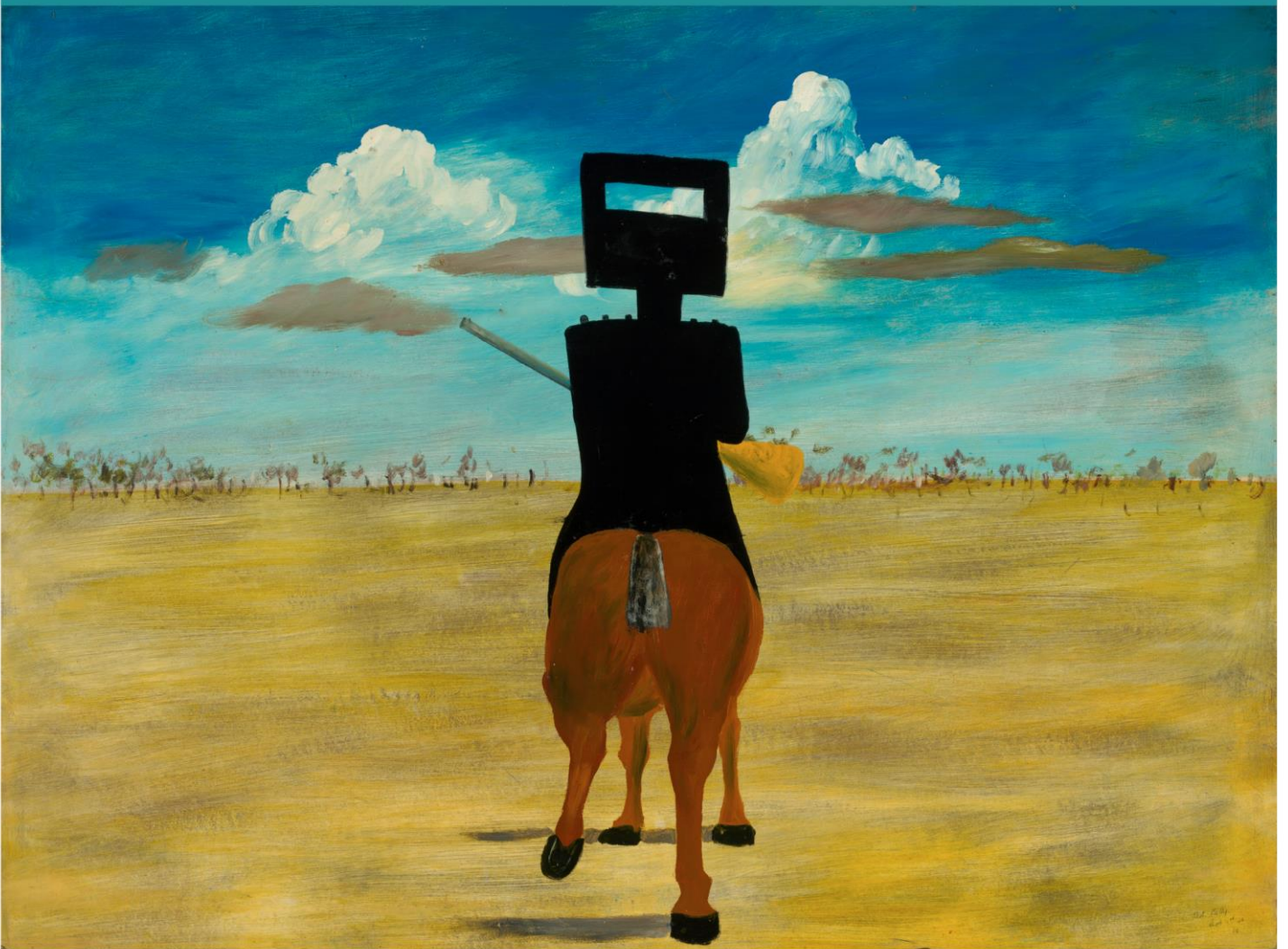


Image: Sidney Nolan, *Ned Kelly*, 1946, enamel paint on composition board, 90.8 x 121.5 cm, National Gallery of Australia, Canberra, Gift of Sunday Reed 1977.

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Borders of Culture

Review of the

Protection of Movable Cultural Heritage Act 1986

Final Report 2015

Shane Simpson AM

Letter of Transmittal

Senator the Hon Mitch Fifield
Minister for the Arts
Parliament House
CANBERRA ACT 2600

Dear Minister

Independent review of the *Protection of Movable Cultural Heritage Act 1986*

I am very pleased to present to you the Borders of Culture—Review of the Protection of *Movable Cultural Heritage Act 1986*.

The Australian Government commissioned me to undertake this review in December 2014. As outlined in the introduction, I have taken into account the findings of previous reviews and completed a comprehensive consultation process. This approach was necessary to address both the breadth of my terms of reference as well as to deal intelligently with the extraordinary range of materials regulated by the Act.

The challenge of the review was to provide a new model for a legislative framework that would be balanced and nuanced. Private owners of culturally significant material have a right to enjoy the financial value of their personal property and their agents, dealers and auction houses have a corresponding financial interest in being able to sell to the highest bidder, irrespective of borders. On the other hand, the Australian community has a public interest in maintaining items of select, important cultural material within the borders so that the Australian story can be told at home.

The gentle irony of the report's title is intended. Advances in technology, systems and markets mean that the trade in cultural property is truly global. The use of the internet to market and sell cultural property, together with modern delivery mechanisms, mean that international purchases are now made in minutes and delivery rates are measured in hours. The ability of law enforcement to truly control the borders is more limited than it has ever been.

Implementation of previous reviews has been limited or not progressed at all and now, what was appropriate a quarter of a century ago, is no longer.

I was asked at the outset whether the Act should be modified or completely rethought. I believed then and I am certain now, that only the latter approach will be effective. To this end, I have decided not to present a smorgasbord of recommendations for individual consideration and action by Government. Rather, I present a new and single model for regulating cultural material coming into and leaving Australia.

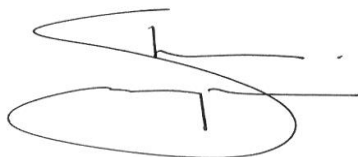
In the contemporary context, a new and streamlined approach is needed: one that provides a devolved decision-making process that will allow decisions to be made more quickly, cheaply, transparently, and certainly—while more effectively protecting Australia’s most significant material. It is not an easy balance.

In relation to the importation of foreign cultural material, the model ensures the continued ability to fulfil our obligations under the UNESCO *Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property* 1970 through a transparent and balanced process. The model also affords the opportunity to strengthen Australia’s commitment to protect foreign cultural material that has been stolen or looted.

It has been my privilege, through this review, to consult with many individuals and stakeholder groups. Their views are wide ranging and, in their divergence, reflect the complexity of the issues. I would like to express my sincerest thanks to all those who gave their time and thoughtful consideration in discussions with me. This generous engagement influenced the final form of the model and made it both more practicable and more robust.

I commend my report to you and look forward to the Government’s response.

Yours sincerely

A handwritten signature in black ink, appearing to be 'Shane Simpson', written over a faint, light-colored circular stamp or watermark.

Shane Simpson AM

30th September 2015

Acknowledgements

I would like to thank everyone who contributed to the Review.

Those who made submissions to this and the 2009 Review and those who participated in the extensive consultation process were generous in the way that they shared their knowledge, experience and passions.

I would like to acknowledge the extensive assistance given me by the staff of the Ministry of the Arts, the Attorney General's Department and several other government departments. In particular, Kim Brunoro, the Director and Erin Cassie, the Assistant Director of the Review's secretariat made an enormous contribution to the authorship of the Review. I am grateful not only for their intellectual and organisational contribution, but for the spirit in which they worked.

Terms of Reference

The *Protection of Movable Cultural Heritage Act 1986* protects Australia's movable cultural heritage and provides for the return of foreign cultural property which has been illegally exported from its country of origin and imported into Australia. It gives effect to Australia's agreement to the UNESCO *Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property* 1970. The *Protection of Movable Cultural Heritage Act 1986* has not been significantly amended since its enactment, and the scope of the proposed Review is therefore intentionally broad. It will consider the existing framework for the protection of movable cultural heritage material in Australia, as set out in the *Protection of Movable Cultural Heritage Act 1986* and the *Protection of Movable Cultural Heritage Regulations 1987*. The Review will focus on the appropriate settings for protection and regulation in this area, and explore other, similar protection schemes in Australia and other international models for the protection of cultural property.

Which objects are protected, including having regard to the following:

- What are the categories and types of Australian cultural objects which should be protected via regulation?
- What are the appropriate thresholds and definitions of significance?
- What levels of protection should be extended to foreign material?

How Australia's international obligations are fulfilled, including having regard to the following:

- How Australia implements the UNESCO *Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property* 1970;
- How this scheme interacts with obligations under the UNESCO *Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict* 1954; and
- Whether there are other international conventions or practices which provide useful benchmarks or guidance?

How this protection is administered, including having regard to the following:

- What is the most effective framework for protecting Australia's cultural heritage?
- How are decisions regarding specific objects best made?
- How the scheme is best enforced?

The Review may also examine and report on any other issues it considers relevant or incidental, and will consult with stakeholders as is thought necessary. It will report to the Australian Government Minister for the Arts by 30 September 2015.

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Part A: Introduction

1 The Review

Since 1987, the *Protection of Movable Cultural Heritage Act 1986* (the 'Act') has provided the regulatory framework for the import and export of significant cultural material. It has allowed Australia to fulfil its obligations under the *UNESCO Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property 1970* (the 'UNESCO Convention 1970') and has sought to provide protection to both Australian and foreign cultural material.

Although there have been a number of reviews over the life of the Act, the Act has not been significantly amended since its inception. Accordingly, this review has ambitious terms of reference, giving consideration to all elements of the scheme and seeking to modernise and streamline the model. The Terms of Reference raised some overarching questions:

- What are the categories and types of Australian cultural objects that should be protected by regulation?
- What are the appropriate thresholds and definitions of significance?
- What is the most effective framework for protecting Australia's cultural heritage?
- How are decisions regarding specific objects best made?
- How is the scheme best enforced?
- What levels of protection should be extended to foreign material?
- How can Australia improve its implementation of the UNESCO Convention 1970?
- How does the scheme interact with Australia's existing obligations under the UNESCO Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict 1954 (the 'Hague Convention 1954')?
- Whether ratification of the First and Second Protocols of the Hague Convention 1954 would better reflect Australia's commitment to the international community?
- How to provide the procedural machinery necessary to ensure the effective implementation of United Nations Security Council sanctions and resolutions concerning looted cultural property?

- How other international conventions might enhance the effectiveness of Australia's international obligations in respect of the protection of significant cultural heritage objects?

The legislation must balance the public interest in protecting cultural material with the public and private interests of property ownership and the maintenance of a legitimate trade in such material. In many respects, the legislation has not been able to obtain that balance.

Currently the system is expensive and time-consuming for owners and decision-makers. Its procedures are ponderous. Its provisions are opaque and, at times, internally inconsistent. It is difficult for owners and their agents to identify what is protected and what is not. It does not adequately reflect contemporary Australia's expressed commitment to the international community.

Previous reviews have come up with long lists of recommended improvements and suggestions for further consultation but what all of these, and indeed any analysis of the Act will show, is that the problems of the Act are systematic. They cannot be dealt with by tinkering amendments. I have adopted the position that any attempt to undertake piecemeal amendment would be inefficient and that what is needed is a new model by which the Australian Government can deliver effective, cost-efficient and balanced protection for significant cultural material.

Accordingly, I have chosen a different path from my predecessors—to create a model designed to replace the current scheme.

2 Methodology

The review was conducted in three broad stages.

2.1 Research and development

Extensive research was undertaken including consideration of the 118 submissions made to the 2009 review. In the research and analysis phase, numerous other models were considered including those used internationally as well as various options suggested by previous reviews. This helped to identify the key problems and limitations of the current scheme and to develop a new model that would modernise the framework for protection of cultural heritage. A Position Paper outlining the model and various issues for discussion was released on 1 July 2015.

2.2 Consultation

Throughout July and August 2015 targeted consultation was undertaken inviting input from select experts. This was followed by broader consultation, including travel to all states and territories. In addition, consultation was conducted through a national on-line survey to ensure wider input regarding a proposed model.

I would like to thank everyone who took the time to attend consultation meetings, participate in the survey or write to me. I am very grateful. Your suggestions have informed and enriched the model.

2.2.1 Consultation meetings

More than 40 meetings were held in all state and territory capital cities between 13 July and 14 August 2015. Over 500 institutions and individuals were invited to attend. These included representatives of: collecting institutions, Aboriginal and Torres Strait Islander communities, special interest groups, the commercial arts sector, non-government organisations and state, territory and Commonwealth Government bodies. I also met with key academics in the fields of natural sciences, museum studies, anthropology and international law.

2.2.2 Survey responses

The review received 120 survey responses. These survey responses, with a mix of quantitative and qualitative questions, have assisted me in identifying which proposals had wide support and which needed further refinement.

The survey findings can be found throughout this report, highlighted in the corresponding section.

2.2.3 Other correspondence

I also received more than 40 emails and letters from various individuals and organisations offering their thoughts as to how the export and import of cultural material should be regulated and providing further detail on discussions in the consultation meetings.

2.3 Refinement of model and report

Throughout the consultation period the feedback I received from stakeholders was very valuable. It confirmed the need for change, affirmed the proposed new basic model and provided a rich and generous commentary. This was analysed and used to refine the proposed model and inform this report to Government.

The report is divided into the following components:

- Part A: Introduction;
- Part B: Protection of Australian cultural material;
- Part C: Protection of foreign cultural material;
- Part D: Offence provisions; and
- Part E: Recommendation—New Model.

The model presented in this document sets out what I consider to be the most appropriate regulatory framework for both current and future Australian conditions. Nationally, it represents what I believe to be an equitable balance of the many competing interests—acknowledging that any model that seeks to protect the cultural heritage of a nation for future generations will be, to some extent, an interference with the property rights of its citizens. Internationally, it confirms Australia’s expressed commitment to the protection of international cultural heritage.

3 Purpose of the regulation of cultural material

The cultural material of a nation is a fundamental expression of the identity, history and values of its citizens. It is important to individuals, communities, regions, states and the nation. Internationally, our cultural material plays a significant role in promoting understanding of Australians and interpreting Australia’s place in the world.

The right to enjoy and benefit from culture is part of the *International Covenant on Civil and Political Rights*,¹ the *International Covenant on Economic, Social and Cultural Rights*² and several other international conventions and declarations. To get full benefit from cultural property, the public must have access to it—together with information regarding origin, history and context. Access to cultural property, rich information about that property, and the protection of a diverse range of cultural practices and traditions, is central to the right to benefit from culture.

A people's connection with its heritage is inextricably linked to its ability to participate in decisions regarding its own cultural material.³ This is particularly relevant for Aboriginal and Torres Strait Islander peoples for whom cultural material often has strong spiritual as well as cultural significance. The model presented in this report seeks to protect that connection, not just by regulating the trade in such material but also by placing Traditional Owners at the heart of decision-making.

For all these reasons to retain cultural material there are also good reasons to allow the export of Australian cultural material. These reasons are economic, cultural and diplomatic. They are both public and private.

Certainly the export of cultural material can foster a greater awareness and understanding of Australian culture through the legitimate trade in cultural material. It is an important form of cultural diplomacy that fosters better understanding of cultures and thus more harmonious relations. Further, in the area of art, craft and design, the development of overseas markets promotes the health of the commercial sector within Australia and this in turn helps to foster and support a diverse creative community.

All of these ends require that significant—not just minor—examples of Australian cultural material be available to an international audience. To ensure that this public interest is balanced with the public interest in maintaining a rich domestic cultural environment, the 'representation' test is of central importance.

Also, any regulation of the sector must recognise that Australian owners have a right to enjoy the financial value of their personal property. Any model must seek to balance

¹ Article 27

² Article 15

³ This is recognised in a variety of Australian legislative schemes and programs, such as the *Aboriginal Heritage Act 2006* (Vic).

the private interests of the owners and the commercial sector with the public interests of maintaining a rich domestic cultural heritage.

Similarly in the natural sciences, the balances are important. While some material is so significant that it must be held within Australia, with other, export may allow the expertise and technologies of other nations to be harnessed and so lead to a greater understanding of that material, its global context and its local significance.

The Act also controls the import of foreign cultural material. Australia already has international obligations to regulate the import of cultural material pursuant to the Hague Convention 1954, UNESCO Convention 1970 and UN Security Council Resolution 2199.⁴ Two questions have informed the framing of the import sections of this report: What is legally and ethically appropriate to import? How can the legislative framework best implement our current obligations and those that we should embrace?

To date the Act has taken a limited answer to those questions and been restricted to the regulation of material illegally exported from its country of origin. An expanded approach is central to the new model. With its adoption, Australia would ban the import of cultural material that has been stolen or been looted in time of armed conflict. This extension is not just a matter of ethics and conscience—although it is that. The destruction and illicit trade of cultural material has long served as a weapon of war and to subjugate other cultures but, more recently, it appears that the illicit trade in cultural material has become a significant source of income for terrorist groups including ISIS and many criminal organisations.⁵

It is essential that the private interest in trading cultural material and the public interest of the promotion of peace and harmonious international diplomatic relations is balanced with the need to protect cultural material and the need to restrict the illicit trade in cultural material.

⁴ UN Security Council Resolution 2199 (2015), S/RES/2199 (12 February 2015). The resolution prohibits the import of cultural material from Iraq and Syria illegally removed from Iraq since 6 August 1990 and from Syria since 15 March 2011.

⁵ Neil Brodie, Jenny Toole and Peter Watson, *Stealing History—the Illicit Trade in Cultural Material* (The McDonald Institute for Archaeological Research, 2000). Andrea Watson, *Islamic State and the 'blood antique' trade* BBC, 2 April 2015 at <http://www.bbc.com/culture/story/20150402-is-and-the-blood-antique-trade> (accessed 26 August 2015).

This Review hopes to continue and enhance Australia's commitment to the protection of cultural material by recommending legislative changes that reflect the importance of the protection of cultural material while fostering the legitimate trade and exchange of such material.

4 Limitations of the current model

The key limitations identified during analysis of the current scheme and the information provided through previous reviews, include:

- opaque language and structure of legislation;
- lack of clarity as to the objects regulated;
- inefficient and time-consuming process for the assessment of objects;
- duplication of processes, burdensome and lengthy administrative procedures;
- unnecessary delays in decision-making caused by the inflexible (but compulsory) decision process;
- confusion as to the statutory obligations on stakeholders;
- lack of transparency in decision-making processes and decisions;
- inconsistent and obscure methodologies and criteria for evaluating significance;
- inconsistency or failure to protect objects of significance through sporadic or incoherent enforcement;
- weaknesses in the procedures for the protection of foreign cultural property entering Australia;
- lack of coordination across all of the Government's international obligations in relation to cultural material;
- inadequate protection of foreign looted or stolen cultural objects;
- lack of clarity as to the responsibilities of Australian purchasers of foreign objects; and
- problems of proof in cultural property cases.

5 Principles for the proposed model

To address the above concerns the proposed model seeks to provide:

- a simpler legislative framework for the regulation of export and import of cultural material;

- objective standards to define the material being regulated;
- clear, practicable criteria for determining the significance of the material;
- a more efficient assessment process by requiring a greater degree of title, provenance and asset description information from applicants applying for permits;
- adherence to principles of Aboriginal and Torres Strait Islander decision-making;
- a distinction between Ancestral remains and objects;
- interaction with other Commonwealth, state and territory legislation and regulatory schemes;
- a flexible and risk-based approach to assessment processes;
- clearer guidance to decision-makers throughout the process;
- a shortening of the decision-making process so that the processing of applications is faster and more cost-effective than the current system;
- transparency at all stages including application, process and decision;
- a new classification system for protecting the nation's most important cultural material that:
 - better reflects the true richness of the cultural heritage of Australia and the diverse regions and places that constitute the nation;
 - protects material already found to be significant by Commonwealth, state and territory governments; and
 - provides a flexible and living category of material which attracts high-level protection (currently only available to the static melange that is Class A);
- more effective prosecution procedures (such as varying the burden of proof in certain circumstances where the relevant evidence is reasonably expected to be in the control of the applicant rather than the Government);
- an extension of the current General Permit system to a wider group of approved organisations;
- a transparent process for the testing of foreign claims for the return of illegally exported material that is consistent with international models and compliant with relevant treaties;
- incorporation of mechanisms that are informed by other international conventions relating to cultural property (including a cohesive and consolidated process for the return of looted and stolen cultural material); and

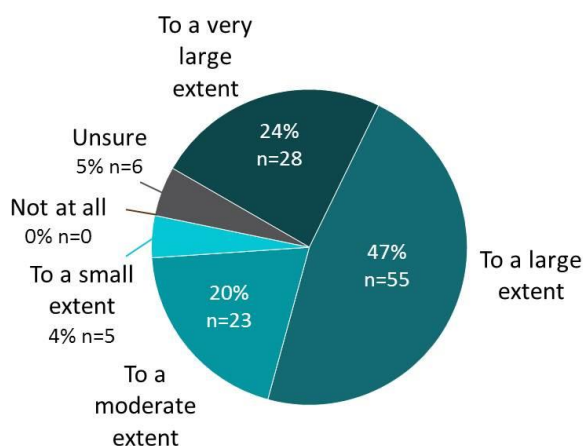
- modernisation of enforcement provisions to ensure they are in line with current best practice.

Survey response

The survey asked participants to consider the proposed changes to the Act overall. These questions included:

- Whether the model achieves the draft principles to make the implementation of the legislative framework simpler and more efficient and provide clearer guidance to those using the legislative framework.
- Whether the proposed changes to the Act will ensure a better balance between public interest in protecting cultural material and the public and private interests of property ownership and maintenance.
- The extent to which the proposed model will create a more efficient and effective approach.

Overwhelmingly, survey respondents agreed to a large or very large extent with the intent of the overall changes across these three questions. Over 70% of survey respondents agreed that the proposed model will achieve the draft principles. Furthermore no survey respondents selected 'not at all' for this question.



6 Ethical considerations

6.1 Provenance

It has become very clear from recent repatriations and the publication of the new edition of the Australian Government's *Australian Best Practice Guide to Collecting Cultural Material*, that the Australian collecting community is already expected to maintain extremely high standards of provenance research before acquiring foreign cultural property. The ethical principles underlying this obligation are irrefutable but the question remains how those principles are to be best translated into legal obligations.

It is arguable that implementation of these high standards is a matter of thorough provenance checking—and it is. But it is also more than that. The provenance of non-contemporary material is often incomplete, notwithstanding that the various dealings that make up its provenance have been perfectly legal and ethical.

Most acquisitions of non-contemporary material are dependent on a balancing of risks—a balancing that has to take into account many factors, not the least of which is the ethical propriety of the circumstances surrounding the acquisition. It is no longer appropriate to take a purely legalistic or aesthetic view of acquisition: the ethics of the acquisition are now as important as any other factor in the decision.

It is undoubted that Australia should be committed to the fight against the illicit trade in antiquities. However, it is clear from discussions with the directors of a number of Commonwealth and state collecting institutions that the burden imposed by the current legislation, while decent in intention, has had the unintended effect of placing an almost impossible burden on those wishing legally to acquire foreign antiquities. Under the current legislation, even where the provenance of an object is relatively clear, the prospective buyer is required to familiarise themselves with cultural property legislation in foreign jurisdictions stretching back, in some cases, more than a century. This legislation (or the fact of its existence) may or may not be publically available and is often not in an official translation. Overlaid with the shifting of borders throughout the twentieth century, it can be near impossible to determine in which legal jurisdiction the

⁶ Data from responses to question 6 of the survey. Total responses n=117.

object originated, which laws applied, whether and how an object was protected and how that law was actually applied.

One might respond to that by saying that Australian collecting institutions should simply no longer collect such material—but that is a very blunt knife. Australian institutions may need to take a more proactive approach to collaboration with foreign governments to ensure representation of diverse cultures in Australia. This is a step beyond merely seeking to confirm the legitimacy of provenance and export documentation with authorities in the source country.

For example, where well-provenanced material is not available for acquisition, collecting institutions could seek to augment their exhibitions with long-term loans from foreign governments. These approaches would allow Australian audiences to access significant foreign cultural material, while respecting the sovereign rights of foreign states to regulate and protect their cultural property. The diplomatic advantages of such a course are obvious.

6.2 Transparency

While the new model sees a time limitation placed on claims, it is important to acknowledge that all cultural material acquired since Australia's ratification of the UNESCO Convention 1970 requires, and would continue to require, a thorough provenance.

Public acceptance and understanding of the ethical position of Australian collecting institutions would be enhanced if institutions provided a reasonable level of information on the provenance of material acquired after 1987. Some may choose to adopt 1970 or 1972 as the relevant date, but given the size of the task, adopting the 1987 date (when the current Act commenced) would be a very good place to start—and when they have done [2015–1987], then they can tackle [1986–1970] and so on. In this way, the problem is undertaken in bite-sized tranches of work: one starts with what one **must** do and when that is done, move on to what one **should** do.

Transparency as to provenance does not require that confidential information be disclosed—however the tag 'commercial in confidence' must not be used as a shield for conduct that is criminal or unethical. The experience of collecting institutions which have adopted a transparent acquisition model indicates that there will be no floodgate

of claims. The result can be quite different—material can come to light that actually strengthens the provenance of the object. Occasionally, an adverse claim might arise and if it does, that is as it should be: it can be tested and dealt with—and the suggested procedures would provide an appropriate methodology and forum for that.

6.3 Leadership

The International Council of Museums (ICOM) *Code of Ethics for Museums*, the *Australian Best Practice Guide to Collecting Cultural Material* and several other specific sector codes of practice,⁷ make it clear that collecting institutions have an ethical responsibility to conduct diligent provenance research. It is not merely a ‘box-ticking’ procedure.

In some areas, our premier institutions have already shown ethical leadership. For example where material is suspected of being Nazi spoliated (thus outside of the ambit of the current Act), Australian institutions abide by the Washington Principles, an internationally agreed (but not legal) framework for the settlement of such claims. Institutions are transparent as to the provenance of work in their collections suspected of being in Europe during the 1930s and 1940s. Indeed the National Gallery of Victoria negotiated the voluntary return of such a work acting with goodwill and transparency, without the need for intervention by governments or legislation.

That said, it is important that Australian public institutions take a leadership role regarding some of the broader ethical concerns relating to the collection of cultural material—in particular material from Asia and the Pacific.⁸ Since the untimely demise of the Collections Council of Australia, the collections sector has lacked a resourced and over-arching body to support sector-wide initiatives of this kind.

A legal framework can be designed in any number of ways but it is only a tool: ethical leadership is essential.

⁷ Such as the Washington Principles and see too ICOMOS ethical guidelines.

⁸ For example, the American Association of Art Museum Directors’ taskforce on archaeological materials and ancient art.

Part B: Protection of Australian cultural material

7 Title of the Act

7.1 Protection

During consultation several people expressed a frustration that, despite its name, the Act did not really protect cultural material—it doesn't stop people neglecting or destroying it; it doesn't assist owners to care for it; it doesn't compensate those who are not allowed to export it for sale. Some submissions suggested that the name of the Act should be the *Export and Import of Cultural Material Act* and that this would clarify people's expectations. Indeed, largely, it is true that the Act is principally about import and export. For the most part, the protection of cultural material within Australia is a matter for the states and territories. For the Commonwealth, the limitation of constitutional powers requires focus on the borders, the implementation of international treaty obligations and trade and commerce.

Accordingly, the Act seeks to protect Australian cultural material in a very specific sense—the protection of the object from unregulated export, thereby preserving it for future generations of Australians. In the Second Reading Speech to the current Act, the then Minister noted that, in framing the legislation, the Commonwealth's intention was not to replace or subsume arrangements already made by other levels of government. It is appropriate for the Commonwealth to regulate the export and import of important cultural material and for each state and territory to retain responsibility for other types of protection for significant material within its own jurisdiction. It is the intention of this Review to propose the continuation of this approach—but with better integration with state-based protection regimes.

7.2 Cultural–natural material

Given that 'cultural' objects might well be considered to refer to the products of human endeavour it is noteworthy that the Act also covers fossils, meteorites, gems, rocks, minerals and a range of other natural materials that may not immediately be apparent as 'cultural' material. During consultation, consideration was given to whether the title of the Act should be amended to 'natural and cultural' movable heritage. A very persuasive argument was made that natural objects **do** form a core part of our social

and cultural inheritance and thus no change was needed in relation to the title. In brief, any dichotomy between natural science material and cultural material is false. Natural science material without its relationship with humans is as meaningful as one hand clapping. The study of natural science material is fundamental to our understanding of who we are and where we live. It explores, describes and explains. That is why it is important that we regulate the trade in natural science material—we need to be able to continue these endeavours towards a greater understanding of our surroundings and indeed, ourselves. It is in this context that the Act refers to natural science objects and cultural material and this is why its export must be regulated.

Accordingly, no change in the name of the Act is proposed, however 'natural' has been explicitly included in the definition of 'movable cultural heritage' to address any confusion.

8 Definition of cultural material

The legislative definitions and public interpretation of 'cultural material' and 'Australia-related' have proved very troublesome. As these definitions delineate the material that is regulated, they go to the very core of the legislation. Accordingly, if the terms 'cultural material' and 'Australia-related' are not clear and easily understood, even the most streamlined decision-making processes will be compromised.

It is clear from the inclusive language and exhaustive descriptions of both natural and man-made material in the National Cultural Heritage Control List (the 'Control List'), that the legislation is intended to cover **all** types of movable heritage objects—whether the product of human activity or nature. Natural objects are not, inherently significant. They are significant because of their relationship with mankind. It is in this sense that they are included as 'cultural heritage'.

Perhaps more importantly, unhelpfully, the current legislation provides definitions for 'movable cultural material' and 'Australian Protected Objects' that may be different for different types of objects. This inconsistency is confusing. Further, for some classes of objects, the criteria by which protection is accorded is dependent on specialist knowledge.

All of this makes it difficult for even well-intentioned owners to know whether and how the legislation applies to their material. It also has the incongruous effect of increasing

the regulatory burden on both owners and Government, while decreasing the effectiveness of the protection offered to significant material.

Subsection 7(1) of the Act sets out a definition of the movable cultural heritage of Australia. It is unwieldy and unnecessarily verbose. In addition, while it looks at first glance as if the list is intended to be exhaustive, it is evident that it is not.

This provision is extended by section 3 of the *Protection of Movable Cultural Heritage Regulations 1987* (the ‘Regulations’), which lists five prescribed categories of objects. A general reader of the legislation may be led to hope that this extended definition would provide clarity.

Unfortunately, the initial confusion is exacerbated when the extended definition is compared against the nine-part Control List in the Regulations—an extraordinarily detailed (but incomplete) list that does not manage to correlate with the said, extended definition.

Some may argue that this approach is consistent with the UNESCO Convention 1970 and gives an appropriate statutory basis for the Control List. However, so long as the reformulation continues to fulfil both of those requirements, there is no reason why Australia should not seek to implement its obligations through a coherent structure that is given clear, concise and modern expression.

Accordingly, to provide the basis for international convention compliance, the new model includes a broad and encompassing provision to describe the diverse range of material protected by the legislation. Then, in the Regulations, it sets out the classes of protected material in thematically organised headings in one place—the Control List.⁹

⁹ The proposed Control List is set out in Part E.

The following, simpler definition of ‘movable cultural heritage’ forms part of the new model:

A reference to movable cultural heritage is a reference to material that is of importance for ethnological, archaeological, historical, literary, artistic, scientific, spiritual, natural or technological reasons.

- *In relation to Australia-related material, this is material falling within one or more of the National Cultural Heritage Control List categories.*
- *In relation to foreign material, this is material forming part of the cultural heritage of a foreign country according to the laws of that country.*

While anchoring the definition with the words of the UNESCO Convention 1970, and indicating further elaboration (either in the Control List or under foreign law), the definition has the significant new inclusions of the terms ‘spiritual’ and ‘natural’. This explicit recognition is particularly important in the Australian context. For example, it allows the recognition of Aboriginal and Torres Strait Islander material as material important to their spiritual traditions, rather than just for ethnological or historical reasons.

Survey Response

Over 75% of survey respondents agreed to a very large extent or to a large extent with the suggested definition for movable cultural heritage and only 2% of survey respondents did not agree with the proposed definition.

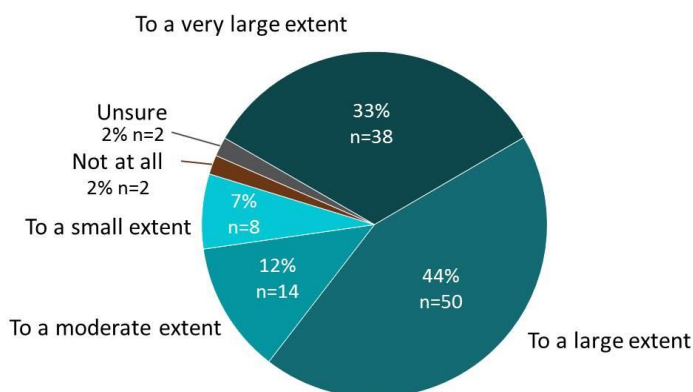


Figure 2—Extent to which respondents agree with the suggested definition of movable cultural heritage¹⁰

¹⁰ Data from responses to question 8 of the survey. Total responses n=114.

8.1 Australia-related

Across the entire Control List, which has the purpose of describing the movable cultural heritage of Australia, the terms ‘Australian’ and ‘Australia-related’ are inconsistently used. In particular, although section 7 of the Act provides a definition of what should be considered as Australia-related, some Parts of the Control List re-define what may be meant by these terms in regard to particular types of material.

This confusion has also fed the misapprehension that the Control List is a list of ‘national treasures’. The Act does not (and was never intended to) only protect material that could be described as national treasures.

Material may be of outstanding significance and worthy of protection, notwithstanding that it relates only to a ‘part’ of Australia. Material that has state and regional significance can still play an important part in telling the stories of Australia. The proposed model incorporates a single definition of ‘Australia-related’ which can be applied across the entire range of regulated material.

The following provision forms part of the new model:

Australia-related material means any one of the following:

- *natural material or Ancestral remains recovered from above, on or below:*
 - *the land, soil or inland waters of Australia;*
 - *the waters, seabed or subsoil of the territorial sea or Exclusive Economic Zone of Australia; or*
- *relics recovered from a historic shipwreck (as defined under the Historic Shipwrecks Act 1976); or*
- *material made in Australia, or with substantial Australian content, or that has been used extensively or assembled in Australia, being one or more of the following:*
 - *material designed or made by an Australian citizen or resident, inside or outside of Australia;*
 - *material designed or made in Australia, or which has substantial content made in Australia (including those designed or made by a non-Australian citizen);*
 - *material not made in Australia but altered, assembled or modified in Australia for the Australian market or conditions, or extensively used in Australia;*
 - *material with subject-matter or motifs related to Australia;*
 - *material strongly associated with an Australian person (or group of people), activity, event, place or period in science, technology, arts or history.*

This definition allows for all types of material to be considered against a single definition. It incorporates consideration of the intangible aspects of material including its association to an Australian story. For example the wealth of information that is provided in documentary archives may be described as strongly associated with an Australian person, activity, event, place or period and therefore an integral part of understanding and interpreting that story.¹¹

Note that in the final dot point of the suggested clause, I have used the phrase ‘strongly associated with’. The choice of words will be a matter for drafting but the essential point is that its association must be direct and substantial. In consultation, an excellent example was provided: Jack Brabham, an Australian racing driver who was Formula One champion in 1959, 1960, and 1966, owned very many cars in his lifetime. The Act is not designed to protect the cars he used to go to the local shops just because he owned them—but it would protect the race cars with which he won his World Championships—his Cooper Climax and the Brabham BT-19.

Survey Response

Over 70% of survey respondents agreed to a very large extent or to a large extent with the suggested definition for Australia related. Only a very small number of participants did not agree at all or were unsure about the definition for Australia-related.

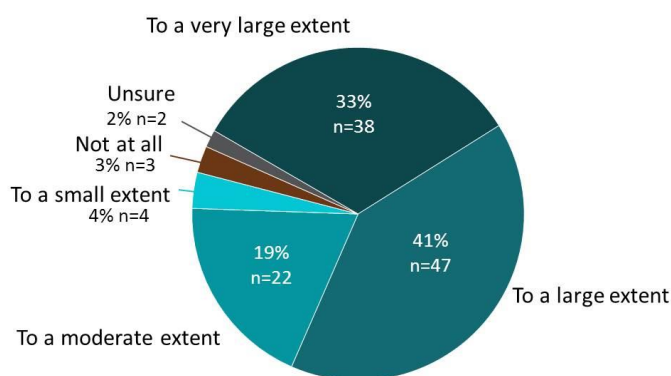


Figure 3—The extent to which respondents agree with the definition for Australia-related¹²

¹¹ Note that there is no requirement that the association be with a notable person or event – it may be an ‘ordinary’ life. It is just as important that we have an understanding of what ordinary life was like in earlier times and not just the glory bits.

¹² Data from responses to question 9 of the survey. Total responses n=116.

9 A new classification structure

Currently, there is a single term for the material regulated by the Act—Australian Protected Object. Within this term, objects may be further defined as Class A or Class B. Class A objects are not able to be exported but Class B objects may be granted or denied an export permit, whether for permanent or temporary export.

The distinction between Class A objects and Class B objects has been subject to criticism for many years. The material categorised as Class A (and thus attracting the highest degree of protection) constitutes only a small part of the most important Australian heritage material. The proposed scheme abolishes the designation of material as Class A or Class B—however it ensures that objects currently within Class A continue to receive the maximum protection afforded.

The new model adopts a new three-tier classification structure for Australia-related cultural material. It provides greater clarity and specificity about the objects regulated by the Act and the conditions placed on exporting them. The three classifications are:

- Australian Heritage Material;
- Australian Protected Material; and
- Declared Australian Protected Material.

The intention of this new classification system is to make the scheme simpler to understand and to reduce the regulatory burden for both applicants and Government. All material within these classifications would require application for an export permit—irrespective of whether the export is on a permanent or temporary basis. Any attempt to export other than in compliance with a permit would be an offence and various sanctions and forfeiture provisions would apply.¹³ The following sections describe the proposed classification system in more detail.

¹³ Offence provisions are further discussed in Part D.

9.1 Australian Heritage Material

The first classification is that of Australian Heritage Material. This is material which either:

- exceeds the relevant age and value thresholds as set out in the Regulations; or
- is listed in the Regulations as Australian Heritage Material;¹⁴ or
- irrespective of the age and value criterion, is declared by the Minister to be Australian Heritage Material.

An owner who is considering the export of cultural material must apply the relevant age and value thresholds.

Where market value is one of the objective tests to determine whether an item is Australian Heritage Material, the new model requires that the threshold value accorded to an object be the higher of either the Australian or international value. Also, it must include buyer's premiums, commissions and other charges on top of the hammer price of the material. In other words, it is the total price a buyer is willing to pay, not just the hammer price.

If the material does not exceed both the age and relevant value thresholds (and is not prescribed on the Declared Australian Protected Material list), no export permit is required. The application of the thresholds is a matter of self-assessment.¹⁵

If it exceeds both thresholds, it is Australian Heritage Material and an owner (or agent) who wishes to export it, either temporarily or permanently, must apply for an export permit.¹⁶

Not all significant cultural material should be prevented from permanent export. There are situations in which the benefits of the export can outweigh the benefits of prohibition of export—notwithstanding that the object is culturally significant. For example, export can mean that important collectors and institutions overseas also have access to quality Australian material. Such purchases can have very positive

¹⁴ For example meteorites or fossils. Material which has been declared to be Australian Heritage Material would be listed in the Regulations (and on the Department's website).

¹⁵ Self-assessment does not mean lax or self-serving assessment. Sanctions are applicable (see Part D).

¹⁶ Note that it does **not** mean that it must be assessed for significance or representation – only that an application must be made.

benefits in promoting business opportunities, professional reputations and the exposure of Australian culture overseas. Accordingly, the new model provides that the permanent export of Australian Heritage Material may be granted even though the material has been found to be significant—provided that it satisfies the representation test.

Case Study: Nolan's Ned Kelly

An applicant wishes to permanently export Sidney Nolan's *Ned Kelly* (1946), an ink and wash on paper work which is not on the Declared Australian Protected Material list. The applicant initially must determine whether the work meets the thresholds for being Australian Heritage Material.

Under the new model, this work would be assessed under Part 3: Visual Arts, Craft and Design Material:

- (1) Visual Arts, Craft and Design Material is Australian Heritage Material if it:
 - (a) is Australia-related; and
 - (b) is more than 30 years old; and
 - (c) has a current market value set out below:
 - watercolours, pastels, drawings, sketches and other similar works having a current market value of at least \$40,000.

The work was made by an Australian artist who is no longer alive; it is more than 30 years old; it is an ink and wash on paper and valued over the \$40,000 threshold. Based on this assessment the artwork does meet the objective thresholds and is therefore classed as Australian Heritage Material. It would require an application for a temporary or permanent export permit.

The Department would undertake an initial assessment and determine whether a full significance assessment was required. If so, an Assessor would determine the work's level of significance and representation in public collections. Even if the work is found to be of outstanding significance, it may still be granted a permanent export permit if it is found to be adequately represented.

9.2 Australian Protected Material

Australian Protected Material is Australian Heritage Material that has been:

- permitted to leave the country on the basis of a temporary export permit (for the period it is outside of Australia); or
- determined to be significant to Australia, or a part of Australia, according to the significance criteria and not adequately represented in Australian public collections, as defined in the Regulations; or
- listed in the Regulations as Australian Protected Material;¹⁷ or
- irrespective of the criterion, is declared by the Minister to be Australian Protected Material (making it Declared Australian Protected Material).¹⁸

Australian Protected Material is protected. It can only be exported temporarily with a permit.¹⁹ The granting of a temporary export permit may be based on an assessment of the risk by the Department regarding potential non-return to Australia or may be subject to a full significance assessment.²⁰

9.3 Declared Australian Protected Material

Declared Australian Protected Material is the proposed classification for material of outstanding significance, requiring the highest level of protection. The permanent export of Declared Australian Protected Material would be prohibited.²¹

Such material would be listed in the Regulations (and on the Department's website). The starting point for the list would be an expanded version of the current Class A objects and the material which has already been refused export under the current Act. Everything currently protected under Class A would be included in the list of Declared Australian Protected Material.

¹⁷ Whether or not the material complies with age or value thresholds.

¹⁸ Ibid.

¹⁹ Permanent export may be granted under exceptional circumstances see Part 9.3.2.

²⁰ Temporary export permits are further discussed at Part 18.2.

²¹ Permanent export may be granted under exceptional circumstances see Part 9.3.2.

There would be three ways that additions could be made to the list of Declared Australian Protected Material:

- if the Minister declares it to be Australian Protected Material;²² or
- if Australian Heritage Material is denied a permanent export permit; or
- if an owner applies for declared status.²³ In this case, an application would be assessed for significance and representation.

The ability of the Minister to place an object on the list, without reference to the thresholds in the Control List, represents an important safety net. While necessary as a filter, objective criteria such as age and value cannot ever hope to capture adequately all significant Australian heritage material. This provision will provide a mechanism for the Minister to intervene and protect material outside of those blunt instruments.

9.3.1 Temporary permits for Declared Australian Protected Material

While Declared Australian Protected Material cannot be exported permanently under the proposed model, a permit for temporary export may be granted under strict conditions. It is important that Australia's finest cultural material be available for international display to the international community—provided that it is done with appropriate safeguards.

Temporary export would only be permitted in restricted circumstances:

- where the export is for public exhibition, scientific examination and research, conservation or ceremonial purposes; and
- where the decision is made in consultation with experts; and
- when the material is Aboriginal or Torres Strait Islander cultural material, with the consent of relevant owners and community; and
- where the permit issued is subject to a range of strict conditions.

The temporary export permits would be granted for the period required for the approved purpose and generally for no longer than one year. Other conditions placed

²² Whether or not the material complies with age or value thresholds.

²³ Ibid.

on the permit may include the requirement of appropriate security, insurance and environmental conditions.

For example, assume that a temporary export was sought by a private owner in respect of a painting that is on the list by virtue of having had permanent export refused. The circumstances considered by the decision-maker in this case may include:

- the reasons for export (e.g. exhibition, conservation treatment, research); and
- the destination country (e.g. are they a signatory to the UNESCO Convention 1970? Do they have immunity from seizure laws?).

9.3.2 Permits for permanent export in exceptional circumstances

The one exception to the prohibition of permanent export for Australian Protected Material and Declared Australian Protected Material is for appropriate destructive scientific testing of samples overseas. Approval will be required and applications will be considered on a case by case basis. Where relevant the decision will be made:

- on the basis of demonstrated need;
- in consultation with experts; and
- when the material is Aboriginal or Torres Strait Islander cultural material or Ancestral remains, with the consent of relevant descendants, owners and community.

9.3.3 Removal from the list

Just as material may go onto the list, it may be removed from the list. Acknowledging that significance and representation can change over time, the model includes a mechanism to ensure that objects and categories on the list are still appropriate for the highest level of protection and whether, therefore, they should be retained on the list. Owners who have been refused permanent export permission may reapply for reassessment after a period of five years.

Survey Response

78% of respondents agreed to a very large extent or to a large extent that the classification approach accurately reflects the types of Australian cultural objects which should receive protection

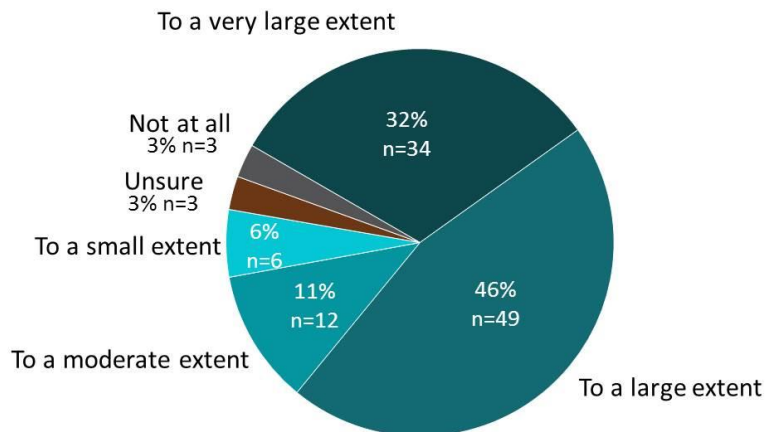


Figure 4—The extent to which respondents believe the classification approach accurately reflects the types of Australian cultural objects which should receive protection.²⁴

9.4 National register of significant objects

Previous reviews have canvassed the possibility of creating a National Register of Significant Objects. While the submissions made for and against such a mechanism have been considered, the proposed model does not include a National Register. The task of compiling the list across national, state, territory and local governments, heritage organisations and private collections would take significant resourcing and time. It would also require a high level of ongoing administration to remain effective.

Many advantages of a National Register can be achieved by the Declared Australian Protected Material system. Through it, a version (if not an equivalent) of a National Register will organically emerge.²⁵

It is not the purpose of this Act, nor should it be, to list material that is in no danger of being lost for future generations. Material already preserved by our public institutions is already protected. What would be much more valuable is to provide a system by

²⁴ Data from responses to question 11 of the survey. Total responses n=107.

²⁵ Note that the list would not include the inventories of national, state or territory collecting institutions as these objects are not at risk of permanent export.

which both the public and the collection community could better determine what material was already held in the disparate public collections throughout Australia. The undoubted public interest in such an initiative is for others to articulate and argue.

10 National Cultural Heritage Control List

It is essential to question whether the current Control List is the most appropriate formulation with which to capture the diverse range of cultural heritage material. It is an odd assortment that requires recasting and simplification to give it greater coherence.

Presently the assessment of whether a particular item falls within the definitions of the Control List may require an owner to consider multiple parts of the list, consider the significance of the material, research the contents of public collecting institutions²⁶ and apply the subtly different definitions within the Act. Given these complexities, the present model makes it unreasonably difficult for an owner (or other decision-maker) to navigate the Control List and to arrive at a correct assessment.

The new model seeks to provide a greater degree of clarity and simplicity so that it is easier to arrive at the correct decision as to (a) whether material meets the threshold criteria, and if so, by subsequent assessment, (b) the material's significance.

10.1 The current Control List

The current Control List (set out in the Regulations) divides heritage material into nine categories:

- Part 1: Objects of Australian Aboriginal and Torres Strait Islander Heritage
- Part 2: Archaeological Objects
- Part 3: Natural Science Objects
- Part 4: Objects of Applied Science or Technology
- Part 5: Objects of Fine or Decorative Art
- Part 6: Objects of Documentary Heritage
- Part 7: Numismatic Objects
- Part 8: Philatelic Objects

²⁶ To properly determine 'adequate representation' see Part 16.8.

- Part 9: Objects of Historical Significance.

Within each Part of the current Control List, significance and some formulation of 'representation in public collections' form part of the definition of whether an object is subject to export control. The unintended consequence of this is that applicants are required to have the skills to undertake a significance assessment and have a broad knowledge of the holdings of public collecting institutions, in order to determine whether their object requires a permit application. It does not make it easy for owners to be law-abiding and it makes it very difficult for the officials and courts responsible for enforcing the legislation.

Determinations as to significance and representation should be made later in the decision tree, by appropriately qualified experts. This would alleviate the burden on applicants and ensure that the more objective questions are asked of the applicant, and the more subjective questions as to significance and adequate representation are asked of experts in a position to provide the necessary independent analysis.

10.2 Proposed new Control List

To provide a simpler, less opaque paradigm by which export control is determined the Control List should be recast so that:

- it has greater coherence;
- it allows the objective criteria of age and value thresholds to be the initial thresholds to determine whether or not material is subject to export control; and
- it reformulates the definitions and the methodology by which 'significance' and 'adequate representation' are determined.

It is proposed that the Control List be reduced to just four principal headings:

- Part 1: Aboriginal or Torres Strait Islander Material and Ancestral Remains
- Part 2: Natural Science Material
- Part 3: Visual Arts, Craft and Design Material
- Part 4: Historically Significant Material.

This revised Control List divides the Parts into coherent and over-arching themes. At once, it is easy to see where one should look to find the controls relating to a particular

type of subject matter. Some of the thematic headings are then broken down into more detailed subject descriptions and sub-categories.

For example, 'Part 4: Historically Significant Material' would be broken down into sub-categories:

- Part 4.1: Archaeological Material
- Part 4.2: Documentary Heritage Material
- Part 4.3: Applied Science and Technology Material
- Part 4.4: Numismatic Material
- Part 4.5: Philatelic Material
- Part 4.6: Social, Cultural, Spiritual, Sporting, Political and Military History and Other Material These sub-categories each have their own 'Part' in the current Control List but this is to belie the feature that links them all: they are not necessarily important for their own characteristics: they tend to be important because of their association with a person, community, movement, event, period or story. Perhaps this can be said of all cultural property but it is very evident in these categories.

Under each of these categories it is proposed that there be a description of what material is included in that subpart; concise thresholds as to the material concerned; and the factors that need to be considered once an application for export is received. The proposed Control List can be found in the model at Part E.

Survey Response

75% of respondents suggested that the reconfiguration of the Control List makes it easier to decide whether an object requires an export permit application.

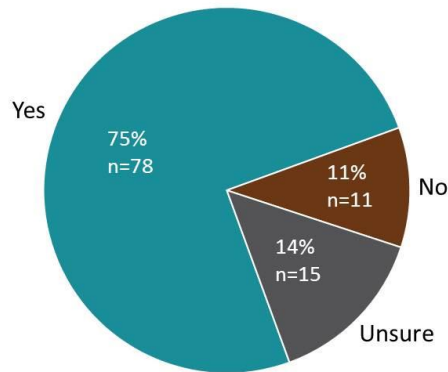


Figure 5—Proportion of respondents who found that the reconfiguration of the Control List makes it easier to decide whether an object requires an export permit application²⁷

11 New Part 1: Aboriginal or Torres Strait Islander Material and Ancestral Remains

11.1 Ancestral remains

The new model continues to give the highest level of protection to Aboriginal or Torres Strait Islander Ancestral remains. Ancestral remains are recognised as a separate category under the new model, ensuring they are afforded appropriate recognition and dignity, and not referred to as ‘objects’.

Unlike the current Act, the new model includes a definition of Ancestral remains—one that ensures protection for parts and samples (including bone, hair and samples such as DNA). This will require careful navigation in drafting. What is intended is to protect Ancestral remains from unregulated export for testing and research purposes where no (or unclear) consent has been given, and to ensure Ancestral remains are not used internationally for commercial gain. The Act should not inadvertently place restrictions on testing for which clear consent was obtained from individuals who have now passed, or their descendants. Nor should it inadvertently capture as Declared

²⁷ Data from responses to question 15 of the survey. Total responses n=104.

Australian Protected Material artworks containing human material (e.g. hair) placed there by the artist where there are no further sensitivities about that object.

Informed consent is fundamental to the new model. For the first time it will explicitly require that the consent of a Traditional Owner or recognised representative of the relevant community is a pre-condition of any export of Ancestral remains.²⁸ The complexities of consent will be elaborated in guidelines that conform to the Australian Institute for Aboriginal and Torres Strait Islander Studies' protocols.²⁹

Throughout the legislation the term 'Aboriginal or Torres Strait Islander peoples' should have a meaning consistent with the *Aboriginal and Torres Strait Islander Act 2005*.

11.2 Artworks

In the present Control List there is unnecessary confusion between Part 1 (Objects of Australian Aboriginal and Torres Strait Islander Heritage) and Part 5 (Objects of Fine and Decorative Art). There is misunderstanding as to whether works of contemporary Indigenous art can be considered under either or both classifications. Given the sophistication of the Indigenous art market in contemporary Australia, there is no longer any justification for this lack of clarity.

In the new model, all works of visual art, craft and design made with the intention to sell are assessed under the same Part, irrespective of the artist's race or culture. Contemporary Indigenous art, craft and design is a vital part of the art, craft and design practice of Australia—it is not separate from it—and this should be reflected in the Control List.

11.3 Recognition of spiritual and cultural significance

During consultation concern was raised that by confining the assessment of Indigenous artworks to the current Part 5 (Objects of Fine and Decorative Art), experts could not consider the spiritual and cultural significance of the works. The approach to significance assessment embedded in the new model makes clear that **all** elements of

²⁸ Including samples.

²⁹ AIATSIS *Guidelines for Ethical Research in Australian Indigenous Studies 2012*

the material's significance may be considered, regardless of the Part under which the material falls.

11.4 Maintaining and strengthening protection

The new approach to the classification of material will strengthen the protection given to important material. All the material currently described as Class A will be classified as Declared Australian Protected Material.

It is clear from consultation and in the submissions to earlier reviews that the Aboriginal or Torres Strait Islander material currently protected by Class A status remains appropriate for maximum protection. That protection is retained in the new model.

It is also clear that there are other items and categories of Aboriginal or Torres Strait Islander Material that should be provided that high level of protection. The express protection granted to a wider group of such heritage material will give greater certainty to communities, owners, purchasers, vendors and auction houses as to the protected status of the material.

The high degree of significance of the material recommended for protection as Declared Australian Protected Material is self-evident. They would not be granted a permit for permanent export under the present system and, with their new status as Declared Australian Protected Material, will not be granted permanent export permits under the new system. With this new approach, it would no longer be necessary to go through the cost and delay of significance assessment to end up with the same result—prohibition of permanent export.³⁰

11.5 Consultation and consent requirement

In line with Australia's commitment to the United Nations *Declaration on the Rights of Indigenous People*, the material regulated under this Part of the Control List is subject to specific consultation and consent provisions, acknowledging that Aboriginal and Torres Strait Islander peoples remain the ongoing custodians of their cultural material.

³⁰ The detail of the material that would receive this protection is at Part E.

The new model ensures that, for the first time, material that is being temporarily exported by a Traditional Owner in accordance with Aboriginal or Torres Strait Islander customs and traditions does not require a permit.

All other exports of material under this Part will require consultation with and consent from the Traditional Owner or relevant family or community. Owners will be expected to have consulted and obtained consent prior to making the application, however the Department will need to satisfy itself that respectful, informed, ethical and meaningful consultation has been carried out and consent given or withheld, before an export decision is made.

Where the appropriate Traditional Owners or representatives cannot be identified, the Department can have the significance assessments undertaken by Aboriginal or Torres Strait Islander experts.

In the case of unprovenanced Ancestral remains or other material, a panel of Aboriginal or Torres Strait Islander representatives/ experts should be convened to provide advice. In addition, there are several national advisory bodies or committees such as the Advisory Committee for Indigenous Repatriation and the National Centre for Indigenous Genomics, from which appropriate advice may be sought on issues of consultation, consent or the assessment of applications.

In formulating the guidelines for consultation and consent, the Department should consider those already developed within the sector, such as the National Museum of Australia's *Indigenous Cultural Rights and Engagement Policy*.

Survey Response

60% of respondents agreed to a large extent or a very large extent that the 'Declared Australian Protected Object' approach provides enhanced export protection for Aboriginal and Torres Strait

Islander material. A further 21% agreed to a moderate or small extent that the approach provides enhanced export protection.

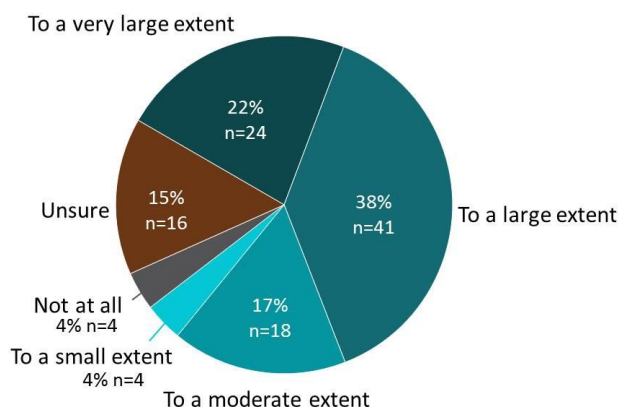


Figure 6—The extent to which respondents believe that the 'Declared Australian Protected Object' approach provides enhanced export protection for Aboriginal and Torres Strait Islander material³¹

12 New Part 2: Natural Science Material

The consultation process confirmed that the natural science material which is currently captured by the Act remains the most important. In general, consultation also indicated that this material is adequately described. Therefore, in terms of the material captured, the proposed formulation of this Part remains for the most part unchanged.

That said, value thresholds for this Part have been reassessed and 'significance' and 'representation' aspects have been standardised and streamlined in accordance with the new model.

For example, fossils provide particular difficulties. They are covered under the general heading of 'paleontological objects' and according to the current decision-tree an owner has to assess whether the fossil is 'of significance to Australia' before knowing whether an export permit is required. Often this cannot be determined without extensive study. Indeed, the purpose of the intended export may be to perform this study. Currently there is an administrative process by which owners can be issued a Letter of Clearance for material that has been assessed as not meeting the significance and representative thresholds in the Act. This process has no statutory basis. As such, these letters are limited in the way in which they can be utilised by exporters and the Department. In particular, it is not possible to place enforceable

³¹ Data from responses to question 12 of the survey. Total responses n=107.

conditions on the export such as the return of significant material which is discovered during overseas study or processing.

Accordingly, it would be more straightforward if fossils were all Australian Heritage Material and thus required an application for export permit. Then it would be a comparatively simple matter to grant an export permit with conditions that fit the particular purpose of the intended export. This would allow greater certainty as to which objects are subject to export control and greater flexibility as to the export approval process. This is the approach taken in the model.

13 New Part 3: Visual Arts, Craft and Design Material

The UNESCO Convention 1970 (and the current Control List) refers to this classification as 'Objects of Fine or Decorative Art'. It is proposed that this category be renamed 'Visual Arts, Craft and Design Material'. This reflects a more current and inclusive description for such material. The meaning remains the same but the language is more appropriate.

Unlike the existing Act, the new model does not differentiate between visual art, craft or design created by Indigenous or non-Indigenous artists. While there may have been a justification for this distinction in the past, those days are gone. Indigenous art is now central to the Australian contemporary art market. The new model has redefined the categories of visual arts, crafts and design material and included monetary thresholds that reflect the market conditions.

During consultation, stakeholders repeatedly expressed the need for the monetary thresholds in this Part to be frequently re-assessed and revised in order to be responsive to market conditions. In particular, I received substantial feedback about the threshold set for paintings, which for the first time sought to cover both Indigenous and non-Indigenous works. The figure of \$150,000 tested in the Position Paper was an attempt to find where the current criterion of \$10,000 for Indigenous art and \$250,000 for non-Indigenous art might find a meeting-place. It would be no solution if lowering the non-Indigenous art figure meant that a swathe of unnecessary applications had to be made and processed and conversely, it was no answer if the figure was so high that no Indigenous art was protected.

The system is not designed to inhibit the international trade in Indigenous art; nor is it to keep all significant works in Australia. It is to ensure the protection of works that are significant but not adequately represented in public collections.

Following feedback from consultation, I commissioned further research and analysis into the Indigenous art market and also a comparison with non-Indigenous sales.

This confirmed two main concerns:

- that there are highly significant works in traditional Aboriginal or Torres Strait Islander styles that would not meet the 50 year threshold proposed in the Position Paper; and
- the proposed \$150,000 threshold would be too low for non-Indigenous paintings but may be too high for some significant Indigenous works.

In light of this, I have decided to retain the 30 year age threshold for all material under Part 3: Visual Arts, Craft and Design Material and settled on a higher general threshold figure of \$300,000. So that Aboriginal works are dealt with appropriately, there are also carve-outs that act as exceptions to the general \$300,000 threshold:

- Aboriginal desert paintings having a current market value of at least \$100,000;³²
- Aboriginal Kimberley paintings on canvas having a current market value of at least \$100,000;
- Aboriginal or Torres Strait Islander ochre paintings on bark, composition board, wood, cardboard, stone and other similar supports having a current market value of at least \$20,000.³³

A view was expressed during consultation that, even where an assessment indicates that a work is significant, public collecting institutions have been such voracious collectors of Indigenous art that there are very few works that would not pass the representation test. With perhaps some early exceptions, as Indigenous communities have emerged as art producers, the public collections have been collecting from the beginning. This may well be true—but it does not invalidate the significance of the

³² This category will encompass Aboriginal Papunya paintings (pre-1974) having a current market value of at least \$100,000 (excluding those with secret/sacred imagery which are covered under Part 1).

³³ From regions such as Arnhem Land, Kakadu, Groote Eylandt, Tiwi Islands, Wadeye, Mornington Island, Kimberley and Far North Queensland.

work and the need to assess it against the criteria. Collections might hold a number of works by a particular artist but the test of representation under the new model is not merely a matter of numbers.

In the Position Paper I proposed prohibiting the permanent export of some categories of Indigenous artworks by listing them as Declared Australian Protected Material. However, in light of the data and research I have decided that most of those categories proposed in the Position Paper should be classified as Australian Heritage Material. This approach will ensure that Aboriginal and Torres Strait Islander art works that meet the thresholds will require a permit application but those that are significant but adequately represented can be exported.

The categories that will remain in the Declared Australian Protected Material category under Part 3 are:

- pre 1901 Aboriginal artworks with a current market value of at least \$25,000; and
- pre 1960 Aboriginal or Torres Strait Islander bark paintings and sculpture, with a current market value of at least \$25,000.

Because this is an area of considerable market fluctuation, I recommend that the monetary thresholds be reconsidered every five years to ensure currency.

14 New Part 4: Historically Significant Material

This large category should be broken down into sub-categories—those already familiar under the current Regulations:

- Part 4.1: Archaeological Material
- Part 4.2: Documentary Heritage Material
- Part 4.3: Applied Science and Technology Material
- Part 4.4: Numismatic Material
- Part 4.5: Philatelic Material
- Part 4.6: Social, Cultural, Spiritual, Sporting, Political, Military History and Other Material

14.1 New Part 4.1: Archaeological Material

This Part will now sit as a sub-part within the broader category of Historically Significant Material.

The following examples of Archaeological Material from the current Act can be placed within guidelines:

- objects relating to seagoing exploration, transportation, supply and commerce, including ordnance, coins, ship's gear, anchors, cargo and personal items from shipwrecks, sunken ships and landfalls, ship's logbooks, diaries and other documentation;
- objects relating to military activity;
- objects relating to the exploration of Australia and to the colonisation and development of Australia by non-Indigenous peoples;
- objects relating to convict transportation and settlement;
- objects relating to relations between Indigenous and non-Indigenous peoples;
- objects relating to missionary activity;
- objects (including documentation) relating to the history of mining, processing, industry, technology and manufacture in Australia;
- objects relating to the development of the pastoral industry and other land industries;
- objects relating to whaling and sealing;
- objects relating to visits to, or settlement in, Australia of identifiable cultural minorities;
- biological or ethnographic objects or collections;
- human remains, other than Aboriginal or Torres Strait Islander remains;
- organic remains associated with, or representative of, a prehistoric or historic culture;
- archaeological objects not mentioned in this item relating to persons, places or events significant in the history of Australia;
- unclassified material recovered for archaeological study;
- objects forming part of, discovered on or otherwise associated with any place listed on:
 - the Australian National Heritage List; or

- the World Heritage list (provided that the place is in Australia); and
- material related to any object mentioned in this item that adds significantly to Australian historical or scientific information.

14.2 New Part 4.2—Documentary Heritage Material

This Part will now sit as a sub-part within the broader category of Historically Significant Material with wording from the current Act brought in to make it clear what the Part is intended to cover.

During consultation, a number of stakeholders raised a concern that the Act only regulates tangible forms of documentary heritage. While the model (and the current Act) can cover all types of documents with a physical aspect (including for example film), the extension of the Act to non-physical documents (specifically, born-digital material) is problematic for legislation based on border control. While it is acknowledged that the contents of digital material may well have heritage value (either now or in the future) legislation regulating the physical export of material is not the appropriate place to protect it. Indeed, any attempt by this Act to regulate the storage of digital material is likely to have unintended consequences which go far beyond the objectives of the Act—such as restricting the ability to select competitive information technology service providers offering storage in the ‘cloud’. While digital records are not explicitly excluded from the Control List, and acknowledging that the future preservation and integrity of digital records is undoubtedly an issue, they are not included under the new model.

14.3 New Part 4.3—Applied Science and Technology Material

14.3.1 Preliminary

In responding to the Position Paper the special interest groups for material in this category have been some of the most helpful, vocal and passionate and, for their input and enrichment of the model, I thank them. As some organisations (particularly in relation to cars) use a 30 year benchmark for determining heritage, some stakeholders advocated against the change in age threshold. While acknowledging that there may be particular models of cars which are very significant without being 50 years old, I believe it is better to target these highly significant exceptions through inclusion on the

Declared Australian Protected Material list rather than expand the pool of Australian Heritage Material and thus unnecessarily increase the number of permit applications.

14.3.2 Simplification of the list

This heading covers an enormously wide range of material such as: military technology; communication and information technology; medical innovations; optical, photographic and electronic equipment; alternative/renewable energy technology; steam road vehicles (road locomotives, steam wagons, road rollers, and steam cars); agricultural equipment (traction engines, ploughing, portable and stationary engines); motor vehicles (racing and motor cars, trucks, tractors, oil and gas engines); and space technology.

Notwithstanding that the current Part is expressed to be inclusive, it has been interpreted over the years by users almost as a codification. Many submissions to previous reviews have argued for the inclusion of particular technologies on the basis that they are not protected—because they are not on the list. However the intention was not to exclude technologies or objects of applied science which were not expressly listed in the Part. After all, no legislation can predict the developments of technology and applied science and, therefore, none can ever be expected to provide an exhaustive list.

The reformulated Part seeks to address this misconception by only listing types of material, not itemising individual object types. More detailed examples can be provided in explanatory guidelines and on the Department's website. They do not need to be in the Regulations.

14.3.3 Inclusion as Declared Australian Protected Material

Some material in this category is so scarce that it has been included on the list of Declared Australian Protected Material. Some of the earliest examples of transport and agricultural machinery are examples of this.

This has been loudly applauded in consultation. A few have said that this will send the exporters underground; that they will disassemble engines and take them out as scrap metal or simply mis-describe the material in customs documentation. Just as pedestrian crossings do not stop pedestrians from being hit by vehicles, mere legislation cannot stop those who are determined to break the law. That said, the

current sanctions regime provides little disincentive to those who do not comply with the Act: that will change under the new model.

14.4 New Part 4.4—Numismatic Material

The only medals currently given the highest level of protection are Victoria Crosses awarded to named recipients. These are included as Class A objects.

In the proposed scheme, Victoria Crosses with significance to Australia (either awarded to Australian citizens or to soldiers fighting in or with an Australian force) would continue to receive maximum protection as Declared Australian Protected Material.

It is suggested that this level of protection should also be explicitly extended to the Australian-only medals that replaced the imperial honours system, and also extended to other medals and decorations of extraordinary significance:

- the Victoria Cross for Australia;
- the George Cross;
- the Cross of Valour; and
- the insignia of the Dames and Knights of the Order of Australia and the Companion of the Order of Australia.

It is right and proper that Australia should give the same level of protection and significance to its highest civil awards as it does to its highest military awards. Both honours are given in recognition of an extraordinary contribution to the nation.

14.5 New Part 4.5—Philatelic Material

Over the life of the Act, there has been discussion as to whether philatelic material should be combined with numismatic material. As the stakeholder groups for each are quite distinct, it is difficult to see what practical advantage would be obtained by doing this. It may make the Control List slightly shorter, but the detail of each type would still have to be articulated separately. Accordingly, it is proposed that they remain separate—but within the overarching category of Historically Significant Material.

In its submission to the 2009 Review, the Australian Philatelic Traders Association argued that it was inappropriate for stamps to be covered at all by the Act because

they could easily be digitised and retained in that form. This was not a view shared by collectors, who saw philatelic objects as more than mere commodities.

14.6 New Part 4.6—Social, Cultural, Spiritual, Sporting, Political, Military History and Other Material

The proposed section for material that relates to the social, cultural, spiritual, sporting, political or military history of Australia subsumes much of the material that is currently included in Part 9: Objects of Historical Significance.

In the new scheme, Class A objects under that Part (items of Kelly armour) would now be listed as Declared Australian Protected Material—together with the armour worn by other members of the Kelly gang.

14.6.1 Recognition of particular material

The biggest issue with the current formulation is that like other Parts it is overly long and, while expressed as inclusive, it is read as a codification. In the Position Paper, I sought to elevate the description that would appear in the Control List, and envisaged leaving the detail to explanatory notes and examples in guideline documents.

While I still believe this is the best approach, a number of stakeholders expressed alarm that they could no longer see their particular area of interest explicitly listed. While acknowledging that this is a change, as long as the material itself continues to be protected in the legislation (and I believe that to be the case in relation to all of the cases raised with me) the explicit recognition in the Control List is not necessary. In avoiding a prescriptive ‘laundry-list’ of material, I am aiming to actually make the model more responsive to emerging and evolving types of material.

While the proposed title of this new Part includes reference to some types of material it is not intended to be limited to particular categories such as ‘sporting’ or ‘political’. It is envisaged under the new Control List formulation that all types of material, which do not fit into other Parts, can be assessed under this heading. This allows full consideration of the material, including its significance and representation in public collections, against standardised criteria.

14.6.2 Association test

Another problem with the current Part arises from the misconceptions as to the meaning of 'associated' in Part 9.2(b). In some cases, very distant links to significant people have been asserted in order to try and justify a recommendation to deny export. In order to balance the rightful interests of property owners, a valuable cultural item should not be denied export on the basis of a merely tenuous link. Accordingly, the new model incorporates the words 'direct and substantial' to the association test.

This test has also been widened, from 'person (or group of people), activity, event, place or business enterprise, notable in Australian history' to include 'movement or period.'

For example, many National Trust managed properties have objects which may have significance in and of themselves but which accrue greater significance from their location within a collection and a place. Mulberry Hill, the National Trust managed home of author Joan Lindsay, is where she wrote her classic novel, *Picnic at Hanging Rock*, set on St Valentine's Day in 1900. The home's collection includes vintage Valentine's Day cards that Lindsay collected and which were later used as props in Peter Weir's iconic 1975 film.

15 General Control List matters

15.1 Recognition of other Commonwealth heritage legislation

The Control List is augmented to include an express reference to objects forming part of, discovered on, or otherwise associated with any place listed as protected by Commonwealth legislation. This would include places on the Australian World Heritage and National Heritage Lists. This is a very important oversight in the current Control List.

For example, the *Environmental Protection and Biodiversity Conservation Act 1999* (EPBC Act) provides processes for the listing, protection or management of places. The Act does not, but should, enable an export application decision-maker to take into account the lawfulness of an object's removal from a site protected under the EPBC Act.

The Act will also be aligned with regulation under the *Historic Shipwrecks Act 1976*, to minimise any duplication of regulation. This is achieved in the model by requiring that any export application for material covered by both Acts must already have obtained a Historic Shipwrecks permit as a pre-condition to application under the Act. Once again, placing this level of clarity in the new model will ensure that relics protected under another piece of Commonwealth legislation can be appropriately and consistently protected under the Act.

15.2 Recognition of state heritage legislation

While the Commonwealth does not have the constitutional power to prevent the movement of cultural material within Australia, it does have the exclusive power to control its export. Accordingly, it is incumbent on the Commonwealth to work with other levels of government to provide the protection for this material that only the Commonwealth can provide.

If legislation (of any level of government) says that certain cultural material is not allowed to be removed from a protected site or jurisdiction, or is not allowed to be traded without a permit, it should not be exported without examination and proof of the exporter having obtained the appropriate permissions.

This applies equally to legislation protecting movable and immovable cultural heritage material. For example, the Cape Otway light station is listed on the Victorian Heritage Register.³⁴ One might safely assume that the light station is an immovable object. If a piece of the light station is removed, say a lens prism, that prism becomes movable cultural property and falls within the Act. The prism in itself may not be of great historic significance (or may be well represented in other public collections) but it is hugely significant because of its association with the heritage place. Furthermore, if pieces of a heritage site are pilfered, over time, the heritage values of the site will be diminished.

Given that the current Act does not recognise breach of Commonwealth legislation as a reason for prohibiting export, it is perhaps unsurprising that it does not recognise state and territory heritage legislation. For the first time, the new model will recognise these heritage protection instruments as relevant to the refusal of export permission.

³⁴ Registered as H1914

To support the effectiveness of this, under the new model export permits should be refused where the material has been removed or traded in breach of another law. The application form will include a related declaration, and the applicant will be required to provide evidence of any required permits.

15.3 Value of objects

Market values are fluid while regulatory value thresholds are static. The market for each specific type of material will undoubtedly fluctuate, sometimes quite wildly, during the life of the Act. It may be that, prior to the new model being enacted in legislation, the Department needs to do further work to identify precise value thresholds for certain categories. Regardless of this, all value thresholds should be reassessed every five years to ensure currency. In determining any amended threshold, the value identified should be the higher of the Australian or international market price and include the full cost of sale—including buyers' premiums, commissions and other charges.

15.4 Treatment of collections

The current scheme is designed to issue a single permit for individual objects. The administration of the scheme has revealed that it does not cope well where the application is for a collection of objects. On a literal interpretation of the current legislation, it is only where the definition of a particular object type explicitly includes 'collections' that a single permit for the collection can be issued.³⁵ All other types of objects must be considered on an individual basis. This has proved problematic for owners and those responsible for significance assessment and decision-making.

Some collections may run into hundreds of thousands of individual objects, more or less organised into a whole.³⁶ For each of these constituent parts to be the subject of a separate application, individually assessed, and individually issued (or denied) a permit is an impracticable, administrative nightmare.

For example, it would be inequitable to force the owner of a massive documentary archive to retain the whole to protect against the possibility that the collection may contain some individual items of significance. On the other hand, it would be a loss to

³⁵ Ethnographic collections under Part 3 and stamp collections under Part 8 of the current Control List.

³⁶ For example, an archive of documents or a collection of photographs from a theatre company, or a collection of rocks or insects.

the nation if such individual specimens of importance were not protected just because it was expensive to identify and save them. It is a difficult balance.

It must be recognised that documents may accrue significance from inclusion within a collection or due to the collection's relationship to other objects. However, extending the concept of collections to material that crosses multiple parts of the Control List runs into practical difficulties. Questions of which monetary threshold criteria would apply, which Assessors would be qualified to assess them and how adequate representation would be assessed, may mean that a whole collection could be denied export on the basis of a single, high-significance piece within it. This would result in unintended consequences: (a) a higher regulatory burden on applicants, and (b) the unnecessary protection of material and thus an unjustifiable restriction of ownership rights.

In contrast, an argument can readily be made for allowing single applications for collections of a single object-type, such as a collection of documents or type specimens.

For these reasons, the new model stipulates that only collections of material falling within one Part of the Control List can be assessed under a single application and granted a single permit. Of course, should they choose, owners would be able to break their collection into sub-collections of single types of objects for assessment as single type collections.

15.5 Treatment of parts

A related issue is the treatment of parts of objects. Under the current Regulations, as with 'collections', some sections of the Control List explicitly include 'parts' of objects, while others are silent. Standard interpretation of this has been that parts of objects are only considered for protection if the relevant category explicitly mentions 'parts'.

Concern has been repeatedly raised that the lack of consistency on this issue has led to items being dismantled for export to avoid regulation. This concern has been particularly important in respect of machinery relating to agriculture, transport and war. It has become a pathway for the scurrilous: there are several reports of World War II fighter aircraft, rare traction engines and vintage cars leaving the country in boxes

labelled scrap or spare parts only to be reassembled in other jurisdictions where they are then sold.

While this is an obvious issue for objects such as vintage machinery, it can affect many other categories. Rather than address it on an item-by-item basis it would be much simpler to articulate the principle and apply it to all categories so that it is clear to everyone that dismantling, breaking up or separating cultural property is not a way of avoiding the legislation—or its policy intent. Accordingly, there should be created a separate criminal offence and accompanying sanctions, to address this issue.

Moreover, in drafting it must be clearly articulated that protection is provided to all parts or components on the same basis as the whole from which they came. If parts of significant material are treated differently from the whole, not only is it an incentive to dismantle and disassemble, it means that the availability of spares necessary to repair and maintain is diminished, thus affecting the integrity of other significant cultural objects.

15.6 Specificity of Parts

In the current scheme, some Parts of the Control List specifically exclude material in an effort to limit objects falling under multiple Parts. For example, Part 4 ('Objects of Applied Science or Technology') excludes objects arising from 'Artistic activity':

*4.2: The objects in this category relate to human enterprise and activity, **other than artistic activity**, such as:*

- (a) tools, weapons, implements and machines; and*
- (b) any other object produced by, or related to, an object of the kind mentioned in paragraph (a) including prototypes, models, patents and equipment.*

As with the treatment of collections and parts, this is only applied to the Parts and material where it is specifically mentioned. This does not go far enough. In particular, the present situation whereby material may need to be assessed under up to five different categories needs to be held in check. The significance test should not be seen as cumulative—being 'quite interesting' in several categories cannot add up to being 'significant' overall. Accordingly, the model does not allow material to be considered under multiple Parts.

However, it should be noted that consideration should be given to the most relevant Part to the specific material being considered. Continuing with the example of artistic activity, some of the very important developments in the world of art and design are in the field of applied science and technology. For example, the world-class immersive and visualisation technologies being developed and applied within the UNSW Faculty of Art & Design cut across traditional boundaries and are being implemented in museums, research laboratories, operating theatres and many other environments. It is 'artistic activity' but not a specific activity that could have been contemplated when the Act was first drafted. The new provision takes into account a distinction between the means and the product: it is the means that may be protected under Part 4.3 (Applied Science and Technology Material), whereas the product is properly protected under the new Part 3 (Visual Arts, Craft and Design Material).

16 Significance and representation

16.1 What is significant?

16.1.1 The problem

The concept of cultural significance must be at the heart of any legislative scheme as to how objects are judged and why they are denied export. Unfortunately, in the current legislation the meaning of the term 'significance' and the process and principles by which it is evaluated is unclear and confusing, particularly for private owners of objects.

In the current Act, subsection 7(1) states that objects controlled by the Act are those 'that are of importance to Australia, or to a particular part of Australia'. That is a positive test. Unhelpfully, subsection 10(6)(b) then provides that the decision-maker must be satisfied that 'its loss to Australia would significantly diminish the cultural heritage of Australia'. That is a negative test.

To contribute to the difficulty, the Regulations set out a Control List in which each Part provides different factors for assessing significance—factors that are characterised by inconsistencies and omissions.

The current Departmental Guidelines given to expert examiners attempt to give guidance on how to assess significance but that is just a makeshift response to a more

profound problem with the legislation. Because there is no clear definition of significance provided, the legal basis for export decisions is too readily open to challenge.

A number of decisions of the Administrative Appeals Tribunal have tackled the meaning of significance and some of these findings need to be dealt with by legislative reform. In particular, in *Re: Blake and Brain and Minister for Communications and the Arts* (1995) the Tribunal had to determine the meaning of the phrase ‘significantly diminish the cultural heritage of Australia’. Noting that there is no definition in the Act, the Tribunal looked to the Second Reading Speech for assistance. From the words of that speech it adopted a very restricted meaning for the phrase. It held that it meant, ‘constituting an irreparable loss to Australia’. The Minister’s words in the Second Reading had been unfortunately narrow.

What is significant to the Australian story cannot properly be interpreted by a test cast in the negative. With such a test, Australian cultural heritage—the means by which we describe and show who we are as a country and a people—will readily be depleted.

A subsequent decision of the Administrative Appeals Tribunal, *Re: Truswell and the Minister for Communication and the Arts* (1996) took a different and more positive approach. There, after considering a number of High Court and Federal Court authorities, the Tribunal held that ‘significantly’ should be given its normal meaning, namely ‘importantly or notably’ and ‘not unimportantly or trivially’. This interpretation is much more protective of cultural material and provides a test that is much easier to fulfil. Indeed, it is a simpler approach that is easier to interpret and to implement.

The point must be made that if two highly trained legal brains can arrive at two completely different interpretations of the very word that is core to the effectiveness of the legislation, owners and decision-makers have a limited chance of getting the question, and thus the answer, right. The new model meets this challenge and provides an appropriate definition and decision-making process for the determination of significance.

16.1.2 The way forward

The review has considered the most appropriate mechanisms to provide clear and consistent definitions of significance, clear directions as to where in the decision-tree

significance should be considered, and the factors that should be applied in making the decision to grant or deny export.

It is extraordinarily (and unnecessarily) difficult to establish proof of a negative. In effect it means that unless material is (currently) classified as Class A, it is hard for Government to establish the grounds for refusing permanent export as it has the burden of proving what would happen to Australia if the individual item were not retained.

If the wording of subsection 10(6)(b) were to be maintained, one option would be to reverse the burden of proof so that it is the applicant who must prove that the permanent export would not significantly diminish the cultural heritage of Australia. After all, it is the applicant that seeks the permit and it is reasonable to require it to provide a basis as to why the permission should be granted (notwithstanding that the decision-maker's overall decision would remain subject to review).

However, the new model requires a more constructive approach—replacing the negative test of ‘importance to Australia’ with a positive one. It requires consideration of the cultural significance of the material in terms of its contribution to the richness of Australian cultural heritage. How this is achieved is a matter for drafting.

Looked at in that light, the test currently described in subsection 10(6)(b) might be better phrased as:

‘...that its retention is important to the cultural heritage of current and future generations of Australians’.

16.2 Assessing significance

It is proposed that the legislative framework provide a standard definition of significance to be applied across all Parts in the Control List. Further, the Regulations, in a separate provision, should establish the elements to be considered in any assessment of significance. This can be supplemented by additional information in documents external to the legislative framework such as publicly available Guidelines that can provide further practical advice to the public and assessors on the assessment of significance.

The Regulations should provide the range of matters to be considered when a significance assessment is undertaken. This should provide a practicable, consistent framework by which assessments are completed and information provided to the decision-maker.

While it is recognised that any determination of significance is subjective and can change over time, the provision of clear criteria would greatly improve consistency and transparency in decision-making. The concept of significance is incorporated or referenced in other Australian legislation and in several international conventions³⁷ and how it is to be assessed is treated in various ways. For example, the approach of the United Kingdom's Waverly criteria, is to ask the following of the object:

- is it so closely connected with our history and national life that its departure would be a misfortune?
- is it of outstanding aesthetic importance?
- is it of outstanding significance for the study of some particular branch of art, learning or history?

In the Australian context, the Burra Charter and the HERCON criteria are also well known. The Burra Charter³⁸ was established by the International Council on Monuments and Sites (ICOMOS) Australia and sets out the principles of assessing the cultural significance of a place with regard to the aesthetic, historic, scientific, social or spiritual value for past, present or future generations. It is an important and proven tool in the making of place-based significance assessments.

The HERCON criteria³⁹ were developed in Australia at the 1998 Conference on Heritage and have been used and adapted for the assessment of place-based heritage across a range of national, state and territory legislation.

³⁷ For example the *Convention Concerning the Protection of the World Cultural and Natural Heritage* 1972, the *Convention on the Protection of the Underwater Cultural Heritage* 2001, UNESCO Convention 1970 and the Hague Convention 1954.

³⁸ The Burra Charter: The Australia ICOMOS Charter for Places of Cultural Significance, 2013.

³⁹ These criteria go to the classification of the level of significance through consideration of eight ways in which a place can be of importance. For example Criteria A is of importance due to the course or pattern of our cultural or natural history while Criterion H has special association with the life or works of a person, or group of persons, of importance in our history.

Finally, there is *Significance 2.0*,⁴⁰ which was developed in Australia as a guide for the assessment of heritage objects (rather than sites) and has been widely accepted by the collections sector. In this model 'significance' refers to the values and meanings that items and collections have for people and communities. It recognises that significance helps to unlock the potential of objects and collections, enhancing opportunities for communities to access, enjoy and understand the history, cultures and environments of Australia. The criteria and methodology are based on the same principles as those used for place-based significance referenced above but have been adapted and described in ways specifically relevant to heritage objects.

The draft criteria used in the new model and described below are based on those in *Significance 2.0*, as the model most appropriate for assessing the significance of objects. They are based on the principle that the assessment of significance should consider not only the material itself but also its cultural context and associations.

During consultation, stakeholders were broadly supportive of the use of both the criteria and the methodology of *Significance 2.0*. Some concerns were raised that the *Significance 2.0* publication, as it stands, does not adequately address the assessment of the full range of material regulated by this Act. This is acknowledged and it is not proposed that the publication itself be adopted but rather its principles. While the broad assessment criteria and methodology described below can be applied to all material, there will likely be a focus on some aspects for specific material. For example, the consideration of significance in regard to Aboriginal or Torres Strait Islander material in some situations will appropriately rely more heavily on consultation and Traditional Owner input.

⁴⁰ *Significance 2.0: a guide to assessing the significance of collections*, Roslyn Russell and Kylie Winkworth, Collections Council of Australia Ltd 2009.

Survey Response

68% of respondents agreed to a large extent or a very large extent that the proposed mechanisms for assessing significance and representation would enhance the assessment process. A further 26% agreed to a moderate or small extent and only 6% of respondents did not agree at all.

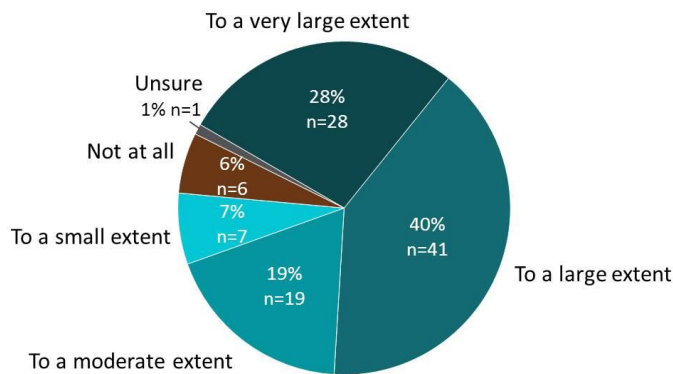


Figure 7 – The extent to which respondents think the proposed mechanisms for assessing significance and representation would enhance the assessment process.⁴¹

16.2.1 Step one—Primary significance criteria

When undertaking a cultural significance assessment, the first step is to apply a set of **primary criteria**. These are the object's:

- historic values;
- aesthetic or artistic values;
- scientific, technical or research potential;
- association with place or other material; and
- social or spiritual connections.

While all of these primary criteria should be considered when making an assessment, it is only necessary to find evidence to satisfy one of the criteria to establish the item as significant.

These criteria apply to all Parts of the Control List so that, regardless of where in the list particular material may be assigned, its full significance can be considered. For example, material under any part of the list (such as, say, Part 2: Natural Science Material) may be found to have spiritual significance.

⁴¹ Data from responses to question 17 of the survey. Total responses n=102.

16.2.2 Step two—Comparative analysis criteria

Having applied the primary set of criteria and finding an object to be culturally significant, it is important to determine the level of that significance: Is the material an outstanding example of its type?

This is done by benchmarking the material using **comparative analysis criteria**. The use of evidence-based arguments founded on comparative evaluation will demonstrate an object's relative level of significance.

This approach takes into consideration the physical properties of the object as well as the associative properties that go to indicate its cultural heritage importance.

Accordingly, the following comparative analysis criteria would be applied:

- provenance;
- rarity or representativeness;
- condition or completeness; and
- interpretative capacity.⁴²

The use of these criteria applies equally over the entire range of material covered by the Control List so that the full context of the material can be considered.

16.2.3 Guidelines

While these criteria should be included in the legislation so that there is a legislative basis for decisions on significance,⁴³ there will need to be Guidelines to provide further explanation of these criteria. These Guidelines may include subsidiary questions to assist the assessor:

- Provenance:
 - Does the object have detailed and undisputed provenance?
 - How is this provenance of value to understanding the object and its context?
- Rarity or representativeness:
 - If the object is representative of a class, is it equal to or better than other objects currently held in collecting institutions?

⁴² To assist with place-based heritage assessment the Australian Heritage Commission (together with the sector) developed the Australian Historic Themes Framework: (www.environment.gov.au/resource/australian-historic-themes). Where the object relates to a heritage place this category of 'interpretive capacity' permits the application of this approach.

⁴³ Something that is missing from the current framework.

- If rare, can that rareness be demonstrated and why is this significant?
- Condition or completeness:
 - What is the condition and the completeness of the object—taking into account aspects such as original condition versus poor restoration; intactness; state of preservation?
- Interpretative capacity:
 - What is the context of the object in a broader narrative of Australian culture—whether by enhancing a story or creating a new one?
 - Are there intangible aspects to consider?

16.3 Methodology for undertaking significance assessments

The method for undertaking significance assessments is also a matter for future Guidelines. While it is not appropriate to include the methodology in the legislation, the Guidelines must require evidence to demonstrate the extent of research, consultation and analysis undertaken by an assessor. Example documents and images should be used.

The principles established within *Significance 2.0* should be considered and adapted for this purpose. For example, the methodology would require the following:

- undertaking research into the history and provenance of the material;
- consulting other experts, institutions, Traditional Owners or other relevant parties as appropriate;
- analysing the full context and nature of the material and information including comparison with other examples; and
- preparing a succinct written statement of significance.

Material may be found to be of outstanding significance for any number of reasons. Unlike the models used by some place-based assessments, the use of the primary and comparative criteria to write a succinct statement of significance does not limit the outcome to the material fitting into a particular criteria wording—provided that the legislated criteria are addressed.

16.3.1 Importance of the methodology

There are three important reasons to establish legislated standard criteria and provide an articulated methodology that assessors must use when determining the cultural significance of objects. It will:

- assist assessors to apply the correct criteria;
- dramatically increase the consistency of assessments across the Control List; and
- in the event of an appeal of the decision to the Administrative Appeals Tribunal, establish the expected nature and quality of evidence upon which export decisions are made.

16.4 Significance and collections

A collection can be assessed as a thing in and of itself. For example, this might be the case where a documentary archive, as a whole, provides a clear understanding or a new interpretation of the life of a significant Australian. Individually, the documents may not be significant but taken as a whole they may be.

For example, the significance of the collection may arise from:

- the fact that the collection was amassed and curated by a particular collector—for example, objects from the extraordinary and diverse Kerry Stokes Collection;
- an object's association or relationship with other objects—for example, a 25-year correspondence relationship between 'ordinary Australians' that may contain no individual document of enormous import but, as a whole, may present a picture of what it was like to live an ordinary life in that community or place during those years;
- its contribution to research, scientific knowledge or public record (such as a specimen or numismatic collection) where it is possible that some individual specimens would be significant but there is added value and significance in the material being collected together.

16.5 Significance over time

The relative significance of material may change over time. Further information and context might be discovered or cultural attitudes may change, so that what is rated as not of outstanding significance today may become significant with the passage of time. The reverse is also possible.

16.5.1 Significance assessments valid for 5 years

It is therefore proposed that a significance assessment made under the scheme has a set period of validity, after which the significance must be re-assessed. It is proposed that this time be set at five years.

This does **not** mean that all material previously assessed must be re-assessed every five years. What it does mean is that:

- where an object has been denied export, after 5 years the owner is able to request a new significance assessment as part of a new export application; and
- where an object was granted export permission but not exported during the following 5 years,⁴⁴ the owner cannot rely on the earlier assessment and must reapply for a new export permit.

The protected status of the object is no longer permanent and thus the refusal decision is not permanent. For example, assume an object had been assessed as significant and not adequately represented in public collections. If the representation of the object changes, the object may well be reassessed and a permit granted: it is still significant but now it is adequately represented. Indeed, there has already been a situation in which a party refused export permission on the basis of inadequate representation in public collections donated a quantity of that type of material to a public collection so that the representation criterion could be fulfilled.

16.6 Significance to Australia or part of Australia

Significant heritage value to the nation does not require that material be important to **all** Australians. Several of those who have made submissions to previous reviews misunderstand the degree of significance that is required: the PMCH framework is not

⁴⁴ For example, where export permission was sought prior to an auction but the material was purchased by a domestic buyer.

a 'national treasures' scheme. Material may be highly significant to a part of Australia, a group of Australians,⁴⁵ or may connect to a national theme.

The Act is explicit—if the material is of significance to the nation or to any part of it, that significance can justify export protection of the material. This approach is retained in the new model.

16.7 Recognition of significance assessments made by other levels of government

There is much material on national, state or territory heritage lists that has already been assessed as significant to the nation, or to a particular state, region, place or community. It is recommended that, for the first time, the Act recognise the significance of assessments already carried out by other Commonwealth bodies and state and territory governments.

There are several reasons for this recommendation:

- it is cost effective and efficient to recognise the significance assessment already made; and
- the local significance has been assessed and agreed by those living in the relevant areas and those citizens and communities have a right to expect material of acknowledged significance to be afforded protection.

It is proposed that material that has been explicitly assessed as significant to local regions of Australia whether under other Commonwealth legislation⁴⁶ or legislative schemes of state and territory governments, be automatically treated as Declared Australian Protected Material.⁴⁷ This would ensure that the Act is able to function as a safety net, providing automatic protection to material that has been given the highest degree of protection under state or territory legislation.

Some local governments also protect cultural material that is significant to their community. Some of these have more rigorous assessments than others; some have long lists of objects while some are much more restrained. Because of the dramatic

⁴⁵ Whether grouped by ethnicity, beliefs, profession or other criteria.

⁴⁶ For example material protected under the *Aboriginal and Torres Strait Islander Heritage Protection Act 1984*.

⁴⁷ If the authority delists the material then the material ceases to have Declared Australian Protected Material status.

variances and inconsistency in the assessment processes, it is not recommended that material on a list maintained by a local government be given automatic protection.⁴⁸

16.8 Representation in public collections

One of the important (and often misunderstood) thresholds is that of ‘representation in public collections’. In brief, for some classes of cultural material, a permanent export permit may be granted notwithstanding that the material is of high or even outstanding significance—because there are already examples of similar description and quality in public collections.

As a principle, that is correct. However, the present drafting is confusing in that, depending on the nature of the object, different tests are to be applied.

Generally the test in the current Control List is presented in a numeric fashion, namely whether the material ‘*is not represented in at least 2 public collections in Australia by an object of equivalent quality*’. However there are Parts of the Control List that use a different test: that the object ‘*is not adequately represented in public collections in Australia*’. This is a subjective not a numeric criterion and a question of judgement rather than mathematics.

Several incidents indicate that, all too often, those wishing to export heritage material treat the representation threshold as a purely numerical exercise—ignoring the requirement that the objects in the collections be ‘of equivalent quality’.

To further complicate matters, each of these tests may have qualifiers. For example, with philatelic objects, the requirements in Part 8 section 8.2 of the Regulations state that the object:

- (c) *is an object of which no more than 2 examples are known to exist in Australia;*
and
- (d) *is not represented in at least 2 public collections in Australia by an object of equivalent quality.*

⁴⁸ In drafting, consideration could be given to making such objects Australian Heritage Material.

The issues raised by this provision would be as well suited to a class in applied logic as they would be to a court faced with its legal interpretation. At first glance, it is simple. In application, it is flawed.

Interestingly, for Objects of Fine or Decorative Art, there are no numeric or representation thresholds. There should be. Just as with objects described in other Parts, it may well be that even if a work of art, craft or design is highly significant, there may already be several examples of equivalent quality in public collections, thus diminishing the rationale for requiring this example to be retained in Australia.

16.8.1 Equivalent quality

There has been considerable uncertainty as to the meaning of the phrase 'equivalent quality'. On one view of the current wording, it would be necessary to assess against all the characteristics of the object that are relevant to its inclusion in the Control List. On another view, as the object is being benchmarked against like objects already in public collections, the considerations should include the desirability of acquisition by a public collecting institution. Both of these views provide limited guidance to applicants, expert examiners and decision makers.

This uncertainty must be resolved so that owners of cultural material are better able to judge whether their property is likely to be classified as protected material and to assist those charged with the responsibility for determining whether an export permit should be granted or denied.

The Explanatory Statement to the current Act gives several examples of 'equivalent quality'. These should be captured in the Regulations so as to provide more certain guidance. These would include:

- an object that is incomplete is not of equivalent quality to one that is complete or more complete;
- an object that is in perfect condition is not equivalent to one that is in poorer condition;
- an original or master copy of a document or an original philatelic object, is not the same as a copy of that material; and
- an object that has a unique feature is not the same as an object that does not have that feature.

These should apply to all material not just particular types of material. They are all relevant, distinguishing characteristics that should be taken into account in the decision-making process.

In addition, the concept of 'equivalent quality' must be given a wider meaning than merely having equivalent physical characteristics. It must also be able to include the heritage or cultural significance of a particular item.

For example, there may be already two examples of a particular traction engine in public collections but if a third was the machine that helped build Old Parliament House, that machine should not be lost merely because there were others in the country of a similar technical or physical specification. It would have a significance to the nation and also to the local community of Canberra that the other examples do not have.

16.8.2 Adequate representation

It should be remembered that the representation test is only applied once material has been deemed to be highly significant. The model is not designed to retain in Australia all minutely different heritage objects; the aim is to ensure that export is only denied in the cases of the most significant **and** underrepresented material.

The new model makes it clear that:

- the representation assessment must be qualitative not quantitative; and
- the number of objects held in public collections is not just a statistical exercise of type and brand; it requires a proper consideration of the significant features of, and differences between, such material—distinctions as to age, model, condition, completeness and significant amendments, repairs, additions or adaptations; and
- the 'quality' test is not merely one of comparing physical attributes. The role, impact or effect that an object has had, may also distinguish it from other examples of similar physical characteristics. This may be on a national level or a local level.

The definition of 'Adequate representation' should be clear, while allowing that its application will vary according to the unique circumstances of each application:

Adequate representation means that there are sufficient comparable examples of the material, considering equivalent quality, age, model and characteristics, held in Australian public collections. An assessment of Adequate representation should include consideration of:

- the number of items of exact type in public collections and comparison of physical qualities, including condition, completeness (and in the case of documents and stamps such issues as whether the object is a master copy or original);
- the number of objects that are required to be considered as a complete representative sample for a material type (for example, in regards to primary type specimens);
- the comparison with material of the same class / style / make and model;
- whether there are unique features or adaptations made to the item that should be considered; and
- comparison with material either of the same or similar subject matter or the same or similar association with events, persons or places.

16.9 The representation must be in public collections

An earlier review of the Act asked whether the representation test should apply only to public collections or whether representation in private collections should be relevant. This Review shares the recommendations of earlier reviews that the representation test take account only of public institutions. It is important, as a matter of public policy, that the relevant collections be publicly accessible and not be privately owned.

There is a definition in the current Act regarding ‘principal collecting institution’ however there is no definition under the Regulations when it comes to representation in a public collection in Australia (which is a much wider concept). In addition there are other aspects of the scheme that refer to collecting institutions but without a consistent approach, including eligibility for funds from the National Cultural Heritage Account.

To ensure that there is clear and consistent understanding as to what should be considered a public collection or collecting institution it is proposed that under the new model, a ‘public collection’ be defined as one that is:

- Publicly accessible; and
- established under a law of:
 - the Commonwealth; or
 - a state or territory; or
 - owned and controlled by a not-for-profit organisation.

Case Study: John Brack

Backs and Fronts (1969) by John Brack, Oil on canvas painting

In 2015, a permanent export permit was granted for *Backs and Fronts* (1969) by John Brack. Under the current system this work is classed as an Australian Protected Object because it is over 30 years old and is valued over the \$250,000 threshold. It therefore required a full significance assessment by an Expert Examiner, then consideration by the National Cultural Heritage Committee and a final decision by the Minister or Delegate.

Under the new model, this object continues to meet the threshold for Australian Heritage Material (30 years old and valued over the \$300,000 threshold) and would still require an application for a permanent export permit. However, this series of works is well represented in national and state collecting institutions and works by this artist are represented in public collections across Australia. Thus, this work is likely to meet the representation test and be granted a permanent export permit

16.10 Assessment of adequate representation and export decision

A statement of representation is core to any permanent export decision. Accordingly the significance assessment must include a comparison of material of equivalent characteristics and quality in Australian public collections.

16.11 Relation of methodology to decision

As a result of applying all of the methodology above, an assessor should be in a position to deliver a report which:

- provides a 'statement of significance' which is a summary of the meaning and importance of the object by articulating how and why the object is or is not significant and, if significant, provides the degree of that significance in comparison to related objects; and

- provides a 'statement of representation' which is a summary of information in regard to the representation of material of equivalent characteristics and quality (or, where applicable, class of material), in public collections.

This report will enable the decision-maker to make an evidence-based decision as to whether the retention of the material is important to the cultural heritage of current and future generations of Australians and therefore to the granting or refusal of export.

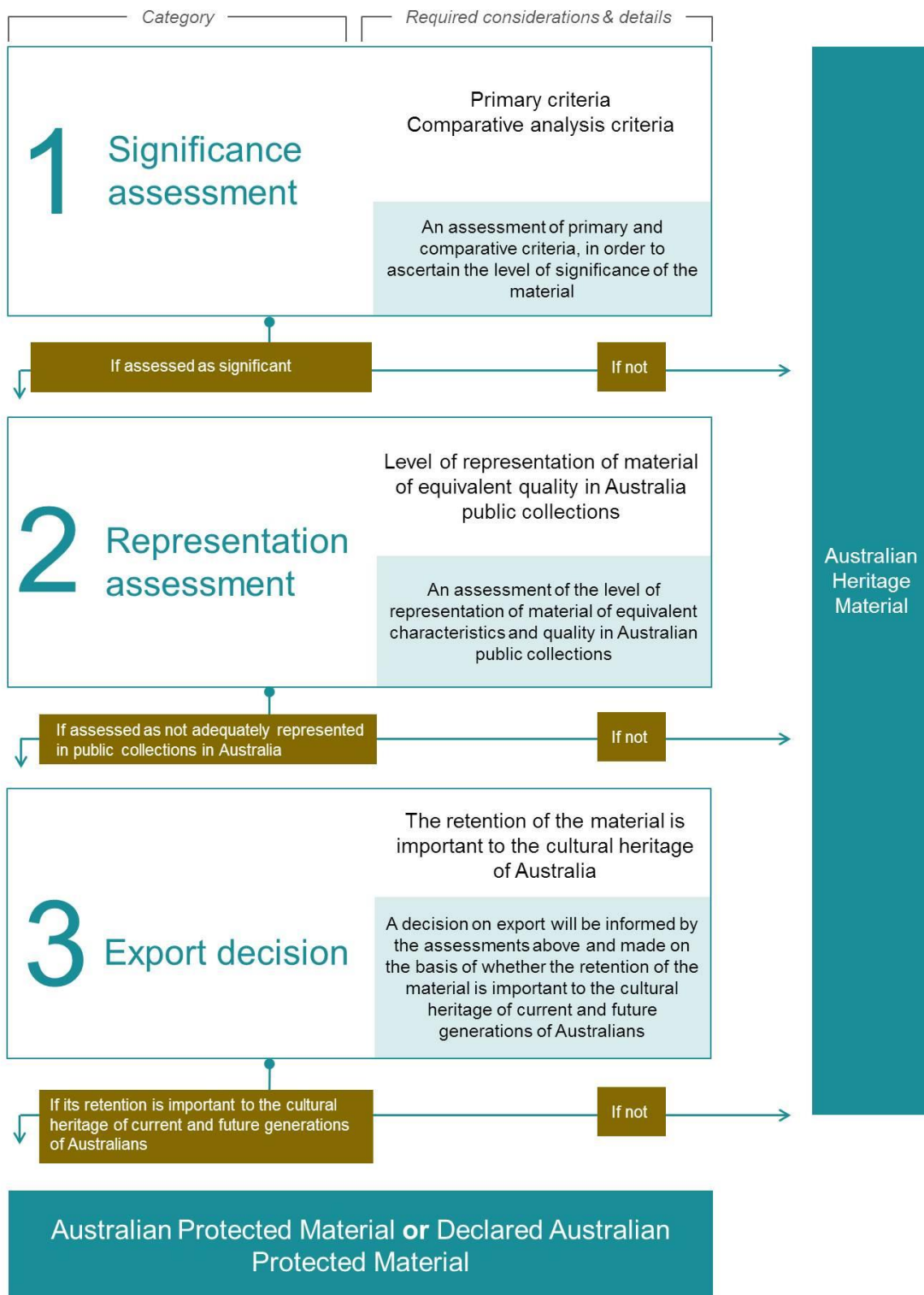


Figure 8—Significance and representation summary

17 The National Cultural Heritage Committee and Expert Examiners

In the current Act, the stated functions of the National Cultural Heritage Committee (the 'Committee') are broad and noble.⁴⁹ However, during much of its existence the Committee has been overwhelmed by prescribed roles that have overwhelmed its intended purpose.

It is currently compulsory that all export applications go before the Committee and for all export applications to be referred to an Expert Examiner. Making the Committee a compulsory part of the decision process is inefficient, unnecessarily bureaucratic and expensive in both time and resources. It causes unnecessary delay in decision-making. This is no fault of the members of the Committee or the Department—the problem is structural.

The Committee meets on average three times a year, so a property owner may have to wait several months before the Committee considers the application. Sometimes that consideration can be concluded in a short period because it is straightforward, however at other times the process of expert examination and then committee consideration takes a considerable time. Sometimes that delay is caused by the paucity of provenance material provided by the owner; sometimes the examiner is busy on other things. The decision-time for contentious applications has sometimes extended for more than two years, as applications have waited for consideration at tri-annual meetings, only to be sent for second and third expert opinions. This is clearly unacceptable to all parties involved.

Many applications (especially for temporary export) are very straightforward and could easily and cheaply be dealt with as an administrative matter. This would allow greater focus of time and resources on the difficult applications that require more expertise and consideration.

17.1 Re-configuration of the Committee function

During consultation the point was made that the Committee has a leadership role in the cultural heritage sector, provides an educative function and promotes awareness of the Act. While these are important in a sector that has limited opportunity for advocacy at the national level, on balance, I believe the standing Committee is not the

⁴⁹ Section 16 of the Act.

most effective mechanism for these things. Accordingly, I am recommending a modernised, more flexible approach.

Having a standing committee is not the most efficient way of achieving the intended purposes of the Committee. It is unreasonable to expect the Committee to be able to fulfil all of the functions set out in section 16 and this has been shown in practice. For example, the provision of strategic policy advice to the Department and to the Minister requires different expertise and experience to that required by specialised and complex significance assessments, or to maintain the register of experts. The process for providing the section 16 functions should be more flexible.

Accordingly it is proposed that there be no standing Committee. In its place there should be a Register of Cultural Property Experts.

The Register would be in two parts: one, the expert examiners; the other, a group of people with a range of experience and expertise in the cultural property sector including senior administrators of collecting institutions, other acknowledged leaders in various fields of cultural property and, importantly, Traditional Owners and representatives.

Thus structured, the Register would be a flexible pool from which the Department and the Minister could call for advice from an appropriate number of people with the most appropriate experience and expertise. In particular, this would allow ad hoc panels to be formed for specific circumstances, from the individuals with the most relevant attributes.

While it is acknowledged that this approach may forgo the corporate memory elements of a standing committee, it does ensure that the most specifically relevant qualities can be retained for each advice sought.

17.1.1 Advice as to Significance or contentious applications

When the Department wishes to seek advice on difficult decisions as to significance assessments it has received, the Department will be able to choose appropriate persons from the Register to form a panel to give that advice. In reality, this is likely to be similar to current practice—just faster and with less bureaucracy.

In this way, experts in the relevant specialty will provide the assessment without taking up the time of others whose expertise lies elsewhere. For example, if the application involves Aboriginal or Torres Strait Islander Material, the Department would be able to call on a group of expert Aboriginal or Torres Strait Islander people and curators to advise as to significance. In contrast, at the moment the Committee has just one specified position for an Aboriginal or Torres Strait Islander person who, rather inappropriately, may be expected to be able to advise on all such material.

17.1.2 Advice as to sectorial issues

Likewise, where the Department or the Minister requires particular sectorial advice on broader issues, a group would be selected from the Register of Cultural Property Experts to provide the best-informed advice as to the particular issue. This small group would become the panel for the purposes of the advice sought. In other words, the constituent members of the panel would be different according to the issue upon which advice is sought. While it is acknowledged that the success of this system is very dependent on the secretariat functions performed by the Department, so too is any committee system.

Similarly, it is envisaged that a panel could be drawn together from time to time to provide advice on the updating of the Control List, perhaps to review value thresholds or to advise on whether additional categories or objects should be included in the Declared Australian Protected Material list.

17.1.3 Flexibility of access to expertise

The process by which the current Committee is required to fulfil its role is inherently inefficient in that it takes no account of modern communication technologies with which we are now all very familiar. The Committee's permitted processes are unnecessarily prescribed by the Act and restrictions around teleconferencing and out-of-session work lead to unnecessary delays for applicants and can be burdensome for Committee members. It is important that any group drawn to form a panel of Cultural Property Experts be permitted to provide advice in the most appropriate way for the question at hand. The legislation should neither prescribe nor proscribe the manner in which advice can be sought or given. Unlike the current scheme, all communication technologies should be equally available to assist the advice givers to provide their counsel.

For example, if the Minister seeks advice on whether particular material should be Declared Australian Protected Material, it may be appropriate to convene members in a face-to-face meeting. Alternatively, where the Department is seeking a second opinion on a contentious application for the export of historic military material, it may be more appropriate to facilitate the co-ordinated advice from a number of appropriately qualified members, electronically.

Further, the legislation should not impose a limit on the number of persons appointed to a panel of Cultural Property Experts. Matters such as the number of members and the balance of expertise should be an administrative matter and determined by the Department. It should not be fossilised in legislation.

Survey Response

68% of respondents agreed to a large or very large extent to the reconfiguration of the Expert Examiner and National Cultural Heritage Committee structure into a Register of Cultural Property Experts to examine significance and representation

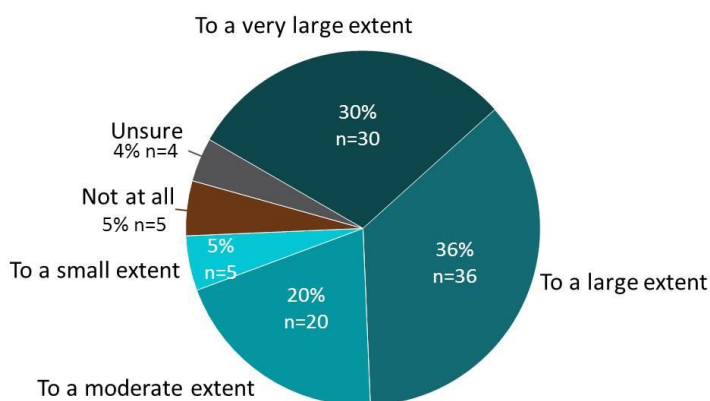


Figure 9—The extent to which respondents support the reconfiguration of the Expert Examiner and National Cultural Heritage Committee structure into a Register of Cultural Property Experts.⁵⁰

⁵⁰ Data from responses to question 18 of the survey. Total responses n=100.

17.2 The role of Expert Examiners

At the moment the significance assessments are undertaken by persons called Expert Examiners. These experts provide an invaluable link between the legislation and the different cultural heritage sectors, undertaking thorough research and providing a firm knowledge base for recommendations and decisions.

Some Expert Examiners have been concerned that the recommendations they provide, while not the final decision, may be seen as such by their sector and have adverse professional repercussions. For example, an Expert Examiner may be of the view that the export of an object should be permitted—knowing that other members of a sector may disagree. Similarly, an examiner might be uncomfortable to recommend against export where the applicant is an auction house with which they have a professional relationship. While some of these situations may not be direct conflicts of interest, they are legitimate concerns in small, highly specialised fields populated with very passionate individuals.

In the new model it is absolutely clear that the sole role of the expert is to assess the significance of the material for which export permission is sought. It is no longer the expert's role to make recommendations as to export permission. By limiting the task to describing the significance of the object and providing information regarding representation, the new model will ensure that experts are better able to give fearless advice.

To make clear this change of function, the new model no longer uses the term 'Expert Examiner' and in its place, the term 'Expert Cultural Significance Assessor' ('Assessor') has been adopted.

17.3 Expert Cultural Significance Assessors

Currently, a single examiner carries out the significance assessment unless additional opinions are requested by the applicant or the Committee. Over the years several submissions made to previous reviews have alleged corruption, bias or conflict of interest on the part of examiners. While such accusations are occasionally to be expected, obtaining two expert opinions would considerably enhance the robustness of the system.

While it is generally recommended that two Assessors should carry out significance assessments, there may be circumstances where a case is so straightforward (or obscure) that one would (or must) suffice. This should be left to administrative discretion. Requiring two assessments where one is sufficient (or only one is practicable) would create unnecessary delay in decision-making.

In addition, it is recommended that one of the Assessors should usually be from a public collecting institution. This is because:

- our public collecting institutions are repositories of great knowledge;
- it would increase the probity of the assessment given that they would not have any personal financial interest in the assessment; and
- as adequate representation is one of the elements in determining significance, the familiarity of these Assessors with public collections would assist this research.

It is sometimes argued that it is difficult enough to get one Assessor to do the assessment. This concern is understandable given that, currently, **all** applications must have a full significance assessment undertaken and these can require extensive research. However, with the adoption of the new model there would be many fewer referrals for expert assessment.⁵¹

17.3.1 Expanding the pool of expertise

It is important that the pool of expertise on the Register be expanded. As has been noted in previous reviews of the Act, the method of identifying and qualifying Assessors is a long-standing problem. Concerted effort must be put into expanding the pool of expertise.

On the basis that the best people to identify experts in a field are other acknowledged experts, each year, everyone on the Register should be asked to nominate persons that they believe would be suitable additions to the Register.

With the reconfiguration of the Committee, the process for identification, selection, training and oversight of the Assessors would be a function of the Department, underpinned by peer referrals from current Assessors. At the moment, the Minister

⁵¹ As outlined in Part 18.

makes the appointments to the Committee and additions to the Register are made by the Committee. In the new model, the Department would administer membership of the Register of Cultural Property Experts.

17.3.2 Payment for expertise

Experts would continue to be paid for their significance assessments. Similarly, experts who are called on to form a panel for advice either on contentious applications or strategic policy advice, would be paid appropriate sitting fees.

17.3.3 Terms of appointment

The term of appointment for Assessors would be for renewable periods. I suggest 5 years for institutional assessors and 3 years for others. There would be a review of any Assessor before reappointment: people change, reputations may diminish, incompetence or competence may be established, required expertise or care may be shown to be lacking. Assessors may also wish to nominate 'sabbatical' periods, where they will be temporarily removed from the Register when focusing on other matters.

17.3.4 Protection of Assessors from legal liability

As the Assessors will no longer provide recommendations (only assessments and information), they can no longer be seen to be a 'decision-maker' in any legal sense. To provide clear protection for them, the model includes a provision modelled on section 7E of the New Zealand *Protected Objects Act 1975*, providing that they may not be held personally liable for any advice provided in good faith.

17.3.5 New assessment forms

As a matter of implementation, new assessment reporting forms should be issued to:

- facilitate the provision of factual information;
- set out the provenance information;
- articulate the significance level; and
- provide comparative information in regard to representation in public collections.

In brief, it is important that the forms be structured in a way that will assist the Assessor to apply the correct criteria and provide quality information on which the decision-maker can rely.

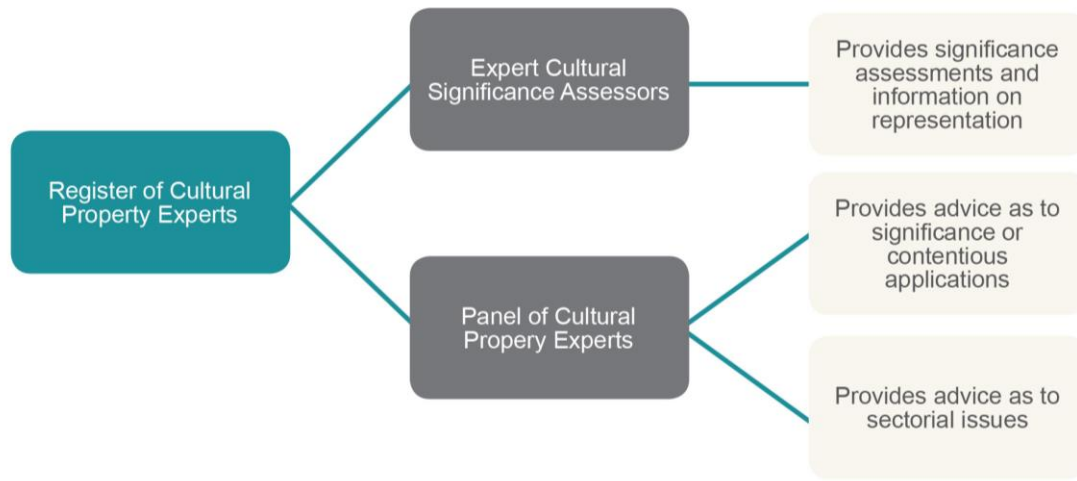


Figure 10—Register of Cultural Property Experts

18 Making the system faster and more efficient

Under the current Act, the process for decision-making is prescribed and inflexible. It involves multiple procedural stages and can be incredibly time-consuming. In addition, the process is the same for both the temporary export of a vintage car attending a rally in New Zealand and the permanent export of a George Cross awarded in World War II.

Some exemptions, known as General Permits, are made for public collecting institutions temporarily exporting material from their own collection but otherwise all exports are dealt with according to the same process—irrespective of the type of material or the degree of risk attending the export.

This leads to a process that is cumbersome and frustrating for applicants and it places a significant administrative burden on the Department. Similarly, it often places unreasonable expectations on the Expert Examiners, the Committee and the Minister (or delegate) where quick recommendations and decisions are required or expected. Concerns about the delays caused by this process were raised in consultation, particularly by the commercial art sector but also in several others.

18.1 A new decision-tree

While recognising the importance of a clearly articulated decision-making process, the proposed mechanisms for decisions are designed to be flexible, responsive and appropriate to the level of risk posed by the export. The features of the new model are:

- a shortened decision-tree, ensuring faster and more cost-effective processing of applications;
- separate decision-making processes for temporary and permanent exports;
- broadened eligibility for General Permits;
- increased transparency in both the information provided on application and the reasons for decision; and
- the retention of Certificates of Exemption for material legally exported from Australia prior to 1987.

Survey Response

63% of respondents agreed to a very large extent or to a large extent that the proposed export process is an improvement to the current system.

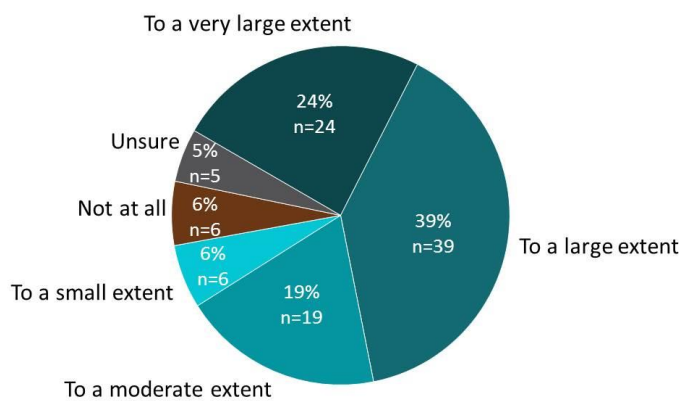


Figure 11—The extent to which respondents thought the proposed export process outlined in the diagram is an improvement to the current system.⁵²

18.2 New and extended temporary export processes

The current Act provides for only two types of permits—an Export Permit (which can have conditions, the most commonly used condition being ‘temporary export’) and a General Permit (available only to ‘principal collecting institutions’).

The new model retains the ability to place conditions on all types of permits, but provides new tools to speed and simplify the temporary export permits process.

In many instances, and perhaps the majority, people or organisations that apply for temporary export permits can be trusted to care for the material and bring it back to

⁵² Data from responses to question 20 of the survey. Total responses n=99.

Australia. Examples include public collecting institutions lending a work to an overseas institution for the purposes of public exhibition; a car club organising a rally in New Zealand; a stamp collectors' association taking a collection to London to compete in an international competition; an auction house touring works to promote an upcoming sale within Australia.

18.2.1 Streamlined procedure for temporary export permits

The Department will be empowered to issue temporary export permits for periods of up to two years⁵³ without the need for a significance assessment, unless:

- it is uncertain whether the material is in fact Declared Australian Protected Material; or
- the Department has concerns about the potential non-return of the material.

Case Study: Temporary export of stamp collection

In 2014, an applicant sought to temporarily export their stamp collection, for exhibition at an annual, one-week international stamp fair. As the collection met the current criteria as an Australian Protected Object the application was sent to an Expert Examiner for an assessment. The application was then considered by the National Cultural Heritage Committee for recommendation and then onto the Minister or delegate for decision. Notwithstanding that the permit was granted in 2014, the entire process had to be re-undertaken for the collector to participate in a 2015 fair.

Under the new model, the Department could simply issue a temporary export permit for the collection each year, if it were satisfied that it was not Declared Australian Protected Material and there were no other risks. Alternatively, the collector could join a philatelic society which holds a General Permit (see Part 19 below).

18.3 Greater safeguards for temporary exports

During consultation, questions were raised about the process for confirming the return of material that had gone out under a temporary permit. It comes down to two things:

⁵³ This would be in alignment with the General Permit allowed for touring exhibitions and the *Protection of Cultural Objects on Loan Act 2013* which also allows inwards loans for up to 2 years.

proof that what was exported was returned and the availability of a strong sanction regime for non-return.

The current practice, of requiring the submission of a declaration, should be retained. However what associated documentation should accompany that documentation is important. For example, it could require photographs duly witnessed prior to export and upon return; it could require the provision of import documentation required under other legislation such as those required by Border Protection and Quarantine. It would be a simple matter for a copy of these to be provided to the Department to ensure that what was exported, has been returned. This is an administrative matter but the new legislative framework must provide for it.

As to sanctions, it is proposed that under the new classification system, any Australian Heritage Material which is granted temporary export is, for the period that it is out of Australia, assigned the classification of Australian Protected Material.⁵⁴ The classification of the material as Australian Protected Material while it is overseas allows higher level protection by ensuring that non-compliance can incur the full palette of sanctions.

18.4 Extensions to be permitted 'in situ'

Extensions to temporary permits should be permitted without the material having to physically return to Australia. This is a waste of everyone's time. If there is no question as to the material's condition or safety, nor any indication of non-compliance with the terms of the temporary permit, then an extension should be available without requiring interim physical return as a pre-condition.

19 General Permits

19.1 Extension of the collecting institutions General Permit system

Currently, General Permits are granted to a small group of public collecting institutions, allowing them to temporarily export material from within their collections without applying for individual permits.⁵⁵ At the end of each financial year, the

⁵⁴ Normally cultural property is classified as Australian Protected Material only after significance and representation assessment but the new model allows low risk material to be granted a temporary export permit without formal assessment.

⁵⁵ Section 10A.

institutions provide a report to the Department on activity under the General Permit. This works effectively in addressing low-risk, temporary exports without clogging the system with applications and assessments.

For example, if a museum is organising an international touring exhibition it is very likely that the exhibition will include objects from within its own collection as well as others that it selects and borrows from public and private collections. At the moment, the museum can export its own material under its General Permit but must seek a temporary export permit for the material that it is borrowing for the very same purpose. That material must go through a full significance and representation assessment— notwithstanding that one already knows (by the fact that it has been selected for an international touring exhibition) that it is likely to be significant.

Under the new model, General Permits issued to collecting institutions would no longer be limited to accessioned material but would extend to cover material that they borrow pursuant to a formal loan agreement.

19.2 Renewal of General Permits

It is expected that most General Permits would be valid for five years and renewable. However, in regard to institutions established by Commonwealth, state or territory legislation, the process of application and renewal would be inefficient. These trusted organisations have ongoing governance and reporting requirements to government therefore it is proposed that an organisation with such oversight obligations should be granted a permit that is not limited by a fixed term. However ongoing reporting on export will be required and sanctions (including termination) for misuse will apply.

19.3 Extension of the General Permit system to other organisations

The new model would extend the eligibility criteria for General Permits to a broad range of other trusted organisations which could include collecting institutions, special interest groups, universities and auction houses. This would allow the General Permit system to deal with a considerable proportion of the temporary export applications in a prompt and cost-effective manner.

Eligibility criteria would apply so that risk may be better assessed or reduced but would be broad enough to capture a wide range of organisations. An applicant

organisation would be required to provide information about its governance, membership structure, nature of its activities and an explanation as to the need for a General Permit. Organisations would be approved according to risk.

For example an approved vintage car peak body may be granted a General Permit to export the vintage cars of its members to attend a rally in an overseas country on the basis that they would be returning at the end of that event. The risks of non-return are low and the consequences to the organiser of failure would be high: available sanctions for a breach would include revocation of the General Permit, fines and forfeiture of the vehicle.

By way of further example, at the moment, if an auction house wishes to take a collection of works to New York or London to promote a local sale that will be held in Australia, it must apply for a temporary export permit for each object and each object must go through the full significance assessment procedure. This puts auction houses (and their clients) to unnecessary expense and delay for what is only a temporary, low risk, promotional, purpose. It deleteriously affects the ability of auction houses to promote overseas the sale of Australian material—notwithstanding that the sale is to be held in Australia. The situation is even more inefficient and constrictive given that, if the works are subsequently sold to a foreign purchaser, the buyer will have to reapply for a permanent export permit.

The extension of eligibility of General Permits was widely tested in the consultation process using the examples of auction houses and special interest groups. While broadly positive about the concept, many stakeholders (including those who were being suggested as candidates for General Permits under the new model) reiterated the need to ensure that rigorous oversight of the suitability of organisations and compliance with conditions would be crucial to ensure the safety of heritage material being exported under them. It was noted that, even within ‘categories’ of organisations (for example, special interest groups) the standards of control, organisation and governance might vary quite widely.⁵⁶

It is for this reason that, rather than the different categories of General Permits envisaged in the Position Paper, the new model adopts a single General Permit type

⁵⁶ Accordingly, unless there are special circumstances, the issue of General Permits to special interest groups should usually be limited to national or state bodies.

but makes clear that conditions should be varied for each individual organisation and export purpose. This system allows the goals of streamlining the temporary export permit system to be met while ensuring the appropriate protection of heritage material is achieved.

Case Study: General Permits

Since 2002 the majority of temporary export permit applications have come from organisations that may be eligible for a General Permit under the new model. Of 290 applications, approximately 170 of these were from organisations that may be eligible for General Permits under the new model, including: other collecting institutions, cultural organisations, auction houses, universities and research facilities.

This demonstrates that if trusted organisations were granted General Permits for the temporary export of material it would greatly ease the pressure on the Department and Expert Examiners. This would in turn allow resources to be focused on the processing of other, potentially more risky, applications therefore making those processes more efficient.

Case Study: General Permits—Parliament House Art Collection

In 2015, the Parliament House Art Collection (PHAC) sought to temporarily export a work from its collection for an international exhibition. It met the criteria as an Australian Protected Object. While an Australian Government agency with a significant collection of artworks, the PHAC does not meet the criteria of a 'Principal Collecting Institution' and therefore is not eligible for a General Permit under the current Act.

This meant that the application required a full assessment by an Expert Examiner, consideration by the National Cultural Heritage Committee and decision by the Minister or delegate.

Under the new model, the PHAC would be eligible for a General Permit and would merely need to report temporary export activity to the Department in line with the conditions of its permit.

19.4 Conditions on General Permits

As noted above, the conditions imposed on a General Permit may differ according to the type of organisation or the activity being undertaken. The conditions may include the regularity of reporting (e.g. on each use of the permit versus annually); length of the export period (e.g. two years versus three months); the eligible purposes for export (e.g. exhibitions, research, participation in events); and whether Declared Australian Protected Material can be exported under the General Permit.

General Permits would be issued by the Department for a set period at which time they would be reviewed. If misused, General Permits can be revoked at the discretion of the Department at any time.

To ensure that material exported under a General Permit is returned, the legislation should provide for severe sanctions for the breach of any conditions of the permit.⁵⁷

Survey Response

62% of respondents agree to a very large extent or to a large extent that the extension of the General Permit system is an appropriate streamlining of the temporary export process.

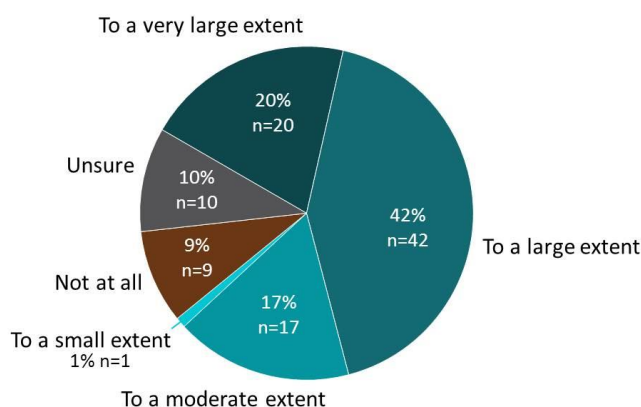


Figure 12—The extent to which respondents think the extension of the General Permit system is an appropriate streamlining of the temporary export process.⁵⁸

⁵⁷ These are further outlined at Part D.

⁵⁸ Data from responses to question 21 of the survey. Total responses n=99.

20 Retention of Certificates of Exemption for material exported prior to 1987

Sometimes, the owner of material exported from Australia prior to 1987 (when the legislation was first enacted) may wish to re-import that material on a temporary basis. These objects may be coming to Australia for an exhibition, or ahead of an auction to be held in Australia. Currently, that owner can apply for a Certificate of Exemption which allows for the material to be re-exported without being subject to the Act. This is a useful and important mechanism that recognises the circulation of important Australian cultural material but respects the principle of legislation not applying retrospectively.

For example, a Certificate of Export was issued in 2013 for the Royal Collection of Australian Stamps from Buckingham Palace. The stamps had been exported from Australia in the early twentieth century and were being exhibited as part of the International Stamp Exhibition in Melbourne. Although the collection would undoubtedly meet the current Australian Protected Object criteria, the Certificate of Exemption allowed the collection to be imported to Australia and later returned to its lawful owner.

It is proposed to retain this mechanism.

20.1 Factors to be taken into account for Certificates of Exemption

As useful as the Certificate of Exemption may be, what is missing from the current Act is clarity as to when it should be granted and the factors that should be considered. Under the current Act, the decision-maker receives no explicit guidance.

Under the new model, Certificates cannot be granted for Ancestral remains. Further, the following should be considered in the decision to grant or deny a certificate:

- cultural sensitivities regarding the material (including consultation which may be required for Aboriginal or Torres Strait Islander Material);
- the purpose for which it is being imported (including whether there is likelihood of it remaining in Australia e.g. it is being imported to be offered for sale); and
- whether the initial export from Australia was legal (either under the Act or another export regulation).

Confusion about the transferability and longevity of Certificates of Exemption was raised in consultation, particularly where the material is being imported for sale and a new purchaser may wish to re-export. The new model makes explicit that the permits and certificates attach to the **material**, not the individual owner, however time limits may be applied (to ensure that this system is not used to simply avoid the regulation where the intention is clearly the long-term holding of material in Australia).

21 Making the system more compatible with other systems of export and import regulation

The export and import of material under the Act is also subject to other Australian Government regulation including the *Environment Protection and Biodiversity Conservation Act 1999* (EPBC Act) and the *Historic Shipwrecks Act 1976* and, most obviously, the *Customs Act 1901*.⁵⁹ In relation to other Australia Government legislation, the over-riding principle should be that, where possible, the systems are compatible and duplication is minimised.

An example of this could be in setting the eligibility for General Permits. Currently, some Australian scientific institutions are registered for the purposes of exchanging certain CITES-specimens and Australian native specimens without a permit under the EPBC Act. These organisations should be automatically granted a General Permit and the reporting and record keeping requirements aligned.

22 Permanent export permit process

Prescribed by the legislation and notwithstanding everyone's best efforts, the present application and assessment system is inefficient, cumbersome and slow. All applications must be referred to the Committee and to an Expert Examiner for a full significance assessment. There is no discretion—all applications must go through the full process. This causes unnecessary red tape, delay and expense for applicants and government. This mandatory process should be abolished.

The new model seeks to recast the process for issuing permanent export permits to ensure that it is readily understandable, equitable and transparent. The principal features of the new model include:

⁵⁹ Alignment with the Customs regime broadly is discussed further at Part D.

- clarity on whether an application is required at all;
- transparency at all stages of the process;
- a streamlined decision-making process;
- a clarified role for experts; and
- the reservation of Ministerial powers for only the most critical decisions.

22.1 Information to be provided by the applicant

At the moment there is a paucity of information provided by many owners and the decision-makers and Expert Examiners must spend considerable time researching information that, in most cases, is most easily provided by the owner. This often leads to unnecessary expense in obtaining the information necessary to make an informed decision, increases the time taken to form a view as to the object's significance and thus delays the time required to make a decision.

In the new model, the current requirements for applications are maintained, including that the application be made in writing in a form prescribed by the Department. However the new model clearly places the onus on the applicant to provide more information regarding the current owner, the description of the object and all available provenance information.

It is the responsibility of the owner to provide, to the extent possible, the information required for good decision-making. The Department will have the power to determine whether the applicant has provided sufficient description and provenance information to permit proper assessment or whether more information is required or can reasonably be expected of the applicant.

Should further information be required, the applicant would be advised and no further action taken on the application until the information sought is provided. When the information is provided, the process can continue.

Of course, there will be legitimate situations where an applicant does not possess a great deal of information about their material. It is anticipated that in such scenarios the online publishing of applications⁶⁰ could lead to the 'crowd-sourcing' of information

⁶⁰ Discussed below at Part 24.

about the material thus also allowing for the enrichment of our understanding of Australia's heritage.

22.2 Application fee

At the moment the application process is free. Concerns have been raised that the imposition of a fee might send owners 'underground' and that they would be more likely to export heritage material without seeking permits. More likely, if the fee were linked to the fee paid for the significance assessment, owners would see that this is a real cost of their decision to export.

The new model includes the necessary authority to charge fees. However the decision to charge and the setting of the fee is a matter for implementation as administration of a fee could impose a regulatory cost and burden that outweighs the funds collected.

22.3 Preliminary assessment by the Department

There are many decisions that could and should be taken at the Department level without having to go to the cost and delay of being sent to cultural heritage experts.

Under the new model, on receipt of an application that contains sufficient information, the Department would check, by applying the statutory tests/thresholds, whether the material is:

- Declared Australian Protected Material; or
- Australian Heritage Material; and if so
- whether the material may be Australian Protected Material.

Material that does not pass the statutory age and value thresholds is not Australian Heritage Material and a Letter of Clearance can be issued if required.

However, given that thresholds of age and value are a reasonable but imperfect tool, the Department should have an ability to seek expert advice and review the significance of material that does not fall within the thresholds. For example this may happen if there is uncertainty over whether material meets the criteria or if a potentially significant item comes to the attention of the Department in some other way.

If the material exceeds the relevant preliminary age and value threshold, it is Australian Heritage Material. Then the question becomes whether its significance is such that an export permit should be issued and, if so, on what terms.

At this stage the Department should be able to:

- grant the export permit sought; or
- grant the permit subject to conditions; or
- refuse the permit sought (for example objects which are clearly within the definition of Declared Australian Protected Material); or
- if there is any doubt as to the material's potential significance, send the application for significance assessment; and/or
- seek advice from appropriate authorities, for example whether the material is protected by other Commonwealth, state or territory legislation or whether consultation with Aboriginal or Torres Strait Islander people or representatives is required.

Not having to send everything for external assessment will streamline the process and make it faster, cheaper and more efficient.

Concern was raised during consultation that, in order to ensure the proposed streamlining of process while not comprising the assessment or protection of cultural material, it is vital that the Departmental section be adequately resourced. This includes having a sufficient number of staff with appropriate training and a balance of experience. Irrespective of the legislative framework, without adequate resourcing and priority by the Department any system will fail to meet efficiency targets.

22.4 Letters of clearance

The current system incorporates an informal document known as a 'letter of clearance'. These letters are issued by the Department to owners of goods which are of a type regulated by the Act but which do not meet the minimum criteria to be assessed under the Act—for example, a 15 year old Indigenous artwork. The letters have no statutory basis but function as documentation for an owner if the export is questioned by an export agent or a customs official.

There have been concerns from stakeholders that these letters are sometimes issued in respect of objects that were not subjected to a significance assessment because the owner deliberately provided incomplete or misleading information. That is no reason to stop issuing letters of clearance. It is, however, reason to review the sanctions provided in the legislation to ensure that people who know their obligations and seek to avoid them through such means, face both fines and automatic forfeiture of title to the Commonwealth. Faced with monetary penalty and potential claim from any overseas purchaser who is required to hand back the material, owners may be less inclined to such behaviour.

Accordingly, the proposed model intends to retain this administrative mechanism as it fulfils an important need for owners of objects not regulated by the Act. Rather than abolishing letters of clearance, the current issues will be addressed by providing a clearer threshold for objects which are subject to regulation, based on the more objective criteria of age and value thresholds and by the requirement to provide more detailed information in the application forms.

Also, the form of the letter should be reconsidered. It should be compulsory for any such letter of clearance to include a picture of the object (or other means of recognition) so that Border Force officers or other officials can better attach the letter to an individual, identifiable object.

22.5 Assessment of Australian Heritage Material by experts

As already discussed, it is proposed that in most cases significance assessments be undertaken by two Expert Cultural Significance Assessors.

In the new model both Assessors submit their significance assessments to the Department. If those recommendations are unanimous the Department may either:

- make the decision in accordance with the assessment; or
- if concerned with the findings, convene a panel of appropriately qualified experts from the Register of Cultural Property Experts to consider the application, expert assessments and any other applicable information.

If the advice of the Expert Cultural Significance Assessors as to the significance of the material is not unanimous or the Department wishes to seek further advice, the Department will refer the matter to a panel from the Register.

After considering the application, expert assessments and any other applicable information, the panel may recommend that the Department:

- grant a permit;
- refuse a permit; or
- undertake or cause further investigation and consultation.

22.6 Change of decision-maker from Minister to Department

Under the present Act all of the decision-making powers are at the discretion of the Minister. In practice, the Minister delegates the majority of those powers to the executive of the Department. The Minister retains the legal responsibility but, in reality has little direct role in most decisions relating to the export of cultural material. Indeed it would be impracticable for the Minister to have a greater role.

Instead of applying to the Minister for a permit to export Australian Heritage Material, it is proposed that the owner (or agent) apply to the Department. This is done presently by delegation and the change is merely a reflection of the current practice.

In the new model, like the New Zealand legislation, both the decision-making power and responsibility for the decision to grant or refuse an export permit would be that of a Senior Executive Service (SES) officer of the Department. The role of the Minister should be reserved for higher-level powers.

22.7 Department's decision

The Department considers the expert significance and representation assessments (and where applicable the advice from other sources or the reasoning and findings of the panel). In light of that information it decides:

- whether the Australian Heritage Material has the appropriate national, regional or local significance to be Australian Protected Material;
- if so, whether the material is adequately represented in Australian public collecting institutions;

- if not, whether or not to issue the export permit;
- if so, whether the permit should be permanent or temporary; and
- whether there should be any conditions attached.

The export permit for Australian Protected Material may be:

- granted or refused; or
- granted on a temporary basis—with or without conditions.

To ensure that the process is as speedy as possible the Department will be required to provide the applicant with notice of the decision within a prescribed period after the decision is made. If the Department refuses to grant the permit, it will be required to provide the applicant with the reasons for the refusal.

Administrative guidelines should be written that provide expected targets for the completion of certain stages of the process. This should not be included in the legislation itself as timing for much of the process (such as the expert assessment process) is outside the control of the Department.

22.8 Conditions

Any permanent or temporary export permit, for any class of material, will be subject to such conditions as the Department may impose. Applicants for temporary permits are familiar with restrictions as to time or purpose of export but the Department should also consider other issues. For example, when considering an application for a temporary permit it may be important to require that any country to which the material is to travel has immunity from seizure legislation (to ensure that the material would not be subject to a claim in that jurisdiction and be prevented from returning to Australia).

22.9 Permit details

Under the new model, the permit will explicitly attach to the material, not the applicant. This will remove an administrative burden where material is legitimately traded within Australia prior to being exported. The permits themselves will be compliant with the UNESCO model permit and clearly identify the material, either by photograph or other relevant identifier.

22.10 Appeal

The Administrative Appeals Tribunal should be retained as the appeal body for owners wishing to challenge a decision.

23 Impact of the changes

The chart below shows the potential impact on the applications received in a given year.⁶¹ Under the current system, all applications required full significance assessment and consideration by the National Cultural Heritage Committee.

Potential impact of the new model on applications

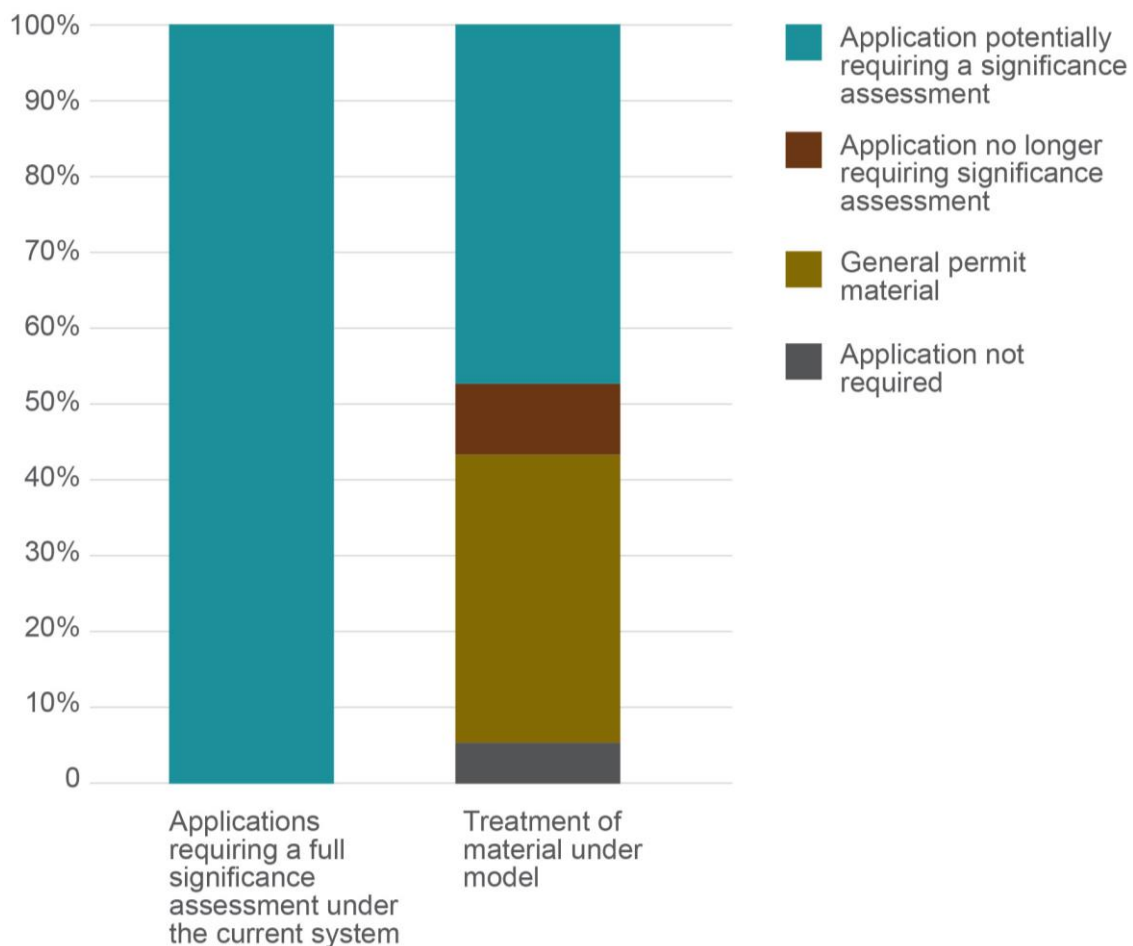


Figure 13—Potential impact of the model on new applications

Under the new system:

⁶¹ Figures based on the analysis of applications received in 2013.

- 5% of applications would **no longer be made**, either because the material no longer meets the age and value thresholds or because the material is included on the list of Declared Australian Protected Material;
- 40% of applications would **no longer be required** as the material would be covered by General Permits;
- 10% of applications would be required but would **not require significance assessment**; and
- 45% of applications **may require a significance assessment**.

24 Transparency

Transparency and accountability are central principles of the new model. While this will need to be drafted in such a way as to respect the principles of the *Privacy Act 1988*, the new model proposes that the following be made publically available:

- applications for permanent export permits, including detailed object information, current owner (perhaps only initials for individual owners) and provenance (excluding current location for security reasons);
- a short period⁶² for public submissions is then included to provide the opportunity for comment and information which may be taken into consideration by the Department or the Assessors;
- significance reports prepared by Expert Cultural Significance Assessors, including an opt-in provision for the name of the expert who prepared the assessment; and
- decisions, with reasoning, as to the granting or refusal of export permits.

Throughout consultation, stakeholders have agreed with the proposal to introduce a large measure of transparency into the process, including a short period for public submissions in regard to permanent export applications.⁶³ Having such information publicly available would address several potential deficiencies (intentional or not) in both applications and assessments. It would:

⁶² Perhaps two weeks.

⁶³ This may mirror other similar processes for example, the one used by the Australian Government Department of the Environment for exceptional wildlife trade permit applications.

- provide an excellent informal way of enhancing and invigorating the quality and completeness of both applications and reports;
- where the applicant has little information about the provenance of the material the public could potentially provide additional information that may assist assessment;
- contribute to an enrichment of knowledge about particular objects and classes of material;
- enhance accountability for decision-makers;
- increase public understanding of the process and the basis for decisions made; and
- as the information is likely to be accessed by members of what are often very niche sectors, rapidly bring incorrect or incomplete information provided by applicants to the attention of the Department.

A submission process does have resource implications for the Department. In addition to the obvious need to have electronic systems in place to receive online applications and publish information within reasonable time frames, there will be resources required to assess received submissions and filter out vicious or incorrect content. That said, it is an important feature of the modernisation of the process. Knowledge and expertise is no longer held in silos. It is distributed. The digital world has irretrievably changed the old paradigms by which expertise used to be valued and protected.

Concerns were raised in consultation about the risk of the transparency model leading to the release of information or details about material that are sensitive for cultural, spiritual, security or other reasons. There were particular concerns about exposing secret sacred material. The transparency model will need to ensure that material that has such sensitivities is not made public or that the secret and or sacred elements of the material are not made public. It is integral to the model that valid exceptions to the transparency measures be granted.

Survey Response

74% of respondents agreed to a very large extent or to a large extent with the proposed changes to publishing information about applications, significance assessments and decisions as to the granting or refusal of permits.

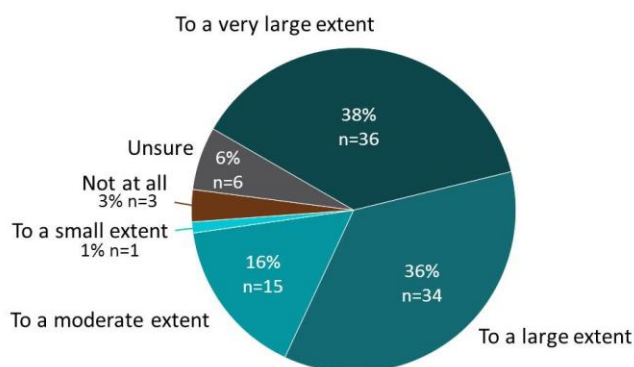


Figure 14—The extent to which respondents agree with publishing information.⁶⁴

25 National Cultural Heritage Account

The Act establishes the National Cultural Heritage Account (the 'Account'). It is a 'section 80 special account' for the purposes of the *Public Governance, Performance and Accountability Act 2013*.

25.1 Purpose of establishing the Account

Currently the Account may only be expended for the purpose set out in subsection 25(b) of the Act:

Amounts standing to the credit of the National Cultural Heritage Account may be expended for the purpose of facilitating the acquisition of Australian protected objects for display or safe-keeping.

This purpose is interpreted broadly and includes not only the purchase price of a Australian Protected Object but also, depending on the circumstances, may include transportation costs, conservation work, legal or other professional advice and any other costs that could be characterised as necessary to facilitate or assist in the acquisition of a protected object. The Second Reading Speech made when the Act

⁶⁴ Data from responses to question 22 of the survey. Total responses n=95.

was introduced into Parliament⁶⁵ supports a wide interpretation, making it clear that funding should be available to:

- assist the retention and protection of objects for which export permits have been refused; and
- assist institutions to acquire such material and to make those objects available to the public; and thus
- assist owners of such material to obtain a fair market price on the local market for them—encouraging compliance with the scheme.

As noted in the report of the 2009 Review, the purpose of assisting owners, while clearly expressed in the Second Reading Speech, is not reflected in the legislation. It should be explicit that the funds may be utilised to cover expenses that would reasonably 'facilitate' the acquisition.

25.2 New, widened purpose of the Account

Under the new model, the assistance that the Account provides would focus on the public benefit of retaining, protecting and making accessible important cultural material for the public and future generations—not just acquisition.

While it is essential to provide funds to support the acquisition of cultural material by collecting institutions, the Act, its Regulations and its Guidelines should reflect the widened purpose of the Account so that it is available not only for the acquisition but includes appropriate activities related to the acquisition and ongoing care.

That said, it should be noted that the Account is **not** a compensation fund for owners of culturally significant material who are unable to export their property and sell it on the international market. That is not, and should not be, its purpose. The material denied export has been assessed to be of the highest importance to Australia and it is in the public interest that it be available to the public. The Account should provide funds to this end.

⁶⁵ It should also be noted that the funding mechanism referred to in the Second Reading Speech was the National Cultural Heritage Fund, which had initially been envisaged as a different type of funding mechanism. This may go some way to explaining the discrepancies.

25.3 Eligibility

The current legislation is silent on eligibility for provision of funds from the Account. However, as the Account may only be used to facilitate the acquisition of an Australian Protected Object for public display or safekeeping, in practice, funds are only granted to not-for-profit organisations that will undertake the preservation and public display of the object. Accordingly, it should be made explicit in the new scheme that the funds are to assist not-for-profit organisations and must be utilised for the retention, public access and preservation of Australian cultural material.⁶⁶

25.4 New priorities

The Account should be designed to promote the effectiveness of the legislation. For example, when significant material is prohibited from export and retained within Australia, the Account should be one of the many doors through which owners can provide for the conservation, storage and protection of that material.

Given the costs of such matters, the Guidelines for the use of the Account should provide that the priority of expenditure be as follows:

- The overseas acquisition of Australia-related cultural heritage material for return to Australia;
- the acquisition in Australia of Australia-related cultural heritage material; and
- other activities related to, or which will facilitate the acquisition of, Australia-related cultural heritage material (such as transportation, professional advices, conservation and specialised storage systems—including digital storage).

⁶⁶ Exceptions would be made to the broad public access requirements for the acquisition of culturally sensitive material by Aboriginal and Torres Strait Islander keeping places.

Survey Response

80% of respondents agreed that the widening of the purpose of the National Cultural Heritage Account is appropriate.

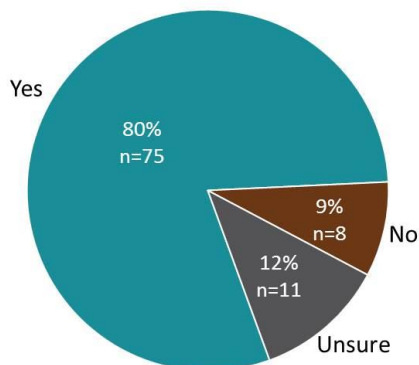


Figure 15—Respondent's views on whether the widening of the purpose of the National Cultural Heritage Account is appropriate.⁶⁷

25.5 Decision-maker

Under the present legislation the decision to provide funds from the Account is made by the Minister, often after advice from the Committee. To ensure the greatest effectiveness of the Account, the decision to provide funds should be retained by the Minister (and where appropriate by delegation, the Department). Where the Department or the Minister believes that the assessment of an application to the Account would benefit from external advice, it can seek advice from one or more experts on the Register or form a panel.

In making a decision on the use of funds from the Account, the Minister or delegate should have regard to the following:

- the significance of the material;
- the suitability of the applicant organisation;
- the purpose for which the funding is sought; and
 - where acquisition is the purpose, the establishment of a fair market value for the material;

⁶⁷ Data from responses to question 23 of the survey. Total responses n=94.

- where conservation or storage is the purpose of the application, establishing and taking into account the fair market value of the services; and
- the source and amount of third party contributions to the project (noting that not all contributions will be financial).⁶⁸

25.6 Financial contributions to the Account

When the Act was initially drafted, the funding mechanism was to be through a fund with payments made by all levels of Government and private individuals. This mechanism was never realised and in 1999 the Act was amended to create the existing Account, solely funded by the Commonwealth.

From time to time it has been suggested that the public be permitted to contribute to the Account and be enticed to do so by giving it Deductible Gift Recipient (DGR) status. This is not recommended. The public collecting institutions or not-for-profit interest groups that are eligible to apply to the Account already have (or are usually entitled to) DGR status, it is therefore inappropriate to have a government fund competing with these organisations for philanthropic dollars.

Throughout the consultation period, stakeholders raised concerns with the amount of money available in the Account and that there was a disconnect between the process of denying permits and acquisition of the material under the Account.

Since its funding began in 2000 the quantum of the Account has remained unchanged. Given the market cost of important heritage material, \$0.5m (the original allocation) is a very modest amount when attempting to purchase nationally significant cultural objects.

While there is great variation within international schemes of the same intent, it should be noted that the equivalent Canadian Government fund is \$1.6m CAD and that institutions in the United Kingdom have access to the very significant lottery fund.

Because of the current economic situation it is recommended that a very modest increase be made to the Australian Account—namely, that the Government:

⁶⁸ The Account should be promoted as a contributor towards an acquisition that also has support from other levels of government and other donors.

- makes an annual payment to the Account of \$1m; and
- allows any unspent money at the end of the financial year to accumulate so that it is available in the following year.

This would allow the Account to be a more effective partner with organisations in the sector and thus give effect to one of the central intents of the legislation and the UNESCO Convention 1970.

There should also be a clear communication with the sector when material has been refused export, actively encouraging its acquisition (either with or without Account assistance) by an appropriate institution or organisation. While it is not the role of the Australian Government to guarantee the purchase of the material, it could facilitate discussions between the owner and appropriate bodies.

New export process flow chart

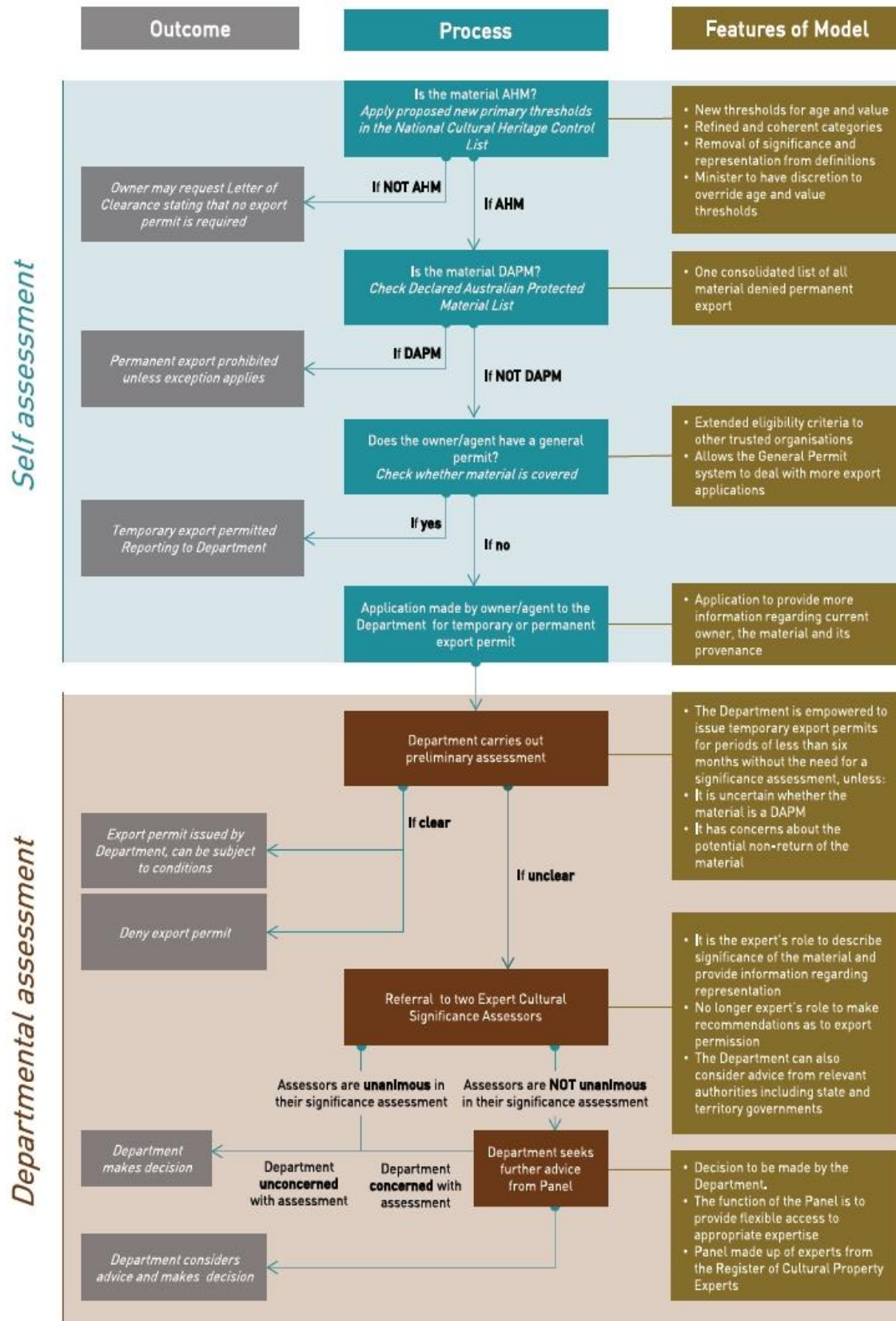


Figure 16—New export process

Part C: Protection of foreign cultural material

26 Australia's international commitments

Australia has made a long and deep commitment to the international community to protect cultural property. It was one of the original signatories to the UNESCO *Convention for the Protection of Cultural Property in the Event of Armed Conflict* 1954 (the 'Hague Convention 1954') and in 1989 it ratified the UNESCO *Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property* 1970 (the 'UNESCO Convention 1970'), which is given domestic effect through the *Protection of Movable Cultural Heritage Act 1986* ('the Act').

At the moment, the Act protects only foreign cultural material that has been illegally exported. It is paradoxical that it should provide an extensive mechanism solely for what is, in effect, the enforcement of a foreign administrative matter,⁶⁹ while being silent as to material that has been stolen⁷⁰ or looted from war zones.⁷¹

That is not to say that Australia does not already have obligations under international humanitarian law to protect cultural property in the event of armed conflict. It does. These obligations may arise from:

- the four Geneva Conventions of 1949 and the two Additional Protocols of 1977;
- the Hague Convention 1954;
- the 1998 Rome Statute of the International Criminal Court; and
- customary rules of international humanitarian law.

In more recent times, Australia has supported Resolution 2199 of the United Nations Security Council urging member States to prevent the trade in items of cultural, scientific and religious importance illegally removed from Iraq and Syria during periods of conflict.

At the moment, the statutory reflection of these commitments is somewhat disjointed and piecemeal. Indeed, no Australian law specifically protects against the import of

⁶⁹ Activity in the absence of a permit.

⁷⁰ A breach of criminal law.

⁷¹ A breach of criminal law and international humanitarian law.

cultural material that has either been stolen or looted in time of war.⁷² While the Act is the primary legislative tool by which Australia implements its commitments regarding movable cultural property, it only provides protection in regard to foreign cultural material that has been illegally exported from its country of origin.⁷³

Australia's international obligations in relation to cultural property in wartime are implemented through the creation of specific criminal offences under the *Crimes Act 1914* and *Criminal Code Act 1995* and Security Council sanctions are enacted through Regulations to the *Charter of the United Nations Act 1945*. Some obligations are implemented through non-legislative means (such as the Australian Defence Forces rules of engagement and training).⁷⁴ In the majority of these cases the various frameworks deal with the activity but not the return or restitution of cultural property that may be discovered in Australia.

The terms of reference for the Review directed consideration of the UNESCO Convention 1970, the intersection with the Hague Convention 1954 and whether other international conventions or practices could provide useful guidance. In looking at the broader international landscape, I have given consideration to the First and Second Protocols to the Hague Convention 1954 ('Protocols'), United Nations Security Council Resolution 2199 and the UNIDROIT *Convention on Stolen or Illegally Exported Cultural Objects* 1995 ('UNIDROIT Convention 1995').

The analysis undertaken as part of this Review demonstrated that the present legislative framework does not provide a coherent range of tools to assist law enforcement officers to deliver Australia's obligations regarding the prevention of illicit trade in cultural material. The need for a comprehensive legislative framework that articulates Australia's commitment to principle and that confers corresponding powers⁷⁵ has been recently highlighted by the role that looted and stolen cultural

⁷² Specific activity is from time to time covered by such mechanisms as the *Charter of the United Nations (Sanctions-Iraq) Regulations 2008*, which regulates illegally removed cultural property from Iraq coming into Australia.

⁷³ Although it might be argued that stolen and looted material is unlikely to have been legally exported, this may occur in countries where a minority is being actively persecuted by the sovereign government – one need only look at the (perfectly legally exported) looting of Jewish cultural material by the Nazi state.

⁷⁴ Recognising that breaches may be offences under the *Defence Force Discipline Act 1982*.

⁷⁵ Including search, hold, seizure and sanction.

material plays in the destruction of the heritage of our international colleagues and in the funding of terrorist groups.⁷⁶

27 International Landscape

There has been a long history of international attempts to provide protection to cultural property. Given that cultural property is one of the principal mechanisms by which we create, maintain and describe identity, it is unsurprising that parties to international and non-international armed conflicts recognise the strategic value of cultural property. To threaten the cultural property of the opponent is to threaten its identity and it is this poignant link between cultural property and cultural identity that so often imperils the former in the service of the latter.

It is because of its powerful link with identity that cultural property often has a strategic function in armed conflicts. In past and even current conflicts, it appears to have been used by combatants as a bargaining tool; its destruction as a weapon; its theft as the rightful prize of the champion. Indeed, for many centuries, cultural property was seen as one of the spoils that went to the victor and many of the great museums are filled with such prizes, self-awarded to the victorious. Not only were they a way of financing the cost of war, they also provided an eloquent symbol of power and success to the victor's public and, at the same time, a proof of military and cultural inferiority to the public of the vanquished.

It was not until the nineteenth century that debate started as to the appropriateness of such conduct.⁷⁷ Perhaps the most important catalyst for this debate was the promulgation of the *Lieber Code* by Abraham Lincoln in 1863, which, in part, stated:

Classical works of art, libraries, scientific collections, or precious instruments such as astronomical telescopes, as well as hospitals, must be secured against all avoidable injury, even when they are contained in fortified places whilst besieged or bombarded.

⁷⁶ Meeting of Minister of Foreign Affairs, the Hon Julie Bishop MP with the Director-General of UNESCO Irina Bokova on 20 April 2015. See article: 'Director-General meets Australia's Minister for Foreign Affairs' in the Media Services section of the UNESCO website <www.unesco.org>.

⁷⁷ See Jiri Toman, 'The Protection of Cultural Property in the Event of Armed Conflict', Dartmouth Publishing and UNESCO, 1996, p5. For a useful summary of history of cultural material in armed conflict also see Anthi Helleni Poulos, 'The Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict: An Historic Analysis,' *International Journal of Legal Information*, 2000:28, p1.

However, the Code went on to 'recognise' that the conquering nation had the right to remove works of art, libraries and scientific collections belonging to the hostile nation.⁷⁸ This initiative was followed over the years by various treaties and declarations. The most important of these were the *Declaration of Brussels* of 27 August 1874,⁷⁹ the 1907 Hague Convention *Respecting the Laws and Customs of War on Land*⁸⁰ and the *Roerich Pact* of 1935.⁸¹ The promulgation of such rules did little to protect cultural material from destruction and looting in the wars that followed them but to the extent that they were responsible for saving any, we can be grateful.

Currently, the international landscape includes both overarching international conventions to provide protection for cultural material in both times of war and peace (such as the UNESCO Convention 1970 and the Hague Convention 1954) and targeted agreements for specific situations (such as United Nations Security Council Resolution 2199).

27.1 UNESCO Convention 1970

The UNESCO Convention 1970 was adopted by the General Conference of UNESCO on 14 November 1970, and entered into force on 24 April 1972. It was the first truly international legal framework for the fight against the illicit trafficking of cultural property in times of peace. It has been ratified by 129 countries, including 39 States in the last decade.

⁷⁸ Articles 34–36, General Orders no.100: Instructions for the government of armies of the United States in the Field (Lieber Code) as cited in 'Chronology of Cultural Property Legislation', K Fitz Gibbon, *Who Owns The Past? Cultural Policy, Cultural Property and the Law*, Rutgers University Press, 2005, pp3-9.

⁷⁹ '... institutions dedicated to religion, charity and education, the arts and sciences even when State property, shall be treated as private property. All seizure or destruction of, or wilful damage to, institutions of this character, historic monuments, works of art and science should be made the subject of legal proceedings by the competent authorities': Article 8, Project of an International Declaration Concerning the Laws and Customs of War.

⁸⁰ Hague Convention (IV), which forbids damage to 'institutions dedicated to religion, charity and education, the arts and sciences ... historic monuments, works of art ...'.

⁸¹ The Treaty on the Protection of Artistic and Scientific Institutions and Historic Monuments, which sought to establish a status of neutrality for monuments, museums, scientific, artistic, educational, and cultural institutions, that were designated by a flag by which they could be identified, just as hospitals and medical personnel were designated by a red cross.

Australia accepted the Convention on 30 October 1989, effective from 30 January 1990, following the enactment of the current Act which gives the Convention force in Australian law.

The Convention requires its State Parties to take action in the following main fields.

27.1.1 Preventive measures

State Parties are expected to set a culture which acknowledges the importance of culture (both its own and that of others) and provide adequate protection measures for its own cultural property.

This may be done by:

- enacting appropriate national legislation;
- establishing national services for the protection of cultural heritage;
- promoting museums, libraries, archives;
- establishing national inventories;
- encouraging the adoption of codes of conduct for dealers in cultural property;
- and
- implementing educational programmes to develop respect for cultural heritage.

State Parties are also required to take steps to control the movement of cultural property across its borders. This may be done by:

- introducing a system of export certificates;
- prohibiting the export of cultural property unless it is accompanied by an export certificate;
- preventing museums from buying objects exported from another State Party without an export certificate;
- prohibiting the import of objects stolen from museums, religious institutions or public monuments; and
- imposing penal sanctions on any person contravening these prohibitions.

Australia enacts obligations regulating the export and import of cultural material primarily through the current Act. Other measures are implemented through the enacting legislation of cultural institutions and through administrative practices, education and promotion.

27.1.2 Return provisions

Where material has been illegally exported from its country of origin, State Parties are expected to assist in its return. Obligations are also placed on the requesting State to make requests through diplomatic channels, provide evidence to support its claim and pay just compensation to an innocent purchaser.

The provisions of the current Act implement these Articles in a broad and full manner, allowing Australia to respond to requests from all foreign governments, not just other signatories. The Act also does not limit the requests to documented cultural property stolen from museums or religious or secular public monuments (Article 7(b) (i)).

The Act also supports the intent of the UNESCO Convention 1970 in regards to the fact that material does not have to be owned by the foreign state. Under the Act a request for the return of a protected object will be considered from any foreign country, as long as the request demonstrates that:

- the object is a protected object under the country's law;
- the object has been exported from its country of origin;
- there is a law that prohibits the export of that object;
- the law relates to cultural property; and
- the object has been imported into Australia (after 1 July 1987).

27.1.3 International cooperation framework

Provision is also made under the UNESCO Convention 1970 for emergency action where the cultural heritage of specific nations is at serious and immediate risk. State Parties are encouraged to do this by adopting emergency import bans when the cultural heritage of a State Party is seriously endangered by intense looting.

The Act does not make explicit provision for these emergency import bans. However, Australia does have bilateral agreements with several countries that address issues relating to cultural property and also takes action in line with United Nations Security Council Resolutions relating to cultural property.⁸²

⁸² Including Resolution 1483 (2003) and Resolution 2199 (2015).

27.1.4 Australia's reservation to Article 10

When Australia acceded to the UNESCO Convention 1970 one reservation was included in regard to Article 10. Article 10 is as follows:

The States Parties to this Convention undertake:

(a) To restrict by education, information and vigilance, movement of cultural property illegally removed from any State Party to this Convention and, as appropriate for each country, oblige antique dealers, subject to penal or administrative sanctions, to maintain a register recording the origin of each item of cultural property, names and addresses of the supplier, description and price of each item sold and to inform the purchaser of the cultural property of the export prohibition to which such property may be subject;

(b) to endeavour by educational means to create and develop in the public mind a realization of the value of cultural property and the threat to the cultural heritage created by theft, clandestine excavations and illicit exports.

Australia's reservation is stated as:

The Government of Australia declares that Australia is not at present in a position to oblige antique dealers, subject to penal or administrative sanctions, to maintain a register recording the origin of each item of cultural property, names and addresses of the supplier, description and price of each item sold and to inform the purchaser of the cultural property of the export prohibition to which such property may be subject. Australia therefore accepts the Convention subject to a reservation as to Article 10, to the extent that it is unable to comply with the obligations imposed by that Article.⁸³

Consideration was given to whether it would be an appropriate time to lift this reservation. However, given Australia's constitutional structure, it remains true that this is not solely a Commonwealth matter. While there is a range of state and territory legislation that regulates second hand dealers there is disparity between states, and much of the legislation is focussed on pawn broking or second hand goods rather than ethical trade in antiquities, art or other cultural material. On reflection, the aligning of state and territory legislation in this matter was considered outside the scope of this Review.

⁸³ Letter LA/Depositary/1989/20 of 10 January 1990



Figure 17—State Parties to the UNESCO 1970 Convention (129 state parties)⁸⁴

⁸⁴ State Parties listed at <www.unesco.org/>.

27.2 United Nations Security Council Sanctions

From time to time, sanctions regimes adopted by the United Nations Security Council relate to cultural property. These are given effect under Australian law through Regulations to the *Charter of the United Nations Act 1945*.

Currently, only the Sanctions Regulations relating to Iraq include cultural property provisions, however in February 2015 the Security Council unanimously adopted resolution 2199⁸⁵ condemning the destruction of cultural heritage in Iraq and Syria, particularly by ISIL and the Al-Nusrah Front. It decided that all Member States should take steps, in cooperation with Interpol, UNESCO and other international organisations, to prevent the trade in items of cultural, scientific and religious importance illegally removed from either Iraq or Syria during periods of conflict.

At the time of writing, it is Australia's intention to give effect to Resolution 2199 by way of regulation pursuant to the *Charter of the United Nations Act 1945*. It may well be a timely way to give legal effect to Resolution 2199. However what must not be overlooked is that a protection regime for foreign cultural material necessarily requires an array of legal,⁸⁶ administrative⁸⁷ and practical responsibilities.⁸⁸ For this reason, the model provides that the Act is the implementation tool for such international instruments.

⁸⁵ Available at the United Nations website <www.un.org>.

⁸⁶ For example, the enforcement of the search and seize powers, the decision to forfeit, the appeal of administrative decisions.

⁸⁷ Such as the information gathering as to circumstances of export, provenance and title.

⁸⁸ Such as warehousing the seized material.

27.3 The Hague Convention

Coming out of the horrors of World War II and the destruction of cultural property inflicted by both sides, it was timely for nations to recognise the losses that the combatants had inflicted on international cultural heritage. Even those countries that had not been directly involved in the damage and destruction of the conflict recognised that their losses, although indirect, were no less real.

Acknowledging that the existing protections had proven so inadequate, in 1954, UNESCO produced the Hague Convention.⁸⁹ The Hague Convention is supplemented by two Protocols: the First Protocol, which entered into force at the same time as the Hague Convention itself, and the Second Protocol, which was adopted in 1999 and came into force on 9 March 2004.⁹⁰

Although Australia was one of the signatories to the Hague Convention 1954, it did not ratify it until 19 September 1984.⁹¹

27.3.1 Structure

State Parties are expected to take action in relation to the forty articles in its General Provisions (which define the terms used and outline the scope) and the Regulations.

27.3.2 Definitions

'Cultural Property', the focus of the treaty, is very broadly defined. Irrespective of origin or ownership, it covers:

(a) movable or immovable property of great importance to the cultural heritage of every people, such as monuments of architecture, art or history, whether religious or secular; archaeological sites; groups of buildings which, as a whole, are of historical or artistic interest; works of art; manuscripts, books and other objects of artistic, historical or archaeological interest; as well as scientific collections and important collections of books or archives or of reproductions of the property defined above;

(b) buildings whose main and effective purpose is to preserve or exhibit the movable cultural property defined in sub-paragraph (a) such as museums, large libraries and depositories of

⁸⁹ The text of the Convention may be found on the UNESCO website at <www.unesco.org>.

⁹⁰ An instrument 'enters into force' once a specified number of states have ratified the instrument. It then binds the parties who have ratified it. The phrase 'enters into force' does not imply that the Protocols have force in Australian law as Australia has not ratified them.

⁹¹ For a lucid explanation as to the process by which a country becomes a party to the Convention (through ratification or accession) see P J Boylan's conference paper 'Implementing the 1954 Hague Convention and its Protocols: legal and practical implications', 2006, available at the University of Chicago website <culturalpolicy.uchicago.edu/protectingculturalheritage/papers.shtml>.

archives, and refuges intended to shelter, in the event of armed conflict, the movable cultural property defined in sub-paragraph (a);

(c) centers containing a large amount of cultural property as defined in sub-paragraphs (a) and (b), to be known as 'centers containing monuments'.⁹²

It is important to note that this definition relates to both **movable** cultural property (the subject of the Act) and **immovable** cultural property.⁹³ Although immovable cultural property is not covered by the Act, if anyone were to dismember a part of immovable cultural property in order to import the item into Australia, the removed item would logically become movable and thus covered by the Act (for instance, a statue or fixture removed from a protected building).

27.3.3 Analysis of the Hague Convention provisions

The Hague Convention prohibits certain conduct and requires State Parties to enact criminal offences to give effect to these prohibitions. Currently, Australia has a 'jigsaw' approach with aspects covered by some provisions in existing legislation such as the *Criminal Code Act 1995*⁹⁴ and the *Crimes Act 1914*,⁹⁵ others are met through mechanisms including Defence practices, doctrine and training.

The following table, outlining obligations under Articles 4 and 9, is illustrative of the approach in implementing Australia's Hague Convention 1954 obligations.

⁹² Article 1.

⁹³ Australia protects immovable cultural property that is situated within its borders through a variety of Commonwealth, state and territory legislation, including the *Environmental Protection and Biodiversity Conservation Act 1999*.

⁹⁴ Section 268.80 and section 268.101 (War crime – attacking protected objects). The *Criminal Code Act 1995* Division 268 also provides for other offences which may be applicable: section 268.51 (destroying or seizing enemy's property); section 268.54 and section 268.81 (pillaging); and section 268.115 (responsibility of commanders and other superiors).

⁹⁵ Section 29 criminalises the intentional destruction or damaging of Commonwealth property. This offence applies to all property belonging to the Commonwealth or to Commonwealth authorities, including national collecting institutions. For further information, the 2010 Implementing Report has a further list of relevant provisions and a range of specific offences relating to damage to cultural heritage in national collecting institutions.

The Convention provisions	Relevant provisions of Australian legislation and processes
<p>Article 4</p> <p>Using cultural property and its immediate surroundings or the appliances in use for its protection for purposes which are likely to expose it to destruction or damage, except in the event of imperative military necessity.</p> <p>Requisitioning cultural property situated in the territory of another State Party.</p> <p>Any act directed by way of reprisals against cultural property.</p> <p>Any act of hostility directed against cultural property except in the event of imperative military necessity.</p> <p>Any form of theft, pillage or misappropriation and any acts of vandalism.</p>	<p>Reflected in Australian Defence Force (ADF) rules of engagement, violation may amount to an offence under Part III of the <i>Defence Force Discipline Act 1982</i> (for example, section 27 makes it an offence to disobey a lawful command). Such an offence only applies to conduct of the ADF.</p> <p>Criminal Code section 268.36 (attacking civilian objects).</p> <p>Criminal Code section 268.38 (excessive incidental death, injury or damage).</p> <p>Criminal Code section 268.46 (attacking protected objects in international armed conflict).</p> <p>Criminal Code section 268.80 (attacking protected objects in non-international armed conflict).</p> <p>Provisions in various Commonwealth and State/Territory legislation regarding stealing, fraud, burglary and vandalism.⁹⁶</p>
<p>Article 9</p> <p>Any use of cultural property under special protection or its surroundings for military purpose.</p> <p>Any act of hostility against and using cultural property under special protection</p>	<p>Reflected in Australian Defence Force (ADF) rules of engagement, violation may amount to an offence under Part III of the <i>Defence Force Discipline Act 1982</i> (for example, section 27 makes it an offence to disobey a lawful command). Such an offence only applies to conduct of the ADF.</p> <p>Criminal Code section 268.36 (attacking civilian objects)</p> <p>Criminal Code section 268.38 (excessive incidental death, injury or damage).</p> <p>Criminal Code section 268.46 (attacking protected objects in international armed conflict).</p> <p>Criminal Code section 268.80 (attacking protected objects in non-international armed conflict).</p> <p>Criminal Code section 268.101 (attacking objects under special protection in international armed conflict).</p>

⁹⁶ These offences are unlikely to apply extra-territorially.

The Convention provisions	Relevant provisions of Australian legislation and processes
	Criminal Code section 268.115 (responsibility of military commanders and other superiors). ⁹⁷

Given that Australia ratified the Convention more than 30 years ago, sufficient time has passed and experience gained to mollify some of the earlier concerns that may have been held as to the effect that it might have on the country's ability to act in war zones. Arguably, that time has also been sufficient to demonstrate that simple enhancements could be made.



Figure 18—State Parties to the Hague Convention 1954 (126 state parties).⁹⁸

⁹⁷ Offences apply no matter the nationality of the alleged offender or where the offence is alleged to have been committed.

⁹⁸ State Parties listed at <www.unesco.org/>. As at 24 September 2015.

27.4 The Hague Convention First Protocol

The primary focus of the First Protocol is to prohibit and inhibit the illicit trade in objects stolen during armed conflict—which aligns it strongly with the focus of the Act.

While the Hague Convention focuses on the protection of cultural property situated in inter-nation war zones, the First Protocol extends this protection to cultural property that has been stolen during all armed conflicts.

The First Protocol was concluded on 14 May 1954, the same date as the principal Hague Convention. One of the characteristics of the war that had just ended (like so many of them for centuries past and since) had been the sheer volume of cultural property that had been taken from its owners. Some of this had been straightforward looting but much had been done under the pretence of pseudo-legality.

When the war ended, the Final Act of the 1945 Paris Conference on Reparations provided some restitution mechanisms but many considered that they were flawed, or at least, did not go far enough. In particular, many considered that there needed to be positive, practical mechanisms to prohibit the illegal trafficking of cultural material. These criticisms were taken into account by those drafting the Hague Convention and in the initial draft they included a provision that stated:

*If during an occupation, a cultural property has changed hands and been exported, the restitution of that property may be required of its last holder within a period of ten years from the date on which it becomes possible to bring an action for restitution before a competent magistrate. If, however, the last holder can show proof that the property changed hands as a result of a legal transaction carried out without extortion of consent, the action for restitution shall be dismissed.*⁹⁹

This draft provision was much disputed. Had it remained, several countries would have refused to sign the Hague Convention so it was agreed that the mechanisms relating to the international trafficking and repatriation of looted property would be split off into a separate document, the First Protocol.¹⁰⁰

⁹⁹ Article 5 of the draft.

¹⁰⁰ For a discussion of the criticisms of the draft Article 5, see Chamberlain, *War and Cultural Heritage*, Institute of Art and Law, (2004), pp 138–139.

27.4.1 Analysis of First Protocol provisions

The First Protocol is brief. The majority of the provisions relate directly to the export and import of cultural material which could easily be fulfilled under the new model.

First, each party makes a number of undertakings:

*to take into its custody any cultural property imported into its territory either directly or indirectly from any occupied territory;*¹⁰¹

and

*to return, at the close of hostilities, to the competent authorities of the territory previously occupied, cultural property which is in its territory, if such property has been exported in contravention of the principle laid down in the first paragraph. Such property shall never be retained as war reparations.*¹⁰²

Such concepts are inarguably proper and completely consistent with Australia's expressed ethical position.

It also seeks to provide compensation to holders in good faith of such material:

*The High Contracting Party whose obligation it was to prevent the exportation of cultural property from the territory occupied by it, shall pay an indemnity to the holders in good faith of any cultural property which has to be returned in accordance with the preceding paragraph.*¹⁰³

Finally, the First Protocol makes provision for State Parties to 'safeguard' material for the duration of hostilities:

*Cultural property coming from the territory of a High Contracting Party and deposited by it in the territory of another High Contracting Party for the purpose of protecting such property against the dangers of an armed conflict, shall be returned by the latter, at the end of hostilities, to the competent authorities of the territory from which it came.*¹⁰⁴

Note that the earlier paragraphs do not apply to internal conflicts, only occupied territories. This 5th paragraph applies to any internal or external conflict.

¹⁰¹ Paragraph 2. This seizure shall either be effected automatically upon the importation of the property or, failing this, at the request of the authorities of that territory.

¹⁰² Paragraph 3.

¹⁰³ Paragraph 4. This is a de facto sanction for failing to prevent the export of the material but the Protocol provides no mechanism for determining the amount to be paid. Note that the obligation to pay the indemnity does not fall upon the country into which the cultural material is imported, only on the occupier of the country from which the material was exported.

¹⁰⁴ Paragraph 5.

In Australia, the temporary safekeeping of endangered foreign cultural material is partly covered through administrative arrangements. The Australian Government's *Australian Best Practice Guide to Collecting Cultural Material* refers to the use of Australian collecting institutions as safekeeping repositories through emergency loans. In addition, there are standardised agreements and codes of practice through UNESCO and ICOM which govern these situations.

That said, it is appropriate that the temporary safekeeping of cultural material and its return be given a clear and cohesive legal foundation.¹⁰⁵

27.4.2 Should Australia ratify?

During consultation the majority of stakeholders expressed strong support for the proposition that Australia should demonstrate its commitment to the prevention of illicit trade and looting from armed conflict areas by ratifying the First Protocol.

The history of conflicts and associated looting has shown that treaties do not prevent evil, but the statement of and adherence to high principle should be a feature of any developed society. Like countries, including France, Germany, Canada and New Zealand, have ratified the First Protocol apparently with minimal issues.

One obligation has caused some major powers to delay ratification:

*to prevent the exportation of cultural property, from a territory that it occupies during an armed conflict;*¹⁰⁶

This is because, on one interpretation, it places on the occupier an obligation to prevent the exportation of all cultural property from the occupied territory.¹⁰⁷ That interpretation would impose an obligation that could be impossible for any country to undertake. Full control of the borders is difficult at the best of times and is even more difficult in times of armed conflict.

Rather, a more realistic interpretation is that there needs to be a regime by which the intentional removal of cultural property from an occupied territory is made unlawful.

¹⁰⁵ Notwithstanding that one might respond to this provision by saying, 'yes of course we would', there have been several examples of the reluctance of countries to return material: see Patrick O'Keefe, 'The 1st Protocol to the Hague Convention fifty years on,' *Art Antiquity and Law*, 2004:9 pp111-112.

¹⁰⁶ Paragraph 1. It is silent as to how this is to be achieved.

¹⁰⁷ Article 42 of the 1907 Hague Regulations: A 'territory is considered occupied when it is actually placed under the authority of the hostile army. The occupation extends only to the territory where such authority has been established and can be exercised.'

Further, the provision is one focussed on the nationals of the occupying force (and those under its discipline)—not the nationals of the occupied country.¹⁰⁸

Australia has had a long involvement in developing the system of international instruments designed to protect cultural material—including its recent involvement in United Nations Resolution 2199. It should be noted that while some important functions of the First Protocol are already achieved in Australia, it is appropriate that the fragmented expression of Australia’s commitment to the principles of the Protocol be clarified and integrated in legislation. There are several reasons for this:

- it would be an expression of Australia’s commitment to appropriate ethical conduct in time of armed conflict;
- as a senior member of the United Nations and UNESCO, ratification of the First Protocol is concomitant to a leadership role in the system of international instruments designed to protect cultural material in time of war;
- it would provide a tool in the efforts to counter those terrorists using the sale of looted cultural material “to support their recruitment efforts and strengthen their operational capability to organise and carry out terrorist attacks”;¹⁰⁹
- it would assist the public to know and understand Australia’s existing administrative arrangements; and
- it can be done in a way that complements Australia’s commitment in the United Nations, including to Resolution 2199 in respect of Iraq and Syria and to any other arenas of future conflict from which cultural material is looted, smuggled and otherwise endangered.

This Review is in strong support of ratification of the First Protocol but, ultimately, the question of ratification is one for the Australian Government. Certainly it is timely that Australia ratify. The principles it articulates are reasonable and indeed, by today’s ethical standards, unarguable and it would provide a clear demonstration of Australia’s continued commitment to appropriate ethical conduct in time of armed conflict.

¹⁰⁸ See for example, New Zealand’s *Cultural Property (Protection in Armed Conflict) Act 2012*, s.15(3).

¹⁰⁹ Meeting of Minister of Foreign Affairs, the Hon Julie Bishop MP with the Director-General of UNESCO Irina Bokova on 20th April 2015: www.unesco.org/new/en/media-services



Figure 19—State Parties to the First Protocol (103 state parties).¹¹⁰

27.5 The Second Protocol to the Hague Convention

In 1995 UNESCO sponsored a meeting to discuss improvements to the Convention and the First Protocol. This resulted in the Second Protocol, which has four key purposes:

- it creates a new protection category of ‘enhanced protection’;
- it requires parties to criminalise serious violations of the Protocol (including obligations to prosecute and punish);
- it seeks to strengthen various mechanisms of the Convention itself, including clarity as to the situations in which military necessity could be invoked; and
- it creates a new Intergovernmental Committee to oversee implementation.

Each State Party to the Second Protocol must take the necessary steps to establish offences as criminal offences under its domestic law,¹¹¹ as well as punish other

¹¹⁰ State Parties listed at < www.unesco.org/>. As at 24 September 2015.

¹¹¹ Article 15 of the 2nd Protocol.

violations of the Convention or Protocol.¹¹² When doing so, the State Party must ensure it is able to exercise jurisdiction over conduct taking place within the State's jurisdiction or by the State's nationals (i.e. extra-territorial jurisdiction).¹¹³

27.5.1 Analysis of the Second Protocol provisions

It should be noted that many aspects of the Second Protocol do not require legislation. Some elements go beyond the coverage of the Act and some will be determined by other Government policy and funding priorities. This Review is in support of ratification but, ultimately, the question of ratification is one for the Australian Government.¹¹⁴

For the purposes of this Review and interaction with the Act, the key element of the Second Protocol is the introduction of criminal sanctions. Some of these actions are already offences under Australian law through the *Criminal Code Act 1995* and the ADF rules of engagement and the *Defence Force Discipline Act 1982*. However, if bold statements are to be made about Australia's commitment to the protection of cultural property in time of armed conflict, those principles should be comprehensively reinforced by sanctions.

Below is a summary of already existing Australian sanctions that correspond to the Second Protocol provisions.

¹¹² Article 21 of the 2nd Protocol.

¹¹³ This kind of jurisdiction closely resembles 'extended geographical jurisdiction – category B' under section 15.2 of the Criminal Code.

¹¹⁴ Partners that have ratified the 2nd Protocol include Canada, Germany, New Zealand and Japan. The United States and the United Kingdom have not ratified it but the latter has announced its intention to ratify the Hague Convention and accede to both Protocols.

Second Protocol Provisions	Relevant Provisions of Australian Legislation and Processes
<p>Making cultural property under enhanced protection the object of attack (Article 15).</p> <p>Making cultural property under the Convention or the Protocol the object of attack (Article 15).</p>	<p>Criminal Code section 268.36 (attacking civilian objects).</p> <p>Criminal Code section 268.38 (excessive incidental death, injury or damage).</p> <p>Criminal Code section 268.46 (attacking protected objects in international armed conflict).</p> <p>Criminal Code section 268.80 (attacking protected objects in non-international armed conflict).</p> <p>Criminal Code section 268.101 (attacking objects under special protection in international armed conflict).</p> <p>Criminal Code section 268.115 (responsibility of military commanders and other superiors).¹¹⁵</p>
<p>Theft, pillage or misappropriation of cultural property protected under the Convention or acts of vandalism directed against that property (Article 15).</p>	<p>Criminal Code section 268.46 (attacking protected objects in international armed conflict).</p> <p>Criminal Code section 268.101 (attacking objects under special protection in international armed conflict).</p> <p>Provisions in various Commonwealth and State/Territory legislation regarding stealing, fraud, burglary and vandalism—but only where that theft or vandalism has occurred within Australia.</p>
<p>Any illicit export, other removal or transfer of ownership of cultural property from occupied territory in violation of the Convention or the 2nd Protocol (Article 21).</p>	<p>PMCH Act section 14 makes it an offence to import an illegally exported foreign cultural object. The offence does not cover removal or transfer of ownership that does not result in an import into Australia.</p>

¹¹⁵ Offences apply no matter the nationality of the alleged offender or where the offence is alleged to have been committed.



Figure 20—State Parties to the Second Protocol (68 state parties).¹¹⁶

¹¹⁶ State Parties listed at <www.unesco.org/>. As at 24 September 2015.

27.6 UNIDROIT Convention 1995

A common problem with both the UNESCO Convention 1970 and the Hague Convention 1954 was the lack of clarity as to how they should be put into effect. This was particularly problematic for common law countries.

This was attempted to be rectified by the development of the UNIDROIT Convention 1995, which applies to international claims for:

- the restitution of stolen cultural objects; and
- the return of cultural objects removed from their country of origin contrary to the export laws of that territory.

While not offering a recommendation as to whether or not the Australian Government should ratify the UNIDROIT Convention 1995, there is value in closely considering the use of some of its provisions. Accordingly, the new model uses many of the principles of the Convention to provide a clearer and more transparent model for addressing the issues that arise from the theft and illegal export of cultural material.

One of its core tenets is that claims for the return of stolen or illegally exported cultural material is best dealt with by providing access to transparent court procedures.

The Position Paper proposed a model that was based on the UNIDROIT Convention 1995, whereby a foreign state would have the right to commence court proceedings in Australia against an Australian possessor. The intent was, as far as possible, to keep the Australian Government out of the dispute and leave it to the possessor and the claimant to fight it out. After consultation, the model has been amended to be less court-based and to include some involvement of government. It does however seek to reflect the general approach of the Convention by providing:

- a transparency as to foreign claims that is presently lacking;
- a mechanism by which the exchange of all information is core to the procedure;
- an opportunity for the owner of the object to defend its interest in the property;
- alternate dispute resolution opportunities; and
- a right of appeal to the Administrative Appeals Tribunal.

In other words, the proposed model has been amended so that the Australian Government has oversight of the process while still providing appropriate opportunities for the parties to resolve their dispute—within a framework that allows review by a court-based system.

Indeed, on reflection, it became apparent that while it was appropriate to incorporate many of the principles of the UNIDROIT Convention 1995, it is not appropriate to adopt the whole model.

For example, in my view, the new model should go further than the UNIDROIT model and not limit the procedures to contracting States. The current Act makes its procedures available to all (irrespective of the country's treaty status) and there is no good reason to take a narrower approach.

Further, the UNIDROIT Convention 1995 imposes a considerable hurdle on the claimant government and a burden on the deciding Government as it imposes a two-step regime: first to find whether the initial export was illegal; and if so, whether the material should be handed back:

The court or other competent authority of the State addressed shall order the return of an illegally exported cultural object if the requesting State establishes that the removal of the object from its territory significantly impairs one or more of the following interests:

- (a) the physical preservation of the object or of its context;*
- (b) the integrity of a complex object;*
- (c) the preservation of information of, for example, a scientific or historical character;*
- (d) the traditional or ritual use of the object by a tribal or indigenous community, or establishes that the object is of significant cultural importance for the requesting State.*¹¹⁷

In my view these requirements should not be included in the Australian legislation. No government is going to go to the trouble of making a formal claim for the return of its cultural material without having first considered the rationale for that claim and it is hardly appropriate that the Department or a court should be second-guessing the government of the country of origin as to the significance of its own cultural material.

¹¹⁷ Article 5 Paragraph 3

Given that the UNIDROIT Convention 1995 is a take-it-or-leave-it creature, its ratification would require further consideration and possibly further legislative amendment. Perhaps the Convention's all or nothing approach is why relatively few countries are party to the UNIDROIT Convention 1995, as illustrated below.

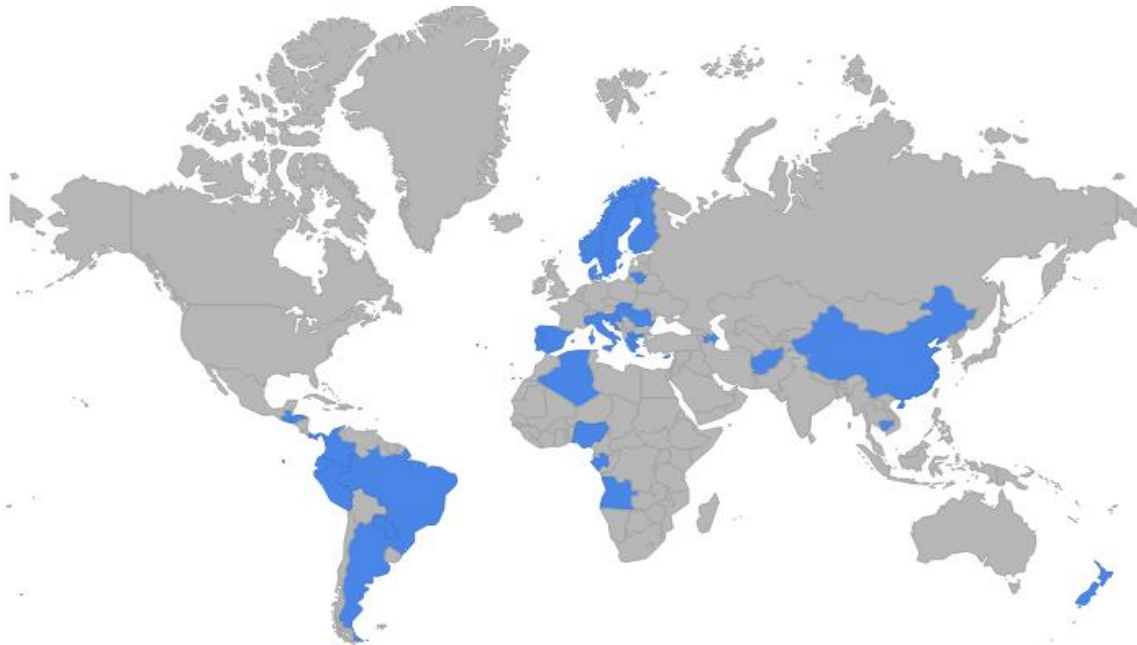


Figure 21—State Parties to the UNIDROIT Convention 1995 (37 state parties)¹¹⁸

¹¹⁸ State Parties listed at <www.unesco.org/>. As at 24 September 2015.

28 Issues with the current Act

Since its inception in 1987, the Act has allowed Australia to meet its obligations under the UNESCO Convention 1970. During that time, the return of cultural property (particularly to countries within our region) has demonstrated our commitment and positioned us as a leader in this area.

However, over the decades some shortcomings have become apparent and, as the Act has not been meaningfully amended, Australia's legal framework has remained stagnant in the face of rapid change in the international trade in cultural material. Since 1987, the volume and nature of this trade has increased enormously, the UNIDROIT Convention 1995 and the Second Protocol to the Hague Convention 1954 have been introduced and the international legal and ethical framework has shifted. The internet has provided new ways of advertising and selling cultural material and this, together with new distribution systems and technologies, has revolutionised the marketplace.

It is evident that the Act lacks clear and transparent processes for the proof of illegal export and its enforcement mechanisms are out-dated. This Review presents an opportunity to ensure that the processes and mechanisms of the Act are clear, transparent and reflect current best practice in law enforcement.

28.1 The procedural dynamic

The situation under the current legislation is the very reverse of the desired position with regard to the responsibility for actions: the burden of commencing legal proceedings falls to the Australian possessor; the burden of proving the legality of the import lies on the Australian Government; the burden on the foreign claimant is opaque.

For example, under the current Act, when Australian Government agencies identify cultural material that appears to have been illegally exported, the relevant foreign government is notified and the Australian Government waits for a formal seizure request. In some circumstances, the foreign government takes a significant period of time to respond. The Australian Government is left monitoring (and in some cases holding) the material, unsure of whether further action will be required and unable to seize the material without a formal request from the foreign government.

The Australian Government's difficulty is exacerbated because the legislation does not recognise the difficulty, indeed impossibility, of distinguishing the actual country of origin when the material is culturally cross-jurisdictional.

A more desirable position would give the Australian Government the ability to hold and seize foreign cultural material on reasonable suspicion, placing responsibility with the foreign claimant and the Australian possessor to progress the claim or prove the legitimacy of the import.

28.2 The theft and looting gap

The current Act does not provide a mechanism for the return of stolen and looted foreign cultural property that cannot be reclaimed as an illegal export under a cultural property law. That is not to say that there are no mechanisms under Australian law to achieve this: civil proceedings may be brought in tort¹¹⁹ and equity and criminal procedures may be invoked through legislation such as the *Mutual Assistance in Criminal Matters Act 1987*—but those would not be proceedings under the Act. It is timely that a new model incorporates this material into its protections—with more generous, but firm, time limitations for recovery.

In adding this head of cultural property protection it must be recognised that it requires a balance between equally legitimate interests: that of the person (usually the owner) deprived of a cultural object by theft and that of the good faith purchaser of such an object.¹²⁰

28.3 Lack of procedural pathway

The absence of a procedural pathway for the resolution of these claims is one of the most significant problems with the current system. Section 41(2) of the current Act requires that a claim be made by the foreign government but the Act does not provide transparent procedures for evidence relating to the claim to be shared with the Australian possessor before a decision is made.

¹¹⁹ The torts of detinue and conversion.

¹²⁰ UNIDROIT *Convention on Stolen or Illegally Exported Cultural Objects* 1995: Explanatory Report, Unif.L.Rev. 2001-3, p.500.

In particular:

- there needs to be transparency of information as to the basis of the claim and the circumstances of the acquisition; and
- information relevant to the claim should be equally available to the parties.

Further, the current system puts an unnecessary burden on the Minister to determine the rights and wrongs of the situation. The procedure in the new model aims to provide an environment in which the claimant and the possessor may be enabled to resolve the claim informally and, if that fails, to provide a reviewable mechanism for determining the claim.

29 Framework of the new model

Having considered the relevant international conventions and models and the limitations of the current Act, it was initially my aim to present a single model for the way that Australia could consolidate the full spectrum of current international obligations regarding the protection of cultural property in times of peace and war. It was also my intention that this model would provide a legal framework which would go beyond what may be interpreted as current ‘obligations’—one that would enable future Australian Government ratification of the First and Second Protocols to the Hague Convention if the Australian Government decided to do so.

However, some of these international agreements (principally the Protocols) go further than the protection of the material within Australian borders and place obligations to regulate extra-territorial behaviour. As my model developed, I was faced with two options: either incorporate additional protections for stolen and looted foreign material within the Act, or recommend a separate piece of legislation for the broader protection of such material in armed conflict.¹²¹

Of these, I have opted for the first. While the second is initially appealing (and, indeed, the option adopted by like countries such as New Zealand) it may be seen as pre-empting the decision of the Australian Government to ratify additional international conventions and protocols. The first option, while adopting some mechanisms from these international conventions, still sits squarely within the policy intent and

¹²¹ For example a possible new legislative framework could be called the Protection of Cultural Material in time of Armed Conflict Act (PCMAC Act).

framework of the existing Act, the Hague Convention 1954 and the UNESCO Convention 1970. The model I have developed provides a flexible mechanism for dealing with a range of material which has been brought into Australia, making it a useful tool for any future commitments.

This will, of course, leave some elements (principally those relating to extra-territorial behaviour and immovable heritage protection in Australia) to be addressed by other legislation. Consideration of these is a matter for the Australian Government however I have made suggestions as to where some of these might logically sit.

Additionally, whether the specific obligations relating to the protection of cultural property sit in one or multiple pieces of legislation, it is important that **all** Commonwealth legislation affecting cultural property be treated as a coherent expression of Australia's commitment to its protection. To do so, it would be desirable to consider the Act, the *Environmental Protection and Biodiversity Conservation Act 1999*, the *Historic Shipwrecks Act 1976*, the *Aboriginal and Torres Strait Islander Heritage Protection Act 1984*, the *Crimes Act 1914* and *Criminal Code Act 1995* as limbs of the one torso. I recognise that these Acts span distinct government departments but the point remains:

the temporary silos of administrative organisation should not stand in the way of Australia having a regime of cultural property laws that are consistent, comprehensive and give real effect to our commitments and principles.

Certainly, this Review strongly supports accession to both Protocols. Whether the Australian Government decides to do so is a matter for it—but the time is right.

29.1 Material protected by the new model

The new model I am presenting relates to cultural material illegally imported into Australia and covers the return of:

- illegally exported cultural material;
- stolen cultural material (including material stolen from inventoried public collections); and
- illegally removed cultural material looted from conflict zones ('looted material').

Generally, all types of material are dealt with under the same process, although there are some specific provisions for each category.

Survey Response

Responses to the introduction of minimum due diligence standards.

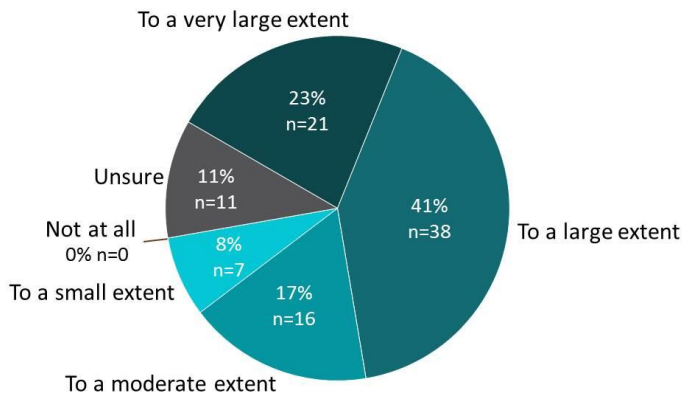


Figure 22—The extent to which respondents believe the inclusion of minimum due diligence standards assist in providing guidance for importers of cultural material into Australia.¹²²

30 Core principles of the model

There are five touchstones at the centre of the new model for the protection of foreign cultural material under the Act.

30.1 Clarity

The new model is intended to provide clarity to all stakeholders, including institutions, dealers, collectors and foreign claimants. Their responsibilities and the actions available to them are clearly explained. The processes to determine whether or not disputed material is to be seized and returned to its country of origin are designed to be easily understood and navigated.

30.2 Due diligence

There are clear expectations on the Australian purchasers of cultural material that require them to undertake a practicable degree of due diligence as to title and provenance. These expectations are set within temporal boundaries.

¹²² Data from responses to question 27 of the survey. Total responses n=93.

30.3 Transparency

Under the new model, the processes for assessing claims and counter-claims relating to disputed material are transparent to both the Australian possessor and the foreign claimant. Each party is obliged to provide the other with the evidence to support its claim. It is a principle of the process that a foreign claimant must be prepared to show the evidence of its claim to the Australian possessor of the disputed property and that any possessor must be prepared to provide its evidence to support its claim of rightful ownership. The Australian Government would facilitate this exchange.

30.4 Responsibility to progress the claim

The model gives expression to Australia's recognition of a claimant's right to seek the return of significant cultural material unlawfully imported into Australia. This is a matter of balancing the rights of a national property possessor with the ethical and treaty obligations towards a foreign claimant.¹²³

It gives the Australian Government a clearly defined initial role in seizing the material, safeguarding of the objects and facilitating communication between parties. It is then up to both the foreign claimant and the Australian possessor to provide evidence to support their claim in a timely manner. If the foreign claimant fails to do so, it casts an unfair cloud on the title of the material and is an improper interference with the property rights of the Australian possessor. However, there must also be an obligation on the Australian possessor to demonstrate that it undertook due diligence and holds the appropriate provenance and export papers.

31 The process of the new model

The following is a summary of the general process by which claims for the return of illegally exported, stolen and looted cultural material will be administered under the new model. Specific provisions relating to each category are dealt with at the end.

31.1 Definitions

In this section dealing with foreign cultural material, '**cultural heritage**' refers to material of importance for ethnological, archaeological, historical, literary, artistic,

¹²³ Note the need for the exception where a country cannot be expected to know of the theft or looting of the cultural heritage material.

scientific, spiritual, natural or technological reasons, forming part of the cultural heritage of a foreign country.¹²⁴

31.2 Time limits

When considering the illegal import of foreign cultural material, under the current Act there are two key dates:

- the date of illicit export from the country of origin; and
- the subsequent date of import into Australia.

31.2.1 Date of export from country of origin

The significance of the date of export of an object from its country of origin has long been one of the more contentious aspects of the Act. The current Act provides no explicit date after which the illicit export must have taken place and the current interpretation given to the Act by government is that any cultural material is liable to forfeiture if its export was in breach of the laws of the country of origin, irrespective of the date of that export. By this interpretation, there is no 'line in the sand' to limit the application of the Act to material that was exported either (a) after the UNESCO Convention was concluded in 1970 or (b) came into effect in 1972 or (c) when Australia ratified it in 1989.

I understand that it was the original intent of the drafters to give fullest expression to Australia's ratification of the UNESCO Convention 1970—but the Convention was expressly worded only to have effect after both parties have ratified.¹²⁵

The desirability of Australia's position has been the subject of debate since the introduction of the Act and, put at its most polite, views on it remain divided.¹²⁶

Whatever the correct legal analysis may be, in practical terms, the no-limits interpretation inarguably creates a considerable burden for the collecting community given the difficulties of determining the applicability and enforceability of foreign laws—

¹²⁴ In drafting, this definition can explicitly exclude material that is legal under customary international law to remove from a state during armed conflict (for example, captured military hardware).

¹²⁵ Article 7(b)(ii). Acceptance by Australia was in 1989.

¹²⁶ See the Ley Report, pp127-130 for a summary of the options.

as well as having to determine which country is the country of origin (and thus which laws apply) given that borders have changed so much in the twentieth century.

31.2.2 A line in the sand

To address these issues, the new model provides for periods of limitation for the bringing of claims.

There are two sensible and practical options:

- the approach of the UNIDROIT Convention 1995 which provides that a claim for the return of foreign cultural material (whether illegally exported, stolen or looted) needs to be brought within 50 years from the date of removal;¹²⁷ or
- applying the date that the UNESCO Convention came into force, 24 April 1972.

The disadvantage to the UNIDROIT model is that, at some time in the future, the 50 year cut-off date may not allow Australia to meet its UNESCO obligations (being either the 1972 date of commencement or the 1989 ratification date). Accordingly, the 1972 date is preferred. It is also the date commonly adopted internationally within the collections sector.

Under either option it would also be desirable to include a secondary time period in which the foreign claimant must take action. UNIDROIT requires that a claim must be made within three years of the foreign claimant knowing the location of the object and the identity of its possessor. This is a sensible provision and should be adopted. It requires a claimant to be active in the protection of its own cultural material so that languishing claims do not unfairly affect the Australian possessor's property rights by casting an unsubstantiated shadow on title.

Case study: Psittacosaurus fossil

The Department is contacted by a stakeholder concerned about a complete skeleton of a psittacosaurus, a dinosaur found only in northern China, being offered for sale in an upcoming Australian auction. China has strict cultural property laws prohibiting the

¹²⁷ Articles 3 and 5. The UNIDROIT model allows for two exceptions. Where the material is made by a member of an indigenous community for traditional or ritual use, the 3-year limit is maintained but the 50-year limit is not imposed. Where the material is stolen from an inventoried collection the 50-year period should either not apply or be increased to 75 years.

export of fossils without permits. The auction website makes no mention of an export permit.

The Department contacts the auction house seeking further information about the fossil. The owner provides verifiable evidence that the fossil had been brought out by a relative in the 1950's. The fossil is therefore not subject to the Act as it was exported prior to 1972.

31.2.3 Date of import into Australia

Currently, if an object was imported into Australia before 1 July 1987 (when the Act came into force), the import is not regulated by the Act and the procedures for seizure, forfeiture and return do not apply. No change to this position is proposed.

Survey Response

Responses to the introduction of time limitations regarding foreign claims

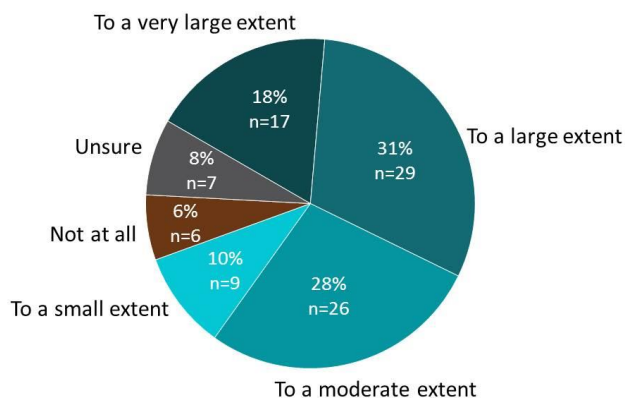


Figure 23—The extent to which respondents believe the introduction of time limitations regarding foreign claims is appropriate¹²⁸

31.3 Initiation of procedure

Cultural material may be held for protection or safekeeping upon suspicion that it is illegally exported, stolen or looted. The Border Force already has this power. The basis for this may include (but is not limited to) suspicion that:

¹²⁸ Data from responses to question 26 of the survey. Total responses n=94.

- trade in the material is currently restricted or prohibited under a United Nations Security Council Resolution;
- the material is suspected to have come from a conflict zone (for example it is material known to have been subject to enhanced protection under the Second Protocol of the Hague Convention from a site protected by a Blue Shield emblem); or
- the possessors or importers are known to authorities to be involved with illegal international trafficking.

While the material is held pending seizure, the Department will seek to identify the material and initiate communications with the relevant foreign government or other authorities.

31.4 Warrant for the seizure of cultural material

The new warrant scheme for the seizure of foreign cultural material will provide a robust process with independent scrutiny of evidence and can accommodate urgent seizure applications where cultural material is at risk.

Requiring a government agency to obtain approval from an independent decision-maker provides external scrutiny and oversight of the proposed actions, prior to a potentially invasive power being exercised. The most common type of function exercised by a judge or member in a personal capacity is issuing a warrant (such as a telecommunications interception warrant, an inspection warrant, or a search and seizure warrant).

Accordingly, under the new model, the Australia Federal Police (AFP), Border Force or Departmental officers may apply for a warrant for the seizure of cultural material based on a reasonable suspicion that the material was illegally exported, looted or stolen. A request from a foreign government would not be necessary to begin this process and the AFP, Border Force or the Department could seek a warrant based on relevant evidence from any source. Warrant applications would be made to an authorised issuing officer, who would be a judge or Administrative Appeals Tribunal (AAT) member acting in their personal capacity. These authorised officers would scrutinise the evidence forming the basis of the application and could apply conditions to the seizure, such as the length of confinement of the object.

Investigation, search and seizure powers established under a variety of legislative schemes require approval through a judge or an AAT member acting in a personal capacity. A judge or member acting in such a role is not performing the functions of the court or tribunal of which they are a member but are acting as an independent decision-maker.

If a warrant is granted, seizure would trigger the need for a Departmental decision regarding the cultural material.

31.5 Period of seizure

The time required to gather information in cultural property claims is considerable and, even after the information has been gathered and exchanged, there needs to be an opportunity for the claimant and the possessor to come to an informal resolution. Accordingly the initial period of seizure should be six months (renewable)—although a specific time frame could be placed on the warrant by the authorising officer.

By the end of this period, one of the following actions must have been taken:

- the **possessor** has ceded possession of ownership of the object to the foreign claimant; or
- the **foreign claimant** has made a formal claim to the Department for the return of the material; or
- the **Department** has determined that it is not feasible for the foreign claimant to make a formal claim within the six month period and has exercised a discretion to hold the object for an extended period.

Should none of these actions have been taken, the object will be returned to the Australian possessor from whom it has been seized.

If a foreign claimant makes a formal claim, as described above, it is expected to adduce the material supporting its claim, as outlined below. If the claimant chooses not to provide this information within the period, the object will be returned to the Australian possessor.

If it does provide the information, the possessor is then given a period in which to demonstrate to the satisfaction of the Department that the object was legally removed

from its country of origin.¹²⁹ The possessor has the evidentiary burden of providing any export permit documentation.¹³⁰

31.6 Claim by foreign claimant

There is no prescribed form for the making of a claim by a foreign claimant for the seizure and return of cultural material but every claim should be accompanied by:

- a detailed and objective description of the material;
- evidence that the material is from the claimant country;
- where the return is sought on the grounds of illegal export, identification of the laws that make the export illegal; or
- where return is sought on the grounds of theft or looting, evidence supporting the allegation such as proof of ownership or inventory; and
- all information that the claimant has in relation to the object, including its known provenance, the circumstances of its export, the discovery of the object and the identity of its possessor.

It is acknowledged that the claimant might not have all of this information but it should have an obligation to provide as much as it can. This is all relevant to the reasonableness of the grounds for seizure and for the consequent actions.

31.7 Information gathering and sharing

A Departmental decision-maker would be required to seek evidence about the seized foreign cultural material from the Australian possessor and any foreign claimant. The decision-maker would also be able to seek information from any other relevant source. Time limits would apply to the provision of information to ensure no unnecessary delays are experienced during this process.

To assist to clarify the issues in dispute and encourage resolution between the parties as early as possible, the decision-maker would be required to provide the information

¹²⁹ This evidentiary burden on the possessor is important because if the international trafficking in cultural property is to be stemmed, it is essential that those who acquire such material have an obligation to undertake rigorous due diligence prior to acquisition. If they have made that enquiry, they will have the necessary documentation to establish legal removal.

¹³⁰ One of the great problems in bringing successful prosecutions is the difficulty of proving the exact country of origin where national boundaries cross-cultural regions (eg Mesopotamia). This is another reason to require the possessor of the object to provide evidence of lawful export.

and evidence received from each party to the other.¹³¹ This exchange of information is likely to provide a stimulus for early resolution between the parties.

If resolution is reached between the parties, the Department would assist to implement the agreed outcomes, for example, the transfer of title to the object.

If negotiation and informal exchange of evidence does not result in a settlement of the claim, the claim will be decided by a senior SES officer of the Department.

31.8 Departmental decision

If the parties do not resolve the matter at this preliminary stage, the matter would proceed to a decision by a senior SES officer of the Department to decide whether the seized foreign cultural material has been illegally exported, stolen or looted. Rules of procedural fairness would apply to the making of this decision and affected parties would be given an opportunity to respond to adverse material before a final decision is made.

The following procedure is proposed:

- if the decision-maker is not satisfied by the information provided by the possessor, he/she will order the forfeiture of the material;
- the possessor then has a time-limited opportunity to commence action against the forfeiture in the AAT; and
- if the possessor chooses to not challenge the forfeiture within the limitation period, the material will be forfeited and transferred to the foreign claimant.

31.9 Alternative dispute resolution in the AAT

A person whose interests are affected by the Departmental decision will be able to seek merits review of the decision in the AAT. This may include Australian possessors and foreign claimants and can include individuals, corporations and governments.

The initial stage of a review process before the AAT may involve an Alternative Dispute Resolution (ADR) process. Different dispute resolution models are available within the AAT and the process applied will depend on the particular issues in dispute.

¹³¹ Subject to limited exceptions where it is not appropriate to provide the information, such as national security considerations.

ADR processes used in the AAT include conferencing, conciliation, mediation, case appraisal and neutral evaluation.

31.10 Determination of the matter in the AAT

If engagement with an ADR process does not lead to resolution, a party can seek listing of their application for hearing by a tribunal. AAT proceedings are designed to be quick, informal, economical, fair, and accessible for all parties. The AAT may inform itself on any matter it thinks fit in undertaking the review and is not bound by rules of evidence.

Full merits review would be available at this stage, affording parties the opportunity to have all aspects of the Departmental decision reviewed. In reviewing a decision on its merits, the AAT will make the legally correct decision or, where there can be more than one correct decision, the preferable decision.

31.11 Judicial review

A person may have the opportunity to appeal to the Federal Court of Australia for judicial review of an AAT decision, where a question of law arises about the decision reached. Alternatively, judicial review of the original decision of the Department may be available under the *Administrative Decisions (Judicial Review) Act 1977*.

31.12 Cost of return

In the current Act the cost of returning a forfeited object is a matter for Ministerial discretion. The Commonwealth also has the right to recover those costs from “the person who was the owner of the object immediately before it was forfeited”.¹³² This differs from the UNIDROIT Convention 1995 approach whereby the costs are met by the claimant government. It is recommended that the current approach be maintained: it is much more practical.

¹³² Section 38.

32 Specific provisions—illegally exported cultural material

32.1 The right to seek return

The claim for the return of illegally exported cultural material must be made by the government of the country of origin of the material. This is the current position and should be maintained.

32.2 Ambit extended

Currently, section 14(1) of the Act is in simple terms:

14 Unlawful imports

(1) *Where:*

- (a) *a protected object of a foreign country has been exported from that country;*
- (b) *the export was prohibited by a law of that country relating to cultural property; and*
- (c) *the object is imported;*

the object is liable to forfeiture.

The key change required is that sub-section 1(b) needs to be extended to include situations where the initial export was lawful (ie pursuant to a temporary export permit) but subsequently became illegal as a result of not being returned in accordance with the terms of the permit.

32.3 Ambit limited

Provided that they are consistent with Australia's obligations under the UNESCO Convention 1970, there are two further ways that the ambit of the return mechanism should be limited.

First, there should be no right to seek return (under current section 14) if the export of the material is no longer unlawful in the foreign State at the time that the object was imported into Australia or its return is requested. As the export model recognises, assessments of significance can change over time and the focus of the legislation is to protect that which is currently significant not what was or may become significant.

Secondly, in recognition of the legitimate art market and the rights of artists, there should be no right to request the return of visual arts, craft and design material exported from the relevant State during the lifetime¹³³ of the person who created it.¹³⁴

32.4 Compensation for innocent purchasers

In the new model, an innocent purchaser of cultural material that is returned on the basis of illegal export may seek just compensation¹³⁵ from the claimant government if it did not know nor ought reasonably have known at the time of acquisition that the object had been illegally exported.¹³⁶ To establish this, a dispossessed owner must be able to demonstrate that it undertook proper due diligence prior to acquisition. As part of this due diligence it is expected that the acquirer would have regard not just to the provenance of the object but also to all of the circumstances of acquisition under the law of the country of origin. For example, the possessor is expected to have enquired as to the export status of the object and, if a certificate was required, obtained the certificate at time of acquisition.

Consideration should be given to going further and **debaring the possessor from seeking compensation in the absence of an export certificate required by the law of the originating country**. This position was argued for and ultimately not included in the UNIDROIT Convention 1995 but it certainly would enhance the rigour with which due diligence is undertaken and save both governments from having to make judgements about the adequacy of that due diligence.

¹³³ New Zealand adds 50 years after the death of that person but this is not supported. The analogy with copyright law (the copyright term was 50 years at the date of the UNIDROIT Convention 1995) is fallacious.

¹³⁴ cf UNIDROIT Convention 1995, Article 7. See discussion at UNIDROIT *Convention on Stolen or Illegally Exported Cultural Objects* 1995: Explanatory Report, Unif.L.Rev. 2001-3, p.542

¹³⁵ The UNIDROIT Convention 1995, Art 6, uses “fair and reasonable” but does not define those terms.

¹³⁶ Article 6(1).

32.5 Alternatives to compensation

The UNIDROIT Convention 1995 also provides some interesting alternatives to compensation:

Article 6(3): Instead of compensation, and in agreement with the requesting State, the possessor required to return the cultural object to that State, may decide:

(a) to retain ownership of the object; or

(b) to transfer ownership against payment or gratuitously to a person of its choice residing in the requesting State who provides the necessary guarantees.

Notwithstanding that Australia is not a signatory to the UNIDROIT Convention 1995, this is worth including as it provides a useful pathway for negotiating settlements. There have already been examples in Australia where the entire matter has been settled by inter-party discussions and a voluntary return effected by way of donation to a public museum agreed between the claimant government and the possessor.

33 Specific provisions—stolen cultural material

33.1 Definition of stolen

Given the international problem of unlawful excavation, the new model proposes that the definition of stolen cultural material include that which has been unlawfully excavated or lawfully excavated but unlawfully retained (according to the laws of the country of excavation).¹³⁷

33.2 Obligation to return stolen property

The new model expressly obliges the possessor of stolen cultural property to return it. This is regardless of whether the Government chooses to pursue criminal prosecution. Accordingly all of the powers of forfeiture are available, whether the matter is dealt with as a criminal offence or administratively.¹³⁸

¹³⁷ cf UNIDROIT Convention 1995, Article 3.

¹³⁸ In this way, the model can be seen as providing a similar tool to the civil forfeiture provisions of United States Code s1595a.

33.3 Material stolen from inventoried public collections or sites

One of the great problems for the international community is the regulation of materials stolen or looted from public collections. Such institutions, monuments, and religious or identified significant sites are particularly vulnerable in war zones and other high-risk situations.

The process for dealing with material stolen from inventoried public collections should be a version of that which applies to all stolen material. It is abbreviated only in that the matters of proof will usually be more straightforward given that the material is inventoried.

The formation of a reasonable suspicion that material has been looted or is otherwise at risk should be sufficient to form the basis of suspicion to authorise seizure, without the need for a formal request from the foreign state.

As to the meaning of ‘public collection’, the UNIDROIT Convention 1995 provides a useful definition which would benefit the model (amended as follows):¹³⁹

“Public collection” consists of a group of inventoried or otherwise identified¹⁴⁰ cultural objects owned by:

- (a) the government; or*
- (b) a regional or local authority; or*
- (c) a religious institution; or*
- (d) a not-for-profit collecting organisation established for cultural, educational or scientific purposes;*

in the country of the claimant.

After determining whether the place of the theft fits the definition of ‘public collection’, the principal question is to determine whether the material in question is the identified object.

¹³⁹ cf UNIDROIT Convention 1995, Article 3(7).

¹⁴⁰ Some countries may not have the resources or skills to have an inventory in the sense of formal accessioning procedures but may still have a system of identification.

33.4 No good faith purchaser argument

With the escalation of art crime it is important that it be made very clear to the market that when it comes to cultural property, the old principles of 'nemo dat'¹⁴¹ are to be enforced in undiluted form. There should be no 'innocent purchaser for value' argument available.¹⁴² Accordingly, the provisions for the return of stolen cultural property make no distinction between bad faith and good faith purchasers (except as to whether compensation may be available). The material must be returned.

33.5 Availability of compensation

While due diligence should never be a defence to a claim for restitution or return, a possessor who returns a stolen cultural object should be entitled to compensation if it can prove that it 'neither knew nor ought reasonably to have known that the object was stolen and can prove that it exercised due diligence when acquiring the object'.¹⁴³ This balances the various competing interests in that the foreign claimant recovers the stolen cultural property, the diligent and ethical purchaser has an opportunity for compensation, and the negligent or wilfully blind purchaser loses both the object and the opportunity for compensation.

In contrast, where the object is stolen from an inventoried collection there is **no** eligibility for compensation. This increases the due diligence obligations of any acquirer of cultural material. The proper due diligence requirement that is the foundation of any compensation claim must be presumed to be absent: any proper due diligence should have discovered that the object belonged to the source collection.

¹⁴¹ This is the concept that valid legal title cannot be conferred by a person who does not hold valid title themselves.

¹⁴² It is for this reason that the term 'possessor' is preferred to 'owner'.

¹⁴³ This mirrors the UNIDROIT Convention 1995, Article 4(1).

33.6 Due diligence

The new model adopts the UNIDROIT Convention 1995 list of matters that should be considered when determining whether the possessor has in fact exercised that due diligence:

(4) In determining whether the possessor exercised due diligence, regard shall be had to all the circumstances of the acquisition, including the character of the parties, the price paid, whether the possessor consulted any reasonably accessible register of stolen cultural objects, and any other relevant information and documentation which it could reasonably have obtained, and whether the possessor consulted accessible agencies or took any other step that a reasonable person would have taken in the circumstances.

33.7 Who may claim for return?

While it is perhaps easier and more comfortable to restrict the right to claim for the return of stolen and looted cultural property to governments, the ethics of the matter require that the remedy also be available to all foreign owners. The new model reflects this.

Moreover when the claim is in respect of tribal or community material, the definition of ‘owner’ needs to be wide enough to encompass claims by bone fide representatives of the relevant tribe, community or people from whom the material was taken.

34 Specific provisions—looted foreign cultural material

34.1 Who may claim for return?

As with stolen material, a claim for the return of looted material may come from any foreign owner.¹⁴⁴ The new model reflects this.

34.2 Safeguarded cultural material

Where the Australian Government has accepted foreign cultural property for safekeeping, the model expresses an explicit obligation to hand it back at the cessation of hostilities.

¹⁴⁴ Including, for tribal or community material, the relevant tribe, community or people from whom the material was taken.

As to process, it would make sense that the Department oversee the safeguarding of the material as it is familiar with, and has responsibility for, those Commonwealth agencies with the necessary expertise and facilities required for the preservation and protection of valuable cultural material.

Any decision as to hand-back (such as whether the conflict has ceased¹⁴⁵ or to whom the material should be delivered), will be a decision to which a number of departments will contribute. There are factual and policy challenges in determining when, how and to where cultural property should be returned. While these are matters to be decided by the Government, the Act should empower the Department to make such decisions.

35 Alignment of the model with international conventions

35.1 UNESCO obligations and the new model

The new model would continue to provide the primary legislative mechanism for Australia's implementation of the UNESCO Convention 1970. In many cases the new model will substantially strengthen the provisions. For example, the export certificates will be better integrated with Customs procedures and the penal sanctions imposed will be brought into line with other, like offences.

The new model will provide a robust framework to continue to meet the obligations regarding illegal imports. It maintains Australia's current approach by which the mechanism is extended to countries that are not signatories to the UNESCO Convention 1970.

In addition, the new model will strengthen Australia's commitment to international co-operation by specifically extending illegal importation mechanisms and offences to stolen and looted material. It will also allow objects to be seized without formal request from a foreign country. In particular this will assist greatly in circumstance where cultural patrimony is in jeopardy from pillage.

Finally the new model will provide clarity by incorporating a compensation mechanism for innocent purchasers. The current Act is silent as to this aspect of the UNESCO Convention 1970.

¹⁴⁵ At least to the extent that the cultural property will not be endangered.

35.2 United National Security Council Resolutions and the new model

While the Department of Foreign Affairs and Trade would retain responsibility for regulations to implement Security Council Resolutions in Australia, it is envisaged that the new model would provide an effective mechanism to seize material,¹⁴⁶ hold and secure it in appropriate conditions, assess it and determine claims—coordinated by the same processes as other protected foreign cultural material. This ensures a consolidated and cohesive system, which streamlines the procedures and avoids overlap between Government agencies.

35.3 Hague Convention and Protocols and the new model

The new model would strengthen the protection available to cultural property which has been stolen, pillaged or misappropriated¹⁴⁷ by making the import of such objects an offence and enabling the Government to take action to safeguard and return the property at an appropriate time.

Much of the First Protocol could easily be fulfilled under the new model. The new model contains provisions that:

- enable the seizure or safeguarding of cultural material from armed conflict areas;
- provide a flexible and transparent decision-making process to determine the country to which material should be returned when hostilities result in a change of State boundaries; and
- deal with compensation claims by innocent purchasers of illegally exported, stolen or looted cultural material.

The new model can go part of the way to introducing the sanctions relevant to the Second Protocol—those relating to activity in Australia and in relation to movable cultural property. However, the criminal sanctions required under the Second Protocol could be best implemented in Australia in the *Criminal Code Act 1995*, where offences relating to the Hague Convention 1954 already sit.

¹⁴⁶ Seizure may be under the Regulations to the *Charter of the United Nations Act 1945*, the *Customs Act 1901* or the new model.

¹⁴⁷ As required by Article 4 of the Hague Convention 1954.

35.4 UNIDROIT Convention 1995 and the new model

While adapted to meet the Australian context, the new model still reflects many of the principles of the UNIDROIT Convention 1995 by providing:

- a transparency as to foreign claims that is presently lacking;
- a mechanism by which the exchange of all information is core to the procedure;
- an opportunity for the Australian possessor of the object to defend its interest in the property;
- alternate dispute resolution opportunities; and
- a right of appeal to the Administrative Appeals Tribunal.

35.5 Interaction with domestic legislation

Another benefit of the new model is that cultural material identified as illegally imported under other pieces of Australian legislation can also be assessed and returned under the proposed mechanisms. For example shipwreck relics which are imported into Australia without appropriate permits or permissions from the relevant sovereign states or coastal states (being the jurisdiction the shipwreck is located) could be seized and returned through the new model. As with the United Nations Sanctions regime, this is merely a matter of ensuring that the provisions of the *Historic Shipwrecks Act 1976*¹⁴⁸ work in tandem with the Act.

36 Protections for looted material—outside the model

In addition to the matters already discussed, in order to give fullest effect to customary international law with respect to cultural property in time of armed conflict, there remain a number of provisions relating to the protection of cultural property which sit outside the PMCH model. These should be implemented in such a way that Australia's commitment is comprehensive, practical and effective.

¹⁴⁸ Or future Underwater Cultural Heritage legislation.

36.1 Extra-territorial protection under the Hague Convention

The Hague Convention and its Protocols require other measures to ensure that cultural property is safeguarded, protected and respected.¹⁴⁹ While these measures sit largely outside of the ambit of the Act, articulating these obligations through legislation or formal government policy would provide clarity and reflect the Australian Government's central role within the federal system in the event of armed conflict.

In the event of international or non-international armed conflict, these measures include:

- having in place the appropriate and enforceable sanctions for the range of offences regarding the destruction or unethical use of cultural property including attack, destruction, vandalism, dealing in illicit material and ancillary acts—both domestically and extra-territorially;
- taking feasible precautions to remove cultural property from the vicinity of military objectives and provide adequate *in situ* protection;
- avoiding locating military objectives near cultural property;
- ensuring that cultural property is not used in a manner that is likely to expose it to destruction or damage;
- preventing the exportation of cultural property from territory occupied by the State; and
- appointing a representative or delegate, if and when required by the Hague Convention, for the protection of cultural property.¹⁵⁰

36.2 Additional criminal sanctions

Some of the above are administrative matters. Others go further and impose obligations that must be underwritten by legislative offences and associated sanctions.

¹⁴⁹ Article 2, somewhat enigmatically, states: 'For the purpose of the present Convention, the protection of cultural property shall comprise the safeguarding of and respect for such property.'

¹⁵⁰ Regulations for the Execution of the Convention for the Protection of Cultural Property in the Event of Armed Conflict, Articles 1 to 5.

Depending on the Government's decision as to future ratification of the Protocols, such offences may include:

- making cultural property and 'enhanced protection' property the object of attack;
- using 'enhanced protection' property, or its immediate surroundings, in support of military action;
- the extensive destruction, appropriation, stealing or vandalising of cultural property;¹⁵¹
- unauthorised removal of cultural property from occupied territory during an armed conflict or the unlawful removal of 'enhanced protection' property from occupied territory;¹⁵²
- dealing in illegally removed cultural property;¹⁵³
- offences relating to commanders and superiors whose troops commit offences;¹⁵⁴ and
- acts ancillary to removal offences (such as aiding, abetting, inciting, procuring etc).¹⁵⁵

To the extent that these are provided by current law, there is a need to closely examine and modernise Australia's existing legal framework to ensure that there is the appropriate coverage of extra-territorial acts by both military and non-military personnel. Moreover, as discussed earlier in this Report, unless the burden of proof issues and fault elements are addressed, successful prosecutions will prove near impossible.

In any event, the *Criminal Code Act 1995* is the appropriate place for any new offences required. Indeed, simply modernising the language of its existing provisions might cover some of these offences without the need to create new provisions.

Identifying the existing legal framework that covers these issues is no easy task. It is a smorgasbord of disparate sources including the *Criminal Code Act 1995*, *Customs Act 1901*, *Defence Force Discipline Act 1982* and ADF Rules of Engagement, *Charter of the United Nations Act 1945* and the *Charter of the United Nations (Sanctions-Iraq)*

¹⁵¹ New Zealand's *Cultural Property (Protection in Armed Conflict) Act 2012*, s.7

¹⁵² *Ibid*, s.15(1)

¹⁵³ *Ibid*, s.17

¹⁵⁴ *Ibid* s.11

¹⁵⁵ *ibid*, s.16

Regulations 2008 and the *Protection of Movable Cultural Heritage Act 1986*—topped with a dressing of customary humanitarian law. The desirability of containing them within a cohesive legislative framework is obvious. However, the benefits and consequences of such an approach are beyond the scope of this Review and are for others to articulate.

36.3 Extending extradition and mutual legal assistance powers to cultural property offences

In addition to the search and seizure powers proposed earlier in the Report, the full expression of obligations under the Second Protocol requires that criminal offences be treated as ‘extraditable offences’ under Australian law so that Australian agencies are able to cooperate with other countries in the investigation, extradition or prosecution of those offences.

Whether or not the Second Protocol is ratified, extradition powers would improve the effectiveness of the offence provisions by minimising opportunities for an alleged offender to avoid criminal responsibility. Mutual assistance powers would support the exercise of extra-territorial jurisdiction by Australia and other States by providing an avenue for international cooperation in relation to investigations and prosecutions.¹⁵⁶

36.4 Safeguarding cultural property in peacetime

Custodians of cultural property must prepare in peace for times of war. This is not an obligation imposed by international law—it is simply common sense. Article 3 of the Hague Convention 1954 reflects this:

*The High Contracting Parties undertake to prepare in time of peace for the safeguarding of cultural property situated within their own territory against the foreseeable effects of an armed conflict, by taking such measures as they consider appropriate.*¹⁵⁷

The Hague Convention 1954 gives little guidance as to how safeguarding of cultural property must be done or what preparation is appropriate but the 1995 UNESCO report on the implementation of the Hague Convention 1954 provides

¹⁵⁶ In Australia, these powers are regulated by the *Extradition Act 1988* and the *Mutual Assistance in Criminal Matters Act 1987*. While international cooperation is ideal with respect to all cultural property offences, there is a specific obligation to establish a legal basis for extradition and mutual assistance with respect to ‘2nd Protocol offences’: Articles 18 to 20, 2nd Protocol.

¹⁵⁷ Article 3. For a detailed commentary see Jirí Toman, ‘The Protection of Cultural Property in the Event of Armed Conflict’, Dartmouth Publishing Company/UNESCO, 1996, pp 59–66.

recommendations as to such steps and examples of safeguarding initiatives taken by some of the States.¹⁵⁸

Jan Hladik has usefully divided national implementation measures into five categories: administrative, military, penal, technical and promotional.¹⁵⁹ He lists a number of measures by which a country's compliance with Hague Convention obligations may be tested. Most of these are a matter for government¹⁶⁰ rather than individual institutions—except the 'technical' measures.

Technical measures consist mainly in the preparation, in time of peace, for the safeguarding of cultural property against the foreseeable effects of an armed conflict.¹⁶¹ This provision, which is of a very general character, is complemented by Article 5 of the Second Protocol which provides an example of technical measures such as the preparation of inventories, the planning of emergency measures for protection against fire or structural collapse, the preparation for the removal of movable cultural property or the provision for adequate *in situ* protection of such property.¹⁶²

Peacetime measures include:

- identifying and preparing inventories of cultural property;
- disseminating information regarding the Hague Convention and Protocols;
- planning emergency measures for the protection of cultural property against fire or structural collapse;
- preparing for the removal of movable cultural property or the provision of adequate *in situ* protection of such property;

¹⁵⁸ 'Risk preparedness under the 1954 Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict and its 2nd Protocol', J. Hladik.
<http://icom.museum/disaster_preparedness_book/international/hladik.pdf >.

¹⁵⁹ 'Cultural property in the event of armed conflict: Some observations on the implementation at the national level', Jan Hladik, *Museum International* No 4, 228, Wiley-Blackwell, UNESCO, 2005, pp 71-76.

¹⁶⁰ The Commonwealth and state governments share responsibility for the protection of cultural heritage through various intergovernmental arrangements, including: the Intergovernmental Agreement on the Environment 1992; the Council of Australian Governments Heads of Agreement on Commonwealth State Roles and Responsibilities for the Environment 1997; the National Heritage Protocol Statement of Roles and Responsibilities 2004; and the Australian World Heritage Intergovernmental Agreement 2009.

¹⁶¹ cf Article 3 of the Convention.

¹⁶² *Ibid.*

- designating competent authorities responsible for the safe-guarding of cultural property; and
- granting enhanced protection to cultural property.

Australian institutions already comply with most of the peacetime obligations of the Second Protocol. Certainly each state and federal collecting institution is expected to include in its risk management plan issues such as the preparation of collection inventories and disaster preparedness. Other, smaller collections often fail to have the resources and expertise to consider such issues fully. It is difficult to know whether complacency or modesty is a greater enemy of implementation of the Hague Convention principles. The former is the attitude that 'it will never happen here' and the latter is, 'what we have isn't important enough to be endangered'. Yet, often, protective measures in small organisations can be simple, reasonably inexpensive and very effective.

37 The Blue Shield emblem

One of the common difficulties in wartime is recognising cultural property. From the air, a library or museum may look much the same as a government office building or a munitions warehouse. To make identification easier, the Hague Convention provides an emblem and the Second Protocol further defines its appropriate use.

The use of such emblems is not new¹⁶³ but what was new was that the Hague Convention specified its design. It is in the form of a 'Blue Shield'.¹⁶⁴



Figure 24—Blue Shield emblem

The Hague Convention established the use of the Blue Shield as a symbol for identifying protected cultural sites and material. In tandem, an international organisation of heritage and museum professionals was established to assist in the identification and protection of these sites and materials, both in relation to armed conflicts and disaster mitigation more broadly.

Cultural property may (in the case of property under general protection)¹⁶⁵ or must (in the case of cultural property under special protection)¹⁶⁶ be marked by the distinctive Blue Shield emblem of cultural property. It is the responsibility of the Government to identify cultural property that may or must be marked by the distinctive emblem.

The international response to the use of the protective emblem has been diverse. Some countries such as Belgium, Bosnia and Herzegovina,¹⁶⁷ Egypt, Austria and Germany have undertaken a program of marking important cultural property with the Shield. Other countries do not believe that it is prudent to mark such property because it may simply identify important targets for aggressors¹⁶⁸ or unnecessarily alarm the

¹⁶³ For example, symbols were provided by the Hague Convention 1907 and the Roerich Pact 1935.

¹⁶⁴ Article 15: 'pointed below, persaltire blue and white (a shield consisting of a royal-blue square, one of the angles of which forms the point of the shield, and of a royal-blue triangle above the square, the space on either side being taken up by a white triangle).'

¹⁶⁵ See Article 6 of the Convention.

¹⁶⁶ See Article 10 of the Convention.

¹⁶⁷ Which marked cultural property prior to and during the 1992-1995 war.

¹⁶⁸ As Kossiakoff observes, this rationale should be finally dismissed for, as experience in Bosnia showed, a hostile party already knows where hidden property is or at the least can easily find out: 'The art of war: The protection of cultural property during the Seige of Sarajevo (1992-1995)', Megan Kossiakoff, 14 DePaul-LCA J Art and Entertainment Law, (2004), p 109; cf Patrick J Boylan, 'Review of the Convention for the Protection of Cultural Property in the Event of Armed Conflict', (The Hague Convention of 1954), Paris, UNESCO, 1993, Report ref CLT-93/WS/12.

civilian population.¹⁶⁹ Still others have undertaken preparation in peacetime and when conflict threatens, the plans will be implemented.¹⁷⁰

Certainly it must be said that the use of the emblem only works to mitigate against attacks made in error. As the war in the former Yugoslavia showed, it can never protect against deliberate and tactical attack.¹⁷¹

Blue Shield Australia was established in 2005 as one of the many national committees under the International Committee of the Blue Shield. Blue Shield Australia is run by four non-governmental organisations: the International Council on Archives; the International Council of Museums Australia; the International Council on Monuments and Sites Australia; and the International Federation of Library Associations and Institutions. While dedicated professionals volunteer time to assist Australian organisations prevent, prepare for and respond to emergency situations,¹⁷² their ability to effect change or provide education services is hampered by lack of recognition and funding.

The world is very familiar with the meaning of a red cross but the blue and white shield is far less well known and it is clear that there has been insufficient community education as to its recognition, meaning and importance.

37.1 Providing legal protection for the Blue Shield emblem

The distinctive Blue Shield emblem for cultural property should be given legal protection. It is unprotected under current Australian law. This should be remedied. The model makes provision for the protection of the Blue Shield emblem to prohibit its unauthorised use. It also allows for the creation of a framework to authorise the use of the emblem on movable cultural heritage material.

¹⁶⁹ For example, Spain.

¹⁷⁰ For example, Switzerland. These examples are taken from the UNESCO Report, supra fn 31, pp 14–16.

¹⁷¹ Kossiakoff, Id FN 46. The cultural damage suffered in this conflict is summarised in: Lopez Henares, 'Ninth information report on war damage to the cultural heritage in Croatia and Bosnia-Herzegovina', Eur Parl Assembly Doc No 7464, sec 3 (1996).

¹⁷² In Australia this has been particularly focussed on natural disasters.

How protection is achieved is a matter of policy but it should include provisions:

- providing that use of the distinctive emblem must be authorised by the Department;
- requiring the Department to only approve use that is consistent with the Hague Convention; and
- making it an offence to use the distinctive emblem without authorisation (even if the use of the emblem was consistent with the Hague Convention).

The extension of the shield to **immovable** heritage during times of conflict will need to be considered in conjunction with the Department of the Environment.

It will also be necessary to ensure that trademark applications are refused registration if they incorporate the distinctive emblem. In relation to the red cross, red crystal and red crescent, this is currently addressed in the Trade Marks Office Manual of Practice and Procedure.¹⁷³ In the event that the cultural property distinctive emblem has been incorporated into an existing registered trademark, it will be necessary to include a 'savings clause' for trademarks registered prior to the entry into force of the proposed model.

The legal protection established by Part IV of the *Geneva Conventions Act 1957* (in relation to the red cross, the red crescent and the red crystal) provides a useful example, as does Part 4 of New Zealand's *Cultural Property (Protection in Armed Conflict) Act 2012*. Part IV of the ICRC Model Law is also instructive.

In extending legal protection to the distinctive Blue Shield emblem, the Government will also need to give consideration to how the protection will be enforced and who will be responsible for enforcement. The Government may like to canvass approaches to this question with Australian Red Cross given its experience in the protection of their emblem and with Blue Shield Australia.

¹⁷³ Part 30, Article 3.5.2.

New import process flow chart

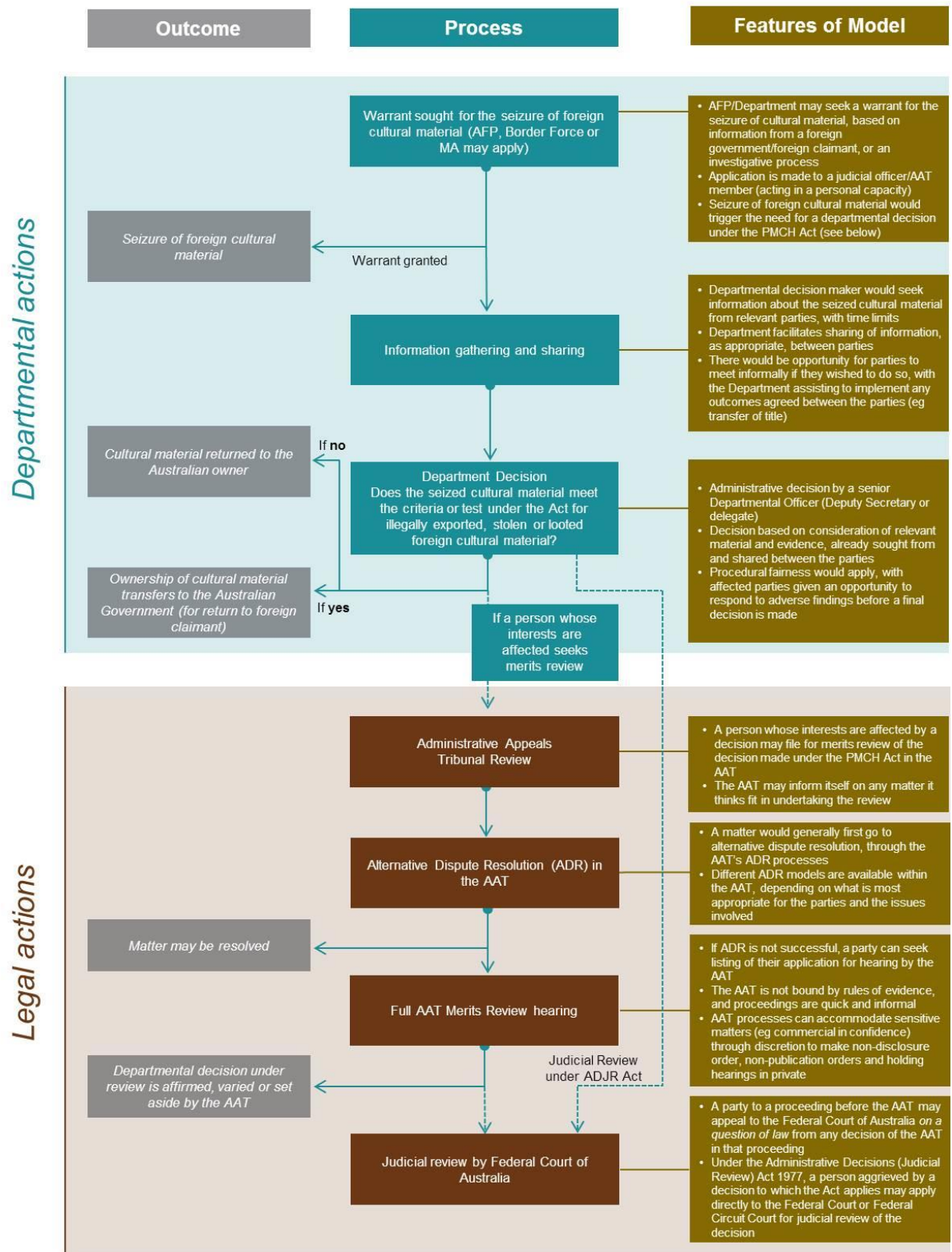


Figure 25—New process for foreign claims

Part D: Offence Provisions

While the current legislation does include offence provisions, these are often difficult to enforce. In some cases their expression lacks clarity or they may not be in line with current law enforcement standards. In others, attention needs to be given to the elements of proof required to establish the offence.

Much of the detail in relation to these issues will be a matter for drafting however the model incorporates principles that reformulate and articulate the provisions in a way that better promotes the intention of the legislation.

38 Offences relating to unlawful exports of Australian material

38.1 Exporting or attempting to export

The proposed model would retain but amend the current offences¹⁷⁴ of exporting or attempting to export Australian Heritage Material¹⁷⁵ other than in accordance with a permit or certificate.

Currently, to prosecute a person it is necessary to prove three physical elements and their associated fault elements.¹⁷⁶

Physical Element	Fault Element
1. Export of the object	Intention
2. The object is Australian Heritage Material	Recklessness
3. The export is otherwise than in accordance with a permit or certificate	Recklessness

It is recommended that consideration be given to simplifying these hurdles.

¹⁷⁴ Section 9 of the Act.

¹⁷⁵ Renamed from the current category of Australian Protected Object.

¹⁷⁶ See Division 5 of the *Criminal Code Act 1995*.

As to physical element 1, prior to the material leaving the jurisdiction it may be difficult for the prosecution to establish intention to export. It is therefore proposed that either:

- the burden of proof be varied by providing that it is for the defendant to prove, on the balance of probabilities, that there was no intention to export; or
- it be provided that the intention to export is established when the person has taken the final actions necessary to cause the object to leave Australia.¹⁷⁷

As to physical element 2, it is suggested that the fault element be amended so that if the prosecution proves that the material satisfies the criteria for protected material then the burden should shift to the defendant to prove that it was not reckless.

As to physical element 3, it is proposed that the fault element be amended. Already, section 9(6) provides that:

...a person who exports or attempts to export an Australian protected object shall be taken to export, or attempt to export, the object otherwise than in accordance with a permit or certificate unless, before exporting or attempting to export the object, the person produces a permit or certificate authorising the export:

(a) where the export is not from an external Territory to an officer of Customs; or

(b) where the export is from an external Territory—to an inspector performing duties in relation to the export of Australian protected objects.

This could be simplified and modernised to provide that the failure to produce the permit or certificate would fulfil physical element 3. That is a matter for drafting.

38.2 Contravening a condition of a permit

The proposed model retains the current offence of engaging in conduct that contravenes a condition of a permit.

¹⁷⁷ See Part 41.1

38.3 New offences

The model creates three further offences:

- a person who engages in conduct to mislead as to the nature of material to avoid regulation, commits an offence. The absence of this offence in the present legislation is an enormous oversight. All too often, the unscrupulous dismantle important cultural material and export it under misleading descriptions—a WWII fighter plane becomes a container of scrap metal;
- a person who exports, or attempts to export, Australian Protected Material or Declared Australian Protected Material without, or in breach of, a permit or certificate, commits an offence. This is covered in the current legislation. The problem with the current expression of the offence would be largely dealt with by adopting the recommendation made in Part 38.1 above; and
- a person who does acts preparatory to export (for example entering into a contract for export with an overseas buyer) commits an offence.

38.4 Differing sanctions according to category of material

Under the new model there are three categories of heritage material. Material in each of these categories has different degrees of established significance and those should be reflected in the sanction provisions.

38.5 Definitions of export and attempted export

At present, attempted export makes the material liable to forfeiture; export results in automatic forfeiture. That should be retained.

The Act also has a very limited and exclusive definition that does not accommodate the increased use of courier services.

Under the current Act it has proved difficult to stop material as it moves from ‘attempted export’ to ‘export’—often this occurs as the ship or plane that the object has been loaded onto leaves the country. To establish ‘export’ there should be no requirement that the departure of the aircraft or ship, or movement of the posted object, have commenced. The Act should provide that an offence is committed (and the material forfeited to the Commonwealth) at an earlier defined point of export: the

point at which it is clear that a person intends the material to be taken out of Australia and has taken decisive actions to fulfil that intention.

In particular, 'export' could be defined as to include the taking of the final actions necessary to cause the material to leave Australia, such as posting the object or delivering it to a courier, shipping agent, wharf or airport for loading. For example, section 9(4)(a) might be simplified and modernised as follows:

For the purposes of this section, an object has been exported when it has been delivered into the control of a carrier, postal or courier service with the intention that it be sent out of Australia.

In addition, export could also occur with the lodgement of documentation for the purposes of sending material out of the country.¹⁷⁸

In drafting it should be clarified that the Act is not intended to impose criminal sanctions on carriers and freight forwarders. This interpretation is open in the current Act but getting the co-operation of the carriers and forwarders is better achieved through co-operation and education than a stick.

38.6 Destroying, damaging or disassembling Australian Protected Material

Consideration has been given to creating an offence prohibiting an owner from damaging or destroying Australian Protected Material or Declared Australian Protected Material but the constitutional power for such legislation may be limited.¹⁷⁹

However, advice indicates that it would only be possible to prohibit causing damage to objects where this is done for the purposes of illegal export—for example, damaging a fossil or a rock painting by excavating it, or disassembling a piece of heritage machinery, for the purposes of export. Similarly the external affairs power would support a legislative provision that makes it an offence to cause damage to material with a view to disguising it so that it could be illegally exported without detection. These offences are included in the new model.

¹⁷⁸ Such a definition should be inclusive rather than exhaustive so as to not exclude coverage of other forms of transport.

¹⁷⁹ Already there is an example of an owner who was refused an export permit who chose to destroy the significant object as an expression of their pique.

39 Offences relating to illegally exported foreign cultural material

The proposed model would retain but amend the current offence¹⁸⁰ of importing a protected object that has been illegally exported from its country of origin.

Currently, to prosecute a person under this offence it is necessary to prove four physical elements and their associated fault elements.

Physical Element	Fault Element
1. Import of the object	Intention
2. The object is a protected object of a foreign country	Knowledge
3. The object has been exported from that country	Knowledge
4. The export was prohibited by a law of that country relating to cultural property	Knowledge

Thus, the prosecution must prove beyond reasonable doubt that the defendant had knowledge of the matters in elements 2, 3 and 4. It is strongly recommended that consideration be given to varying the burden of proof and simplifying these hurdles.

Denial of knowledge is the first resort of any person accused of the unlawful import of cultural material. Whether the defendant had knowledge should not be the test. The purpose of such sanctions is to promote the due diligence of buyers and importers of cultural material. It is not enough to say 'I didn't know'—these are matters that the buyer/importer should be expected to know or to find out. The whole approach of the Act and our related treaty obligations is to oblige importers of foreign cultural material to undertake due diligence enquiries prior to acquisition and prior to import.

Perhaps the intention/knowledge element of physical element 2 may be dealt with by the insertion of additional text as follows: knowing that '*or ought reasonably to have known*' that the object was a protected object of that country.

¹⁸⁰ Section 14 of the Act.

As to element 4, it is suggested that the importer bear the evidentiary burden to demonstrate that the object has been legally exported from its country of origin (through the provision of an export permit or certificate). If the importer has performed proper due diligence enquiries it will be able, quickly and inexpensively, to present the necessary export papers.

How these things are best achieved is a matter for drafting.

40 Offences relating to stolen and looted foreign cultural material

To strengthen Australia's commitment to the UNESCO Convention 1970 and address the illicit trade in cultural material more broadly, the new model introduces offences in relation to the import of stolen and looted cultural material.

Reliance on the present illegal export mechanism does not go far enough. Theft should never be condoned, whether or not the country of origin has an export regime for cultural material. Moreover, where a country is experiencing war or civil unrest the government may not be fully functioning and the export certification of cultural material may not be even feasible.

Accordingly, the new model extends the current offences relating to illegally imported material to include new offences relating to stolen cultural material—including material stolen from inventoried (or otherwise identified) collections, monuments or sites, or stolen from areas of armed conflict.

The general offences should also be extended to cover situations where a person gives, trades, or otherwise transfers the title of stolen or looted cultural material (or ought reasonably to have known that the object was stolen or looted cultural material).

As already discussed, the rightness of stemming the flow of cultural material looted from war zones makes it important that those who acquire such material bear an evidentiary responsibility for proving the legitimacy of their acquisition.

41 Forfeiture provisions

The power to forfeit personal property and hand that property over to another is a considerable inroad into an owner's personal rights. It is something that the Common Law has interpreted narrowly for centuries (although for nearly a thousand years there

have been laws that have provided machinery for the forfeiture of chattels in certain criminal matters).

Given the practical difficulties of patrolling the borders and preventing the unlawful export of Australian Protected Material, the power of forfeiture is essential.

If such property leaves the country illegally, it must be automatically forfeit.

This inhibits its sale and market value in the overseas market, for no reputable auction house wants to sell items to which the vendor cannot establish good title. Already the Department is receiving enquiries from certain London auction houses as to whether material that has been offered to them for sale has the requisite export permits.

Indeed, the best way of promoting the regime would be a couple of high profile actions for the seizure and return of forfeit cultural material. It would give loud warning to the foreign auction houses and collectors as well as the local sellers who are prepared to undertake illegal export for personal profit.

In the new model, the forfeiture provisions reflect the difference between the export and the attempted export of objects, and also the difference between Australian Heritage Material, Australian Protected Material and Declared Australian Protected Material.

41.1 Forfeiture for unlawful export and attempted export

The new model makes it clear that, in relation to Australian Heritage Material, goods seized as a result of 'attempted export' **are liable to forfeiture** while goods that have been exported **are forfeit**.

However, where the object of the attempted export is Australian Protected Material or Declared Australian Protected Material, **forfeiture** is recommended in both cases. This is to highlight the importance of these categories of material and to provide an appropriate level of protection and sanction.

42 Sanction provisions

The sanction provisions in the current Act were drafted in the 1980s and therefore should be reconsidered to ensure they are in line with like offences in other legislation. Currently, the penalties for illegal import or export are set at 50 penalty units (\$9,000)

or imprisonment of up to 2 years for individuals, or 200 penalty units (\$36,000) for a body corporate. These are too low—they are just seen as a cost of doing business.

The new legislation should incorporate modernised sanctions which are set at a more appropriate level. For example, similar offences (contravention of export permit conditions) under the *Environment Protection and Biodiversity Conservation Act 1999* have a penalty unit rate of 300 (\$54,000) for individuals.

Also the legislation should provide for severe sanctions for the breach of any conditions of a temporary export permit or a General Permit. These could include forfeiture of any object not returned within the prescribed time and a fine equal to the sale price or value of the object (whichever is the higher). In regard to General Permits, sanctions should apply to the organisation that holds the permit (fine and loss of permit) as well as the individual owner (fine and forfeiture).

43 Enforcement provisions

Likewise, the current enforcement provisions fail to provide a coherent range of tools to assist law enforcement officers to prevent the illicit trade in cultural material. One of the most important tools is that of seizure. The need to seize cultural property can arise in a multiplicity of circumstances. It is important that Inspectors have the ability to seize on suspicion so that material can be appropriately safeguarded until its status can be properly ascertained. To protect the rights of the property owner and ensure that this suspicion is based on information that has been independently validated, the model introduces a warrant process for the seizure.

The new provisions must also clarify that seizure of cultural objects discovered during the course of a raid or search that is conducted in respect of other material or purposes is permissible. This is one of the common ways that cultural material is discovered and it is important that the legal underpinning for that seizure and prosecution be secure.

Such provisions should be consistent, clearly expressed and in accord with modern enforcement practices. Part C provides further detail about how a modern warrant scheme for the search and seizure of foreign cultural material has been incorporated into the new model.

44 Engagement with the Australian Border Force

Engagement and collaboration with the Australian Border Force is one of the keys to a successful export and import regulation scheme. There are a number of key areas where better engagement and integration would ensure a more successful outcome:

- permit system integration;
- increased integration with the Australian Harmonised Export Commodity Classification (AHECC) codes which reflect the cultural material being regulated; and
- the formalisation of the role of the Australian Border Force officers as *ex officio* Inspectors under the Act.

44.1 Permit integration

Currently, permits issued under the Act are not integrated with the system used by the Australian Border Force. This means that, while permits may be spot-checked, they are not systematically cross-checked. The conditions (largely administrative) which would ensure the integration of these permits with the Australian Border Force systems should be implemented in the new framework. This would include using a compatible numbering system and perhaps using the model export certificate developed by UNESCO in consultation with the World Customs Organization.

This would add an extra layer of protection where permits are not obtained or are forged. It would also act as an educational tool, making it clear to exporters that permits are expected and checked.

44.2 Exploration of AHECC Codes for Australian Heritage Objects

The AHECC codes allow the Australian Border Force to track the flow of goods over our border, primarily for the purposes of statistical analysis and the calculation of duties owed.

AHECC Codes are eight digit codes against which exported goods are coded. The first six of these digits are fixed and are based on the Harmonized Commodity Description and Coding System which was developed by and is maintained by the World Customs Organisation. The final two numbers provide further detail about the category and these are updated and maintained by the Australian Bureau of Statistics. These final two digits of an AHECC code may be altered to create new codes—and this may be very important for the protection of Australian cultural property.

While it would require detailed feasibility studies, including industry consultation, the creation of new AHECC codes to cover cultural heritage material would be a great step towards the effective enforcement of the Act. For the first time, it would permit the Act's framework to integrate into the Australian Border Force system.

The AHECC codes allow the Australian Border Force to identify which permit is required to export a particular type of good and which conditions apply to the export of that good type. For example, the code denoting the export of live fish flags the requirement for a particular permit from the Department of the Environment. In this case the flag indicates that an export permit must be produced and the exporter is informed that the goods will not be cleared for export until that permit is presented.

There are no AHECC codes that directly or specifically align with cultural material as it is defined under the current Act or the new model. There are, however, some codes that have a clear connection to cultural material. These include:

- 97050000—Collections and collectors' pieces of zoological, botanical, mineralogical, anatomical, historical, archaeological, palaeontological, ethnographic or numismatic interest;
- 97011000—Paintings, drawings and pastels, executed entirely by hand (excl. drawings of 4906 and hand-painted or hand-decorated manufactured articles);
- 97060000—Antiques of an age exceeding one hundred years;

- 97040000—Used postage or revenue stamps, stamp-postmarks, first-day covers, postal stationery (stamped paper) and the like, or if unused not of current or new issue in the country of destination; and
- 25120000—Siliceous fossil materials and similar siliceous earths, of an apparent specific gravity of 1 or less.

However, it is clear that these codes do not directly correlate with definitions under the Act. For example, a painting which is regulated under the Act would be captured under AHECC code 97011000; but not all of the artworks exported under that code will require a PMCH permit—some may not be Australia-related, others may not meet the age threshold.

Additionally, some material regulated by the Act may fall under multiple AHECC codes, depending on materials used or type of object. This makes it difficult to accurately predict which codes will be used by exporters for Act-regulated material. For example, farming equipment with historical significance may be exported under code 84320000 (Agricultural, horticultural or forestry machinery for soil preparation or cultivation; lawn or sports-ground rollers) or under code 97050000 (Collections and collectors' pieces of zoological, botanical, mineralogical, anatomical, historical, archaeological, palaeontological, ethnographic or numismatic interest).

This means that it is not feasible for a 'non-clearance' flag to be placed on AHECC codes in relation to permits for cultural material. What could be incorporated is a warning to the exporter that this type of good **may** require a permit under the Act.

While this is possible under the current Act, it is likely to be ineffective due to the complexities of the Control List thresholds. The current use of subjective criteria to define what is protected requires information that is likely to be outside of the reasonable knowledge of exporters or export brokers.

The new model's Control List defines Australian Heritage Material with reference to objective criteria (class of object, age and monetary value) and this would make the use of a 'warning' flag far more effective. It would allow the Department to clearly demonstrate that an exporter who chose to proceed with an export in contravention of the Act did so knowingly. It would also have the added benefit of increasing the public

awareness of the legislation and encouraging exporters to consider their obligations under the Act.

44.3 Inspectors

Under the current Act, all state, territory and federal police officers are Inspectors. The Minister may also designate particular individuals as Inspectors. The new model retains these two classes of Inspectors.

44.3.1 New powers for Border Force officers

It is also recommended that Australian Border Force officers, while on controlled premises, are designated 'Inspectors ex officio' under the new model. This would allow objects to be seized at the border by Australian Border Force officials and would streamline the current processes. It would also allow for better integration of the monitoring of these objects with existing border control systems.

A model such as that under the *Environmental Protection and Biodiversity Conservation Act 1999* could be used as the basis for such a provision.

Part E—Recommendation—New Model

Protection of Australian Cultural Material—export provisions

45 Principles of the new export model

(1) The new model seeks to provide:

- (a) a simpler legislative framework for the regulation of export and import of cultural material;
- (b) objective standards to define the material being regulated;
- (c) clear, practicable criteria for determining the significance of material;
- (d) an articulated process to assess the significance level of material;
- (e) a more efficient assessment process by requiring a greater degree of title, provenance and asset description information from applicants applying for permits;
- (f) a flexible and risk-based approach to assessment processes;
- (g) clearer guidance to decision-makers throughout the process;
- (h) a shortening of the decision-making process so that the processing of applications is faster and more cost-effective than the current system;
- (i) transparency at all stages including application, process and decision;
- (j) a new classification system for protecting the nation's most important cultural material that:
 - better reflects the true richness of the cultural heritage of Australia and the diverse regions and places that constitute the nation;
 - protects material already found to be significant by Commonwealth, state and territory governments; and
 - provides a flexible and living category of material which attracts high-level protection (currently only available to the static melange that is Class A);
- (k) more effective prosecution procedures (such as varying the burden of proof in certain circumstances where the relevant evidence is reasonably expected to be in the control of the applicant rather than the Government);

- (l) an extension of the current General Permit system to a wider group of approved organisations; and
- (m) modernisation of enforcement provisions to ensure they are in line with current best practice.

46 Definitions

46.1 What material is protected?

- (1) Protection is given to ‘cultural heritage’ material that is ‘Australia-related’. It must fulfil both definitions before any further analysis under the Act is required.
- (2) As the legislation regulates the import and export of cultural material, the material must be movable—that is, capable of being exported or imported.

46.2 Definition of ‘cultural heritage material’

- (1) The diverse range of cultural and natural material that may be protected by the legislation requires a broad and encompassing definition that complies with the requirements of the UNESCO Convention 1970:

‘**cultural heritage**’ means movable material of importance for ethnological, archaeological, historical, literary, artistic, scientific, spiritual, natural or technological reasons; and

- (d) in relation to Australia-related material, is material falling within one or more of the National Cultural Heritage Control List categories;
- (e) in relation to foreign material, is material forming part of the cultural heritage of a foreign country.

46.3 Definition 'Australia-related'

(1) There is a single definition of 'Australia-related', which can be applied across the entire range of regulated material:

'Australia-related material' means any one of the following:

- (a) natural material or Ancestral remains recovered from above, on or below:
 - the land or inland waters of Australia;
 - the waters, seabed or subsoil of the territorial sea or Exclusive Economic Zone of Australia; or
- (b) relics recovered from a historic shipwreck (as defined under the *Historic Shipwrecks Act 1976*); or
- (c) material made in Australia, or with substantial Australian content, or that has been used extensively or assembled in Australia, being one or more of the following:
 - material designed or made by an Australian citizen or resident, inside or outside of Australia;
 - material designed or made in Australia or which has substantial content made in Australia (including that designed or made by a non-Australian citizen);
 - material not made in Australia but assembled, altered or modified in Australia for the Australian market or conditions, or extensively used in Australia;
 - material with subject-matter or motifs related to Australia;
 - material strongly associated with an Australian person (or group of people), activity, event, place or period in science, technology, arts or history.

47 A new classification structure

- (1) The model adopts a new three-tier classification structure:
 - (a) Australian Heritage Material;
 - (b) Australian Protected Material; and
 - (c) Declared Australian Protected Material.
- (2) The distinction between Class A and Class B Australian Protected Objects under the current Act is abolished.
- (3) Material currently within Class A continues to receive the maximum protection by inclusion as Declared Australian Protected Material.

47.1 Australian Heritage Material

47.1.1 What is Australian Heritage Material?

- (1) Australian Heritage Material is cultural heritage material which either:
 - (a) exceeds the relevant age and value thresholds as set out in the Regulations; or
 - (b) is listed in the Regulations as Australian Heritage Material; or
 - (c) irrespective of age and value criteria, has been declared by the Minister to be Australian Heritage Material.
- (2) An owner who wishes to export cultural heritage material must apply the definition of Australian Heritage Material (as above). If the material does not meet the definition and is not prescribed on the Declared Australian Protected Material list, no export permit is required and it may leave the country.

47.1.2 What is the consequence of classification as Australian Heritage Material?

- (1) An owner (or agent) who wishes to export Australian Heritage Material must apply for an export permit.
- (2) It does not mean that the material must be assessed for significance or representation—merely that an application for export must be made.
- (3) A permit for permanent export may be granted even though the material has been found to be significant provided that the adequate representation test is fulfilled (thus establishing that there are sufficient other comparable objects in public collections).

47.1.3 What if the Australian Heritage Material is given a temporary export permit?

- (1) If an item of Australian Heritage Material is given a temporary export permit, for the time that the material is out of the country, it is Australian Protected Material. This ensures that a higher level of offences and sanctions apply to this material while it is out of Australia.
- (2) When it returns, it reverts to its previous status as Australian Heritage Material.

47.2 Australian Protected Material

47.2.1 What is Australian Protected Material?

- (1) Australian Protected Material is Australian Heritage Material that is the subject of an export permit application and has been:
 - (a) permitted to leave the country on the basis of a temporary export permit granted without formal significance or representation assessment; or
 - (b) formally assessed as being significant to Australia or a part of Australia and not adequately represented in a public collection; or
 - (c) irrespective of the age or value criteria, declared by the Minister to be Australian Protected Material.

47.2.2 What is the consequence of classification as Australian Protected Material?

- (1) Australian Protected Material can generally only be exported with a temporary permit.
- (2) Permanent export may be granted in exceptional circumstances. If such permission is granted and the material is exported, its status reverts to Australian Heritage Material.¹⁸¹

¹⁸¹ And thus if it were re-imported at a later date, its re-export would require a permit application.

47.3 Declared Australian Protected Material

47.3.1 What is Declared Australian Protected Material?

- (1) Declared Australian Protected Material is Australian Protected Material of outstanding significance. It includes any part or component of such material.
- (2) An item becomes Declared Australian Protected Material if:
 - (a) it is listed in the Regulations as Declared Australian Protected Material; or
 - (b) irrespective of the criteria of age and value, has been declared by the Minister as Declared Australian Protected Material; or
 - (c) it is denied a permanent export permit; or
 - (d) an owner applies for declared status, the material is assessed for significance and representation and the Minister issues a declaration.

47.3.2 What is the consequence of classification as Declared Australian Protected Material?

- (1) Declared Australian Protected Material is to be listed in the Regulations (and published on the Department's website).
- (2) The permanent export of Declared Australian Protected Material is generally prohibited.
- (3) There is one exception to the prohibition of permanent export of Declared Australian Protected Material: to enable appropriate destructive scientific testing of samples, for which there is a demonstrated need.
- (4) A permit for the temporary export of Declared Australian Protected Material will be considered where the temporary export is for appropriate and approved purposes.
- (5) A temporary export permit will be subject to a range of strict conditions. The Department may impose any conditions appropriate to safeguard the material.
- (6) A permit for the temporary export of Declared Australian Protected Material will be granted only for the period required for the approved purpose and for no longer than one year. The Department may extend that period.

47.3.3 Can material be removed from the Declared Australian Protected Material classification?

- (1) Material may be removed from the Declared Australian Protected Material list if its significance or representation values change over time. Material which has been denied export may be reassessed after a period of five years.

48 Cultural Heritage Control List

48.1 New structure for the Control List

- (1) The new Control List has just four principal headings:
 - Part 1: Aboriginal or Torres Strait Islander Material and Ancestral Remains
 - Part 2: Natural Science Material
 - Part 3: Visual Arts, Craft and Design Material
 - Part 4: Historically Significant Material
- (2) To assist in the classification of material, the Control List may have Sub-Parts.
- (3) Under each Part or Sub-Part there are objective thresholds as to the material concerned and any particular factors that need to be considered in relation to material falling within that classification.
- (4) Market value is either the Australian or the international value—whichever is the higher—and includes the full cost price of the material including buyer's premiums, commissions and other charges.
- (5) To the extent possible, the long lists of example objects that fall within various Parts of the current Act are removed from the Regulations and placed as examples in the Guidelines.
- (6) 'Significance' and 'representation' are removed as preliminary thresholds. This is now a matter for expert consideration as part of the expert assessment process.
- (7) The 'equivalent quality' and 'two public collections' tests are abolished and replaced by an 'adequate representation' test. The adequate representation test is applied by the expert Assessor(s).

48.2 Part 1: Aboriginal or Torres Strait Islander Material and Ancestral Remains

- (1) The term Aboriginal or Torres Strait Islander is as defined in the *Aboriginal and Torres Strait Islander Act 2005*.

- (2) Any Aboriginal or Torres Strait Islander material or Ancestral remains currently described as Class A, are Declared Australian Protected Material.
- (3) Any decision in respect of the temporary or permanent export of Aboriginal or Torres Strait Islander Material or Ancestral Remains must be made in consultation and with the consent of Traditional Owners, communities or representatives.
- (4) Artworks made by Aboriginal or Torres Strait Islander people must not be considered under this Part¹⁸²—except where a work contains secret/sacred imagery, in which case it must be considered under this Part 1, not Part 3.
- (5) Aboriginal or Torres Strait Islander Material includes:
 - (a) objects made by Aboriginal or Torres Strait Islander people;
 - (b) objects that are significant in Aboriginal or Torres Strait Islander cultural traditions;
 - (c) any original photograph, drawing, film, video or sound recording and any similar record containing the image or voice of a deceased Aboriginal or Torres Strait Islander person.
- (6) Aboriginal or Torres Strait Islander Material is Australian Heritage Material if:
 - (a) it is more than 50 years old; or
 - (b) irrespective of the age criteria, is declared by the Minister to be Australian Heritage Material.
- (7) The model treats Ancestral remains separately from other material to make it clear that Ancestral remains are not referred to or treated as objects.
 - (a) In this Part, ‘Ancestral remains’ means the human remains, or any part or sample of the remains, of an Aboriginal or Torres Strait Islander person who has been dead for at least 50 years.
 - (b) All Ancestral remains are Declared Australian Protected Material.
 - (c) No permit will be issued for the temporary or permanent export of Ancestral remains without consultation with and consent of any identifiable kin of the deceased or Traditional Owners, communities or representatives.

¹⁸² They now fall into Part 3.

- (8) Aboriginal or Torres Strait Islander Material is Australian Protected Material if it is Australian Heritage Material and:
- (a) is permitted to leave the country on the basis of a temporary export permit; or
 - (b) has been formally assessed and found to be significant and not adequately represented in Australian public collections; or
 - (c) irrespective of the age criteria, is declared by the Minister to be Australian Protected Material.
- (9) Ancestral remains are Declared Australian Protected Material.
- (10) Aboriginal and Torres Strait Islander Material is Declared Australian Protected Material if it is:
- (a) secret/sacred ritual objects;
 - (b) rock art;
 - (c) dendroglyphs (carved trees);
 - (d) petroglyphs (carved rocks);
 - (e) possum skin cloaks;
 - (f) bark and hollow log coffins and other items used as customary burial objects;
 - (g) pre-contact artefacts;
 - (h) western brass breastplates;
 - (i) artworks in the Indigenous tradition identified as having secret/sacred significance for Aboriginal or Torres Strait Islander people;
 - (j) documentation and audio-visual material embodying secret/sacred images or ceremonies; or
 - (k) irrespective of the age criteria, declared by the Minister to be Declared Australian Protected Material; or
 - (l) denied permanent export permission under the Act.
- (11) In determining whether works have secret/sacred significance:

- (a) any material originating from a recognised Australian sacred site¹⁸³ shall be presumed secret/sacred;
 - (b) material or objects made for sale are prima facie presumed not secret/sacred in content; and
 - (c) notwithstanding (b), pre-1974 Papunya Tula boards containing explicit depiction of ceremonial poles and/or tjuringa bullroarers are presumed secret/sacred.
- (12) Except for the Papunya Tula boards described in (11)(c) above, Part 1 does not apply to any work of visual art, craft or design made with the intention of sale.
- (13) Aboriginal and Torres Strait Islander material, whether it is Australian Heritage Material, Australian Protected Material or Declared Australian Protected Material, may be temporarily exported without a permit if it is being accompanied by its Traditional Owners in accordance with Aboriginal or Torres Strait Islander customs and traditions.

Material denied permanent export permission under the Act

- Torres Strait Arrowhead;
- two Queensland Gulmari Shields, c.1880s;
- 28.29 gram specimen of Uluru (Ayers Rock);
- Honey Ant Travelling Dreaming (1971) by Kaapa Mbitjana Tjampitjinpa;
- Water Dreaming (1972) by Old Walter Tjampitjinpa;
- Womens' Dreaming (1972) by Uta Uta Tjangala;
- Rain Dreaming with Ceremonial Man (c1971) by Johnny Warangkula Tjupurrula;
- Porcupine, Danger Men Only (1973) by Anatjari Tjakamarra;
- Untitled (1972) by Ronnie Tjampitjinpa;
- Budgerigar Dreaming (1972) by Kaapa Mbitjana Tjampitjinpa;
- Untitled (Ceremonial Designs) (1971/72) by Mick Namarari Tjapaltjarri;

¹⁸³ The definition of 'sacred site' should harmonise with other Commonwealth, State or Territory legislation. For example: "Sacred site" means a site that is sacred to Aboriginals or is otherwise of significance according to Aboriginal tradition, and includes any land that, under a law of the Northern Territory, is declared to be sacred to Aboriginals or of significance according to Aboriginal tradition—*Aboriginal Land Rights (Northern Territory) Act 1976, Part VII, s.69.*

- Djulpan, the constellation of Orion and the Pleiades (c1958) by Mungarrawuy Yunupingu;
- Hunting (1971) by Long Jack Phillipus Tjakamarra;
- Corroboree for Young Men (1972) by Long Jack Phillipus Tjakamarra;
- Wild Potato Dreaming (1972) by David Corby Tjapaltjarri;
- Men's Corroboree Dreaming in a Cave (1974) by Anatjari III Tjakamarra; and
- Woman's Dreaming (1972) by Tommy Lowry Tjapaltjarri.

48.3 Part 2: Natural Science Material

(1) Natural Science Material is Australian Heritage Material if it is:

- (a) Australia-related; and is either
- (b) a paleontological object; or
- (c) a meteorite; or
- (d) a primary type specimen of biological material (present-day flora or fauna) or mineral if a permit or authority under the *Environment Protection and Biodiversity Conservation Act 1999* is not in force for the type specimen; or
- (e) one of the following objects having a current market value greater than the amount set out below:
 - any mineral object not otherwise mentioned in this item, having a current market value of at least \$10,000;
 - any gold nugget having a current market value of at least \$250,000 based on its value as an object, not weight;
 - any diamond or sapphire having a current market value of at least \$250,000;
 - any opal having a current market value of at least \$100,000; or
 - any other gemstone having a current market value of at least \$25,000.

(2) Natural Science Material is Australian Protected Material if it is Australian Heritage Material and:

- (a) is permitted to leave the country on the basis of a temporary export permit; or
- (b) has been formally assessed and found to be significant and not adequately represented in Australian public collections; or

(c) irrespective of the value criterion, is declared by the Minister to be Australian Protected Material.

(3) Natural Science Material is Declared Australian Protected Material if it is:

(a) denied permanent export permission under the Act; or

(b) irrespective of the value criterion, declared by the Minister to be Declared Australian Protected Material.

Material denied permanent export permission under the Act

- Main mass of the Miles meteorite;
- 'King of the West' gold nugget (now known as the 'Normandy Nugget');
- Binya Meteorite; and
- Fossil: Phyllolepis, Devonian, Merringowry, undescribed.

48.4 Part 3: Visual Arts, Craft and Design Material

(1) Visual Arts, Craft and Design Material is Australian Heritage Material if it:

- (a) is Australia-related; and
- (b) is more than 30 years old; and
- (c) has a current market value greater than those set out below:
 - watercolours, pastels, drawings, sketches and other similar works having a current market value of at least \$40,000;
 - Aboriginal desert paintings having a current market value of at least \$100,000;¹⁸⁴
 - Aboriginal Kimberley paintings on canvas having a current market value of at least \$100,000;
 - All other oil and acrylic paintings (not mentioned above), having a current market value of at least \$300,000;
 - Aboriginal or Torres Strait Islander ochre paintings on bark, composition board, wood, cardboard, stone and other similar supports (from regions such as Arnhem Land, Kakadu, Groote Eylandt, Tiwi Islands, Wadeye, Mornington Island, Kimberley and Far North Queensland) having a current market value of at least \$20,000;
 - prints, posters, photographs or similar works of art with potential for multiple production having a current market value of at least \$10,000;
 - textiles, including tapestries, carpets and batiks having a current market value of at least \$10,000;
 - sculptures having a current market value of at least \$30,000;
 - furniture having a current market value of at least \$30,000;
 - jewellery having a current market value of at least \$40,000;
 - clocks and watches having a current market value of at least \$40,000;
 - musical instruments having a current market value of at least \$10,000;
 - architectural fittings and decoration and interior decoration having a current market value of at least \$15,000;

¹⁸⁴ This category will encompass Aboriginal Papunya paintings (pre-1974) having a current market value of at least \$100,000 (excluding those with secret/sacred imagery which are covered under Part 1).

- objects made from precious metals having a current market value of at least \$25,000; or
 - works, designed with aesthetic intent that are not otherwise mentioned in this table having a current market value of at least \$10,000; or
- (d) irrespective of age or value criteria, is declared by the Minister to be Australian Heritage Material.
- (2) Visual Arts, Craft and Design Material is Australian Protected Material if it is Australian Heritage Material and:
- (a) is permitted to leave the country on the basis of a temporary export permit; or
 - (b) has been formally assessed and found to be significant and not adequately represented in Australian public collections; or
 - (c) irrespective of age or value criteria, is declared by the Minister to be Australian Protected Material.
- (3) Visual Arts, Craft and Design Material is not Australian Heritage Material if the maker of the object is still alive—or where the object was made by more than one person, where any of them is still alive.
- (4) Visual Arts, Craft and Design Material is Declared Australian Protected Material if it is:
- (a) pre-1901 Aboriginal or Torres Strait Islander artwork valued at more than \$25,000; or
 - (b) Aboriginal or Torres Strait Islander bark painting and sculpture, pre-1960, valued at more than \$25,000;
 - (c) irrespective of age or value criteria, declared by the Minister to be Declared Australian Protected Material; or
 - (d) denied permanent export permission under the Act.

Material denied permanent export permission under the Act

- a brooch, gold and boulder opal, made by John or Ernesto Priora;
- a bracelet, gold, attributed to Hogarth, Erichsen and Company, Sydney, New South Wales, Australia about 1858;
- an Australian made decorative photo frame in gold, diamonds and opals attributed to Percy Marks, Sydney c1927–35;
- eight nugget linked bracelet, maker Unknown, Australia, about 1855–65;
- nine nugget linked bracelet, maker unknown, Australia about 1855–62;
- The Bath of Diana, Van Diemen's Land (1837) by John Glover;
- View of the Town of Sydney, artist unknown;
- Table 1880s, Australian made with blackwood base, Italian marble and micromosaic top—awarded as a prize by the Ballarat Agricultural and Pastoral Society in 1885;
- Love Story (1972) by Clifford Possum Tjapaltjarri;
- Ceremonial Dreaming Journey (1971) by Payungka Tjapangarti;
- One Old Man's Dreaming (1971) by Old Tutuma Tjapangati;
- Ceremonial Dreaming (1972) by Ronnie Tjampitjinpa;
- Corroboree (1972) by Timmy Payungka Tjapangarti;
- Yam Dreaming (Version 1)(1972) by Tim Leura Tjapaltjarri;
- Ceremonial Medicine Story (1971) by Mick Namarari;
- Pintupi Travelling Water Dreaming (1972) by Old Walter Tjampitjinpa;
- Travelling Water Dreaming with Lightning (1971) by Johnny Warangkula Tjupurrula;
- Water Dreaming (1972) by Walter Jambajimba;
- Untitled (Ceremony) (c1900) by William Barak;
- Fear (1971) by Charlie Tararu Tjungurrayi;
- Water Ceremony (1972) by Johnny Warangkula Tjupurrula;
- Water Dreaming at Kalipinya (1972) by Johnny Warangkula Tjupurrula;
- Moorool the Dreaming Man (c1950) by Nym Djimurrurr;
- Two Men Dreaming at Kuluntjarranya (1984) by Tommy Lowry Tjapaltjarri;
- Ruby Plains Massacre (1985) by Rover Thomas;

- Untitled (Water Dreaming at Kalipinypa) (1971) by Johnny Warangkula Tjupurrula;
- Untitled (Ceremony) (1970) by Charles Mardigan;
- Untitled (1972) by Kaapa Tjampitjinpa; and
- Water Dreaming with Lightning (1971) by Johnny Warangkula Tjupurrula.

48.5 New Part 4: Historically Significant Material

(1) This large category is broken down into Sub-Parts:

- Part 4.1: Archaeological Material
- Part 4.2: Documentary Heritage Material
- Part 4.3: Applied Science and Technology Material
- Part 4.4: Numismatic Material
- Part 4.5: Philatelic Material
- Part 4.6: Social, Cultural, Spiritual, Sporting, Political, Military History and Other Material

48.5.1 New Part 4.1: Archaeological Material

(1) Archaeological Material is material that has been recovered from above or below:

- (a) the land or inland waters of Australia;
- (b) the waters, seabed or subsoil of the territorial sea or Exclusive Economic Zone of Australia.

(2) All Archaeological Material that had remained for at least 50 years in the place from which it was removed is Australian Heritage Material.

(3) Archaeological Material is Australian Protected Material if it is Australian Heritage Material and:

- (a) is permitted to leave the country on the basis of a temporary export permit;
or
- (b) has been formally assessed and found to be significant and not adequately represented in Australian public collections;
- (c) irrespective of age or value criteria, is declared by the Minister to be Australian Protected Material.

- (4) Archaeological Material is Declared Australian Protected Material if it is:
- (a) irrespective of age or value criteria, declared by the Minister to be Declared Australian Protected Material; or
 - (b) Macassan material; or
 - (c) denied permanent export permission under the Act.

48.5.2 New Part 4.2—Documentary Heritage Material

- (1) Documentary Heritage Material is a Document or collection of Documents. In the definitions section, 'Document' is defined as follows:

'Document' means any written or printed material in any media, or any article on which information has been stored or recorded irrespective of the technology by which this is done. It includes:

- (a) a book, diary, letter, note, ledger, register, pamphlet or similar article;
 - (b) a sound recording, a film, television or video production, or any other production that includes moving images or recorded sounds;
 - (c) a map, plan, photograph, drawing or other graphic; and
 - (d) an article that forms part of records or archives required by a law of the Commonwealth, a State or a Territory to be kept permanently in Australia.
- (2) Export decisions made in respect to Documentary material which also meets the criteria of Part 1 of the control list must be assessed under Part 1.
- (3) Documentary Heritage Material is Australian Heritage Material if it is:
- (a) Australia-related; and
 - (b) more than 50 years old; or
 - (c) irrespective of the age criteria, is declared by the Minister to be Australian Heritage Material.

- (4) Documentary Heritage Material is Australian Protected Material if it is Australian Heritage Material and:
- (a) is permitted to leave the country on the basis of a temporary export permit;
or
 - (b) has been formally assessed and found to be significant and not adequately represented in Australian public collections; or
 - (c) irrespective of the age criteria, is declared by the Minister to be Australian Protected Material.
- (5) Documentary Heritage Material is Declared Australian Protected Material if it is:
- (a) an item that can be reasonably described as foundation historical material relating to the Australian colonies and states; or
 - (b) an item that can be reasonably described as foundation historical material relating to the Australian Federation; or
 - (c) material listed on the UNESCO Memory of the World register; or
 - (d) irrespective of the age criteria, declared by the Minister to be Declared Australian Protected Material; or
 - (e) denied permanent export permission under the Act.

48.5.3 New Part 4.3—Applied Science and Technology Material

- (1) Applied Science or Technology Material includes any machine, vehicle, instrument or invention relating to, or created by, human enterprise and activity and includes any other object produced by, or related to, such object including prototypes, models, patents, spare parts and equipment.

- (2) Applied Science or Technology Material is Australian Heritage Material if it is:
- (a) Australia-related; and
 - (b) more than 50 years old; or
 - (c) irrespective of the age criteria, is declared by the Minister to be Australian Heritage Material.
- (3) Applied Science or Technology Material is Australian Protected Material if it is Australian Heritage Material; and
- (a) is permitted to leave the country on the basis of a temporary export permit; or
 - (b) has been formally assessed and found to be significant and not adequately represented in Australian public collections; or
 - (c) irrespective of age or value criteria, is declared by the Minister to be Australian Protected Material.
- (4) Applied Science or Technology Material is Declared Australian Protected Material if it is:
- (a) an agricultural or industrial steam engine (including traction engines, ploughing engines, portable and stationary engines) manufactured prior to 1945; or
 - (b) a steam road vehicle (including road locomotives, steam wagons, road rollers and steam cars) manufactured prior to 1945; or
 - (c) a motor car, motor truck or motor cycle made in Australia prior to 1929; or
 - (d) irrespective of age or value criteria, declared by the Minister to be Declared Australian Protected Material; or
 - (e) denied permanent export permission under the Act.

Material denied permanent export permission under the Act

- John Fowler B6 three speed road locomotive, number 16161;
- Krupp C96 nA 77mm field gun, serial number NR7207, c1916;
- Fowler tank steam locomotive, c1898 builder's number 7607;
- Decauville narrow gauge steam locomotive;
- World War II Japanese fighter aeroplane, located off Cape York Peninsula, Queensland;
- a pair of wings from a World War II P47 Thunderbolt aircraft located at Duyfken Point, Queensland;
- Steam-hoisting engine (portable steam winch);
- Brown and May portable steam engine, c1890;
- Frodsham Regulator No 1062 (Melbourne Observatory);
- Ruston Proctor steam traction engine number 42028;
- Thomas Walker steam centre engine;
- DAP Mark 21 Beaufighter;
- Marshall Colonial Class C oil tractor, c.1910;
- Swan, an 1884 timber hull motor launch;
- International Titan tractor, 1912 serial number 2535;
- Fowler steam traction engine, 1884 works number 4841;
- Lockheed Electra airliner, 1937 serial number 1107;
- Fowler steam traction engine, 1910 number 12263;
- McLaren steam traction engine, 1905 works number 705;
- Kelly and Lewis stationary motor, c1951 serial number 6477;
- Foden steam wagon, 1920 works number 9734;
- 1923 Foden 'C' type steam wagon—six ton, double crank compound; works number 10972;
- Marshall double-crank-compound, steam road locomotive engine, c1913, serial number 62575;
- Fowler single-cylinder, two-speed, stump puller engine, c1920, serial number 15722;
- McLaren double-crank-compound, two-speed, superheated, direct ploughing traction engine, c1917, serial number 1506;

- Marshall single-cylinder, one-speed, No.1A 'Gainsborough' light traction engine, 1909, serial number 52110;
- Marshall double-crank-compound, steam road locomotive engine, 1914, serial number 65715;
- Single-cylinder semi-portable steam engine, manufactured by J J Seekings & Co, Gloucester, England, c1870s;
- Moore Road Machinery diesel locomotive GT-122-DH-1, c1956;
- McLaren 8HP steam traction engine, 1887 works number 298.

48.5.4 New Part 4.4—Numismatic Material

(1) Numismatic Material is:

- (a) a badge, token, historical medal, coin or paper money including pattern, proof or specimen striking; and
- (b) any civil or military medal or other decoration (other than a campaign medal), awarded to a person:
 - ordinarily resident in Australia at the time of the award; or
 - for a posthumous award—ordinarily resident in Australia at the time of the service or circumstance to which the award relates; and
- (c) any citation or other document, or insignia, relating to a medal or decoration mentioned in (b) above.

(2) Numismatic Material is Australian Heritage Material if it is:

- (a) Australia-related; and
- (b) if it is material within (a) or (b) above, is more than 50 years old (there is no age criterion for (c)); and
- (c) has a current market value of at least \$15,000; or
- (d) irrespective of age or value criterion, is declared by the Minister to be Australian Heritage Material.
- (e) Numismatic Material is Australian Protected Material if it is Australian Heritage Material and:
- (f) is permitted to leave the country on the basis of a temporary export permit; or

- (g) has been formally assessed and found to be significant and not adequately represented in Australian public collections; or
 - (h) irrespective of age or value criteria, is declared by the Minister to be Australian Protected Material.
- (3) Numismatic Material is Declared Australian Protected Material if it is:
- (a) a Victoria Cross awarded to an Australian citizen or to a soldier fighting in or with an Australian force; or
 - (b) a Victoria Cross for Australia; or
 - (c) a George Cross; or
 - (d) a Cross of Valour; or
 - (e) an insignia of the Dames and Knights of the Order of Australia and the Companion of the Order of Australia; or
 - (f) irrespective of age or value criteria, declared by the Minister to be Declared Australian Protected Material; or
 - (g) denied permanent export permission under the Act.
- (4) Notwithstanding that a civil or military medal or other decoration is Australian Heritage Material, Australian Protected Material or Declared Australian Protected Material, it may be temporarily exported without a permit by the person to whom the award was made (or in the case of a posthumous award—by the awardee's next of kin).

Material denied permanent export permission under the Act

- the George Gosse GC RANVR medal group;
- the Victoria Cross medal group awarded to E T Towner VC.

48.5.5 New Part 4.5—Philatelic Material

- (1) Philatelic Material is:
- (a) a postal marking, or postage or revenue stamp;
 - (b) any material used in the design, production, usage or collection of stamps;
 - (c) a stamp collection.

- (2) Philatelic Material is Australian Heritage Material if it is:
- (a) Australia-related; and
 - (b) more than 50 years old; and
 - (c) has a current market value of at least \$10,000; or
 - (d) in the case of a collection, has a current market value of at least \$150,000; or
 - (e) irrespective of age or value criteria, is declared by the Minister to be Australian Heritage Material.
- (3) Philatelic Material is Australian Protected Material if it is Australian Heritage Material and:
- (a) is permitted to leave the country on the basis of a temporary export permit; or
 - (b) has been formally assessed and found to be significant and not adequately represented in Australian public collections; or
 - (c) irrespective of age or value criteria, is declared by the Minister to be Australian Protected Material.
- (4) Philatelic Material is Declared Australian Protected Material if it is:
- (a) denied permanent export permission under the Act; or
 - (b) irrespective of age or value criteria, declared by the Minister to be Declared Australian Protected Material.

Material denied permanent export permission under the Act

- the equal second prize winning design submitted by Donald Mackay in the 1911 Commonwealth Stamp Design Competition.

48.5.6 New Part 4.6—Social, Cultural, Spiritual, Sporting, Political or Military History and Other Material

- (1) An object is Social, Cultural, Spiritual, Sporting, Political or Military History and Other Material if it is directly or substantially associated with a person (or group of people), activity, movement, period, event, place or business enterprise, notable in, or relevant to, an understanding of Australian history.

- (2) Social, Cultural, Spiritual, Sporting, Political or Military History and Other Material is Australian Heritage Material if it is:
- (a) Australia-related; and
 - (b) more than 50 years old; or
 - (c) irrespective of the age criterion, is declared by the Minister to be Australian Heritage Material.
- (3) Social, Cultural, Spiritual, Sporting, Political or Military History and Other Material is Australian Protected Material if it is Australian Heritage Material and:
- (a) is permitted to leave the country on the basis of a temporary export permit;
or
 - (b) has been formally assessed and found to be significant and not adequately represented in Australian public collections; or
 - (c) irrespective of the age criteria, is declared by the Minister to be Protected Australian Material.
- (4) Social, Cultural, Spiritual, Sporting, Political or Military History and Other Material is Declared Australian Protected Material if it is:
- (a) any item of Ned Kelly's armour; or
 - (b) any item of the armour worn by the members of the Kelly gang; or
 - (c) denied permanent export permission under the Act; or
 - (d) irrespective of the age criterion, is declared by the Minister to be Declared Protected Australian Material.

Material denied permanent export permission under the Act

- Sir John Monash Seals;
- Sir Charles Kingsford Smith 'VH-USU Southern Cross' brooch;
- Victor Trumper's cricket memorabilia (including cuff links, a presentation tray, signed programs and team sheets and Trumper's 1902 Ashes diary);
- Master Blackburn's Whip—a cat o'nine tails whip with an Aboriginal club handle and knotted rope lashes attached that belonged to David Blackburn, Master of HM Brig Supply;

- two pairs of boxing gloves, 1886—worn on the night that Peter Jackson beat Tom Lees to become the new Australian Champion;
- Ashes bail letter opener, c1883; and
- Ronisch concert grand piano, c. 1880.

49 General Control List Matters

49.1 Control List Protection

- (1) No material will be granted an export permit if it has been:
 - (a) removed from a site in breach of a Commonwealth, state or territory Act;
 - (b) traded in breach of a Commonwealth, state or territory Act;
 - (c) removed from a state or territory in breach of the laws of that jurisdiction;
 - (d) assessed as significant by any state or territory government, statutory authority, or statutorily established institution; or
 - (e) illegally obtained.
- (2) Additionally, the following material is presumed to be Australian Heritage Material:
 - (a) an object forming part of, discovered on or otherwise associated with any place listed on the Australian National Heritage List and Australian places on the World Heritage List;
 - (b) an object covered by the *Historic Shipwrecks Act 1976*. A permit under that Act is a pre-condition to application for an export permit.

49.2 Collections

- (1) Collections of cultural material may be assessed as a collection rather than individual items where the whole collection is described under one Part or Sub-Part of the Control List.

49.3 Treatment of parts

- (1) Parts or components of Australian Heritage Material must be treated as Australian Heritage Material. Parts or components of Australian Protected Material must be treated as Australian Protected Material. Parts or components

of Declared Australian Heritage Material must be treated as Declared Australian Protected Material.

- (2) There should be created a separate criminal offence with accompanying sanctions to prohibit the disassembly of Australian Heritage Material, Australian Protected Material and Declared Australian Protected Material for the purpose of export.

50 Significance and representation

- (1) The legislative framework must provide a standard definition of significance to be applied across all Parts of the Control List.
- (2) The present negative definition of significance (its 'loss to Australia would significantly diminish the cultural heritage of Australia') is replaced by a positive test that requires consideration of the cultural significance of an object in terms of its contribution to the richness of Australian cultural and natural heritage. The test may be framed as simply, '...that its retention is considered by the decision-maker to be important to the cultural heritage of current and future generations of Australians'.
- (3) The terms 'significance' and 'significant' are given their normal meaning, namely 'important or notable' and 'not unimportant or trivial' (in accordance with earlier judicial interpretation).
- (4) Significant heritage value does not necessarily mean that an object has to be important to all Australians—it may be significant to a part of Australia, a group of Australians, or may connect to a national theme.

50.1 Assessing Significance to Australia or part of Australia

- (1) The Regulations must establish the elements to be considered in any assessment of significance so as to provide a statutory basis for the test.
- (2) By application of the primary and comparative criteria set out below, the assessor determines whether material is significant and, if so, whether it is an outstanding example of its type.
- (3) The assessment criteria set out in the Regulations may be supplemented by additional information in documents external to the legislative framework such as publicly available Guidelines.

50.1.1 Step 1—application of primary criteria:

- (1) When undertaking a significance assessment, consideration is first to be given to a set of primary criteria, being the material's:
 - (a) historic values;
 - (b) aesthetic or artistic values;
 - (c) scientific, technical or research potential;
 - (d) association with place or other material; and
 - (e) social or spiritual connections.
- (2) While all of these primary criteria should be considered when making an assessment, it is only necessary to find evidence to satisfy one of the criteria to establish the item as significant.

50.1.2 Step 2—comparative analysis:

- (1) Having applied the primary set of criteria, the level of the significance is then benchmarked using comparative analysis criteria to demonstrate an object's relative level of significance.
- (2) This takes into account the physical properties of the object as well as the associative properties that go to indicate its cultural heritage importance. Accordingly, the model provides for the following comparative analysis criteria:
 - (a) provenance;
 - (b) rarity or representativeness;
 - (c) condition or completeness; and
 - (d) interpretative capacity.

50.1.3 Other government significance assessments

- (1) The model recognises the significance assessments made by other Commonwealth bodies and state and territory governments.
- (2) Objects assessed as significant to local regions of Australia under legislative schemes of state or territory governments are to be automatically treated as Declared Australian Protected Material.
- (3) If there is a subsequent change in the significance status of the material under the relevant state or territory scheme, protection under the model may also change.

50.2 Assessing Representation

- (1) If, by the application of Steps 1 and 2, the material is found to be significant to Australia or part of Australia, only then will adequate representation need to be considered.
- (2) A permanent export permit may be granted notwithstanding that the object is of high or even outstanding significance if the object is already adequately represented in public collections.

50.2.1 Step 3 - representation in public collections

- (1) The Regulations should include a clear definition of 'adequate representation'. For example:

Adequate representation means that there are sufficient comparable examples of the material, considering equivalent quality, age, model and characteristics, held in Australian public collections. An assessment of Adequate representation should include consideration of:

- the number of objects of exact type in public collections, comparing their physical qualities, including condition, completeness (and in the case of documents and stamps such issues as whether the object is a master copy or original);
 - the number of objects that are required to be considered as a complete representative sample for a material type (for example, in regards to primary type specimens);
 - the comparison with material of the same class, style, make and model in public collections;
 - whether there are unique features or adaptations made to the material that should be considered; and
 - comparison with material either of the same or similar subject matter or the same or similar association with events, persons or places.
- (2) The number of objects held in public collections is not just a statistical exercise of type and brand. Proper consideration must be given to the significant features of and differences between such objects including distinctions as to age, model,

condition, completeness, significant amendments, repairs, additions and adaptations.

- (3) The concept of 'equivalent quality' has a wider meaning than merely having equivalent physical characteristics. It also includes the heritage or cultural significance of a particular object. The role, impact or effect that an object has had, may also distinguish it from other examples of similar physical characteristics. This may be on a national level or a local level.

50.2.2 Meaning of 'public collections' for the purpose of representation

- (1) A '**public collection**' is to be defined as one that is:
 - (a) publicly accessible; and
 - (b) established under a law of:
 - the Commonwealth; or
 - a State or Territory; or
 - owned and controlled by an incorporated not-for-profit organisation (be it a university, company or an incorporated association).

50.2.3 Significance and representation over time

- (1) An assessment will last five years. No further application for assessment will be carried out during that five year period.
- (2) Any assessment can be reviewed after the expiration of five years.
- (3) Accordingly, any export permit decision based on the earlier significance or representation assessment can be changed if the assessed level of significance or representation changes.

51 Register of Cultural Property Experts

- (1) A Register of Cultural Property Experts is established.
- (2) The Register is a flexible reference group which is available to provide advice to the Department and the Minister on significance assessments and broader policy issues.
- (3) It consists of approved:
 - (a) Expert Cultural Significance Assessors ('Assessors'); and
 - (b) acknowledged leaders in various fields of cultural property.

- (4) The legislation neither prescribes nor proscribes the manner, technology or medium by which advice can be sought or given.
- (5) The administration of the Register and matters such as the number of members and the balance of expertise is to be determined by the Department. The Department is responsible for the identification, selection, appointment, training and oversight of the members of the Register.
- (6) Assessors and other experts will be paid for their advice.
- (7) The term of appointment for Assessors is renewable for five years, with a review before reappointment.
- (8) No Assessor shall be held personally liable for any advice or recommendation provided in good faith.

51.1 Assessment reports

- (1) The role of the Assessor is to assess the significance of the material for which export permission is sought and provide information about equivalent material in public collections. It will no longer be the Assessor's role to make recommendations as to export permission.
- (2) As standard practice, significance assessments should be performed by two Assessors, one of whom is from a public collecting institution.
- (3) The Assessor's report provides the grounds for the decision-maker to make an evidence-based decision as to the granting or refusal of export.
- (4) The assessment report:
 - (a) provides a summary of the meaning and importance of the object that articulates how and why the object is or is not significant; and
 - (b) provides the degree of any significance in comparison to related objects; and
 - (c) if significance is established, provides information in regard to the representation of the object (or, where applicable, class of object), in public collections.

52 New permit application requirements

- (1) An applicant must comply with any Guidelines and make the application in the manner prescribed.
- (2) The onus is on the applicant to provide sufficient information to support the application for export. This includes information regarding the current owner, the description of the object and all provenance information.
- (3) The Department has the power to determine whether the applicant has provided sufficient information to allow proper assessment or whether more information is required or can reasonably be expected of the applicant.
- (4) Should further information be required, the applicant will be advised and no further action taken on the application until the information sought is provided.
- (5) The model grants the necessary authority to charge fees—should government decide to do so.

53 New process for export decision-making

- (1) It is not mandatory to conduct a significance assessment for all applications for export.
- (2) On receipt of an application that contains sufficient information, the Department applies the statutory tests/thresholds to determine whether the material is:
 - (a) Australian Heritage Material; and if so
 - (b) whether the object is likely to be Australian Protected Material or Declared Australian Protected Material.
- (3) The Department may seek expert advice and review the significance of any material—whether or not it exceeds the thresholds.
- (4) If material:
 - (a) exceeds a preliminary age and value threshold (and is therefore Australian Heritage Material); or
 - (b) is declared to be Australian Heritage Material, Australian Protected Material, or Declared Australian Protected Material,the Department must determine the nature of the material and whether its significance is such that an export permit should be issued and, if so, on what terms.

- (5) At this stage the Department may either:
 - (a) grant a temporary or permanent export permit;
 - (b) grant the permit subject to conditions;
 - (c) refuse the permit sought; or
 - (d) seek other information about the material (for example, though a significance assessment).

- (6) The Department may issue temporary export permits for periods of less than six months without the need for a significance assessment, unless:
 - (a) it is uncertain whether the material is in fact Declared Australian Protected Material; or
 - (b) the Department has concerns about the potential non-return of the material.

- (7) Where a significance assessment is considered necessary, the Assessors submit their reports to the Department. If their findings are consistent, the Department may either:
 - (a) make the decision in accordance with the assessments; or
 - (b) if concerned with the findings, convene a panel of appropriately qualified experts from the Register of Cultural Property Experts to consider the application, expert assessments and any other applicable information.

- (8) If the advice provided by the Assessors is not consistent or the Department wishes to seek further advice, the Department may seek the advice of another Assessor or may refer the matter to a panel from the Register.

- (9) The Departmental decision-maker considers the application, the expert significance assessments, the reasoning and findings of the panel (where applicable) and any other applicable information and decides:
 - (a) whether the Australian Heritage Material has the appropriate significance to be Australian Protected Material; if so
 - (b) whether the material is already adequately represented; and thus
 - (c) whether or not to issue the export permit; and if so
 - (d) whether the permit should be permanent or temporary; and
 - (e) what conditions (if any) should be attached.

- (10) An export permit may be:
- (a) refused; or
 - (b) granted on a temporary basis—with or without conditions; or
 - (c) granted on a permanent basis—with or without conditions.
- (11) Where the Department refuses the permit, it is required to provide the applicant with the reasons for the refusal.

53.1 Letters of Clearance

- (1) The Letter of Clearance is given a statutory basis.
- (2) They may be issued by the Department to owners of goods which are of a type regulated by the Act but which do not meet the criteria to be Australian Heritage Material.

53.2 Retention of Certificates of Exemption for material exported prior to 1987

- (1) Where the owner of an object exported from Australia prior to 1987 wishes to re-import that object on a temporary basis, a Certificate of Exemption may be issued.
- (2) A Certificate of Exemption allows for the object to be re-exported without being subject to the Act.
- (3) The legislation should provide grounds for consideration by decision-makers, including:
 - (a) cultural sensitivities regarding the material (including consultation which may be required for Aboriginal or Torres Strait Islander Material and Ancestral Remains);
 - (b) the purpose for which it is being imported (including whether there is likelihood of it remaining in Australia e.g. it is being imported to be offered for sale); and
 - (c) whether the initial export from Australia was legal (either under the Act or other legislation).

54 Extension of General Permit system for temporary exports

- (1) A General Permit will be available to a wide range of organisations, to allow material to be temporarily exported without the need for individual applications.
- (2) The General Permit issued to a Principal Collecting Institution is extended to permit it to temporarily export, for the purpose of public exhibition, conservation, research or education, Australian Heritage Material or Australian Protected Material that:
 - (a) is from its own collections; or
 - (b) is borrowed pursuant to a formal loan agreement for the purpose.
- (3) The Department may impose eligibility criteria so that risk may be assessed or reduced. Applications for a General Permit may be made by both commercial and not-for-profit organisations.
- (4) An applicant organisation will be required to provide information about its governance, membership structure, nature of its activities and an explanation as to the need for a General Permit. General Permits may be issued with conditions specific to the organisation.
- (5) Declared Australian Protected Material may not be exported under a General Permit unless the permit holder is a Principal Collecting Institution or an Aboriginal or Torres Strait Islander organisation (in relation to Part 1 material only).
- (6) A General Permit will usually be issued by the Department for 3 years at which time the holder may make an application for renewal. Principal Collecting Institutions are not required to reapply.
- (7) A General Permit can be revoked at the discretion of the Department at any time.
- (8) The breach of any conditions of the General Permit is an offence to which sanctions (including fines and forfeiture) apply.

55 Change of decision-maker from Minister to Department

- (1) Export applications are made to and decisions made by, the Department.
- (2) Approval by the Minister is required for a declaration of a particular item or a class of material as Australian Heritage Material or Australian Protected Material.

55.1 Appeal

- (1) Applicants may challenge a decision by appeal to the Administrative Appeals Tribunal.

55.2 Transparency

- (1) Where an application is made for the permanent export of either Australian Heritage Material or Australian Protected Material, the Department shall make the following information publicly available:
 - (a) the application, including physical and provenance information relating to the material;
 - (b) the state of residence of the owner;
 - (c) any significance report prepared by Assessors; and
 - (d) the decision, with reasoning, as to the granting or refusal of the permit.
- (2) The identity of an Assessor will not be made publicly available unless he or she consents.
- (3) After an application for permanent export is published there will be a two-week period for public submissions before a decision is made.

56 Widened National Cultural Heritage Account

56.1 Eligibility

- (1) Only Commonwealth, state, territory or local government bodies or incorporated not-for-profit organisations are eligible to apply for funding from the Account.

56.2 Extended purposes

- (1) Funds may be granted from the Account for the following purposes:
 - (a) the overseas acquisition of Australia-related cultural heritage material for return to Australia;
 - (b) the acquisition in Australia of Australia-related cultural heritage material; and
 - (c) other activities related to, or which will facilitate the acquisition of, Australia-related cultural heritage material (such as transportation, professional

advices, conservation, restoration and specialised storage systems—including digital storage).

56.3 Decision-maker

- (1) The decision to provide funds from the Account is that of the Minister or delegate.
- (2) The decision-maker may seek advice on the application from one or more experts on the Register or form a panel if required.
- (3) The decision-maker must have regard to the following:
 - (a) the significance of the material;
 - (b) the suitability of the applicant organisation;
 - (c) the purpose for which the funding is sought;
 - (d) whether the costs represent fair market value; and
 - (e) the source and amount of third party contributions to the project (noting that not all contributions will be financial).
- (4) The model is modestly increased and structure strengthened by:
 - (a) the Account receiving \$1m per annum; and
 - (b) any unspent money at the end of the financial year being permitted to accumulate so that it is available in the following year.

Protection of Foreign Cultural Material—import provisions

57 Ambit

- (1) The new model provides protection to foreign cultural material that has been:
 - (a) illegally exported;
 - (b) stolen, including material stolen from a public collection which is documented in an inventory or otherwise identified ('inventoried material');
or
 - (c) illegally removed during armed conflict ('looted material');

by making it illegal to import, or to own, possess or trade in such imported material (whether for oneself or for others).

- (2) Protection is extended to the cultural material of all countries whether or not they are signatories to the UNESCO Convention 1970.
- (3) It is not intended that anything in the model contravene Australia's current obligations to the UNESCO Convention 1970.

58 Definitions

- (1) The following are definitional matters to be taken into account in drafting.
- (2) '**Cultural material**', the diverse range of cultural material protected by the legislation is described as follows:

'cultural heritage' means movable material of importance for ethnological, archaeological, historical, literary, artistic, scientific, spiritual, natural or technological reasons.

- (a) In relation to Australian or Australian-related material, this is material falling within one or more of the National Cultural Heritage Control List categories.
 - (b) In relation to foreign material, this is material forming part of the cultural heritage of a foreign country.
- (3) '**Due diligence**' will include all of the circumstances of the acquisition including:
 - (a) the character of the parties;
 - (b) the price paid;
 - (c) evidence of the terms and place of purchase;
 - (d) all searches undertaken as to provenance and title;
 - (e) full documentation of the original export;
 - (f) any other relevant information or documentation that could reasonably have been obtained; and
 - (g) any other step that a reasonable person would have taken in the circumstances.
 - (4) '**looted**' includes all cultural material which has been stolen or otherwise illegally removed from a territory during armed conflict.
 - (5) '**owner**', when the claim is in respect of tribal or community material, the definition of 'owner' needs to be wide enough to encompass claims by *bone fide* representatives of the relevant tribe, community or people.
 - (6) '**return**' includes restitution.

- (7) **'public collection'** consists of a group of inventoried or otherwise identified cultural material owned by a foreign:
 - (a) government; or
 - (b) regional or local authority; or
 - (c) religious institution; or
 - (d) not-for-profit collecting organisation established for cultural, educational or scientific purposes.
- (8) **'stolen'** includes cultural material that has been unlawfully excavated or lawfully excavated but unlawfully retained (according to the laws of the country of excavation).

59 Provisions common to illegally imported, stolen or looted cultural material

59.1 General

- (1) The new model makes it unlawful to import into Australia foreign cultural property which has been:
 - (a) illegally exported from its country of origin;
 - (b) stolen; or
 - (c) looted.
- (2) Express offences are also created for the possession, ownership and trade in such material. To the extent that these already exist, they are modernised and amended as to evidentiary burdens.
- (3) There is also an express obligation on the possessor of illegally exported, stolen or looted cultural material to return it.
- (4) A foreign claimant has the right to claim return of the unlawfully imported material.
- (5) The mechanisms for return described below are consistent for each category of material unless explicitly articulated. In addition, the mechanisms are expressed in such terms as to allow them to apply to the handling of other foreign cultural material found to be illicit under other Commonwealth legislation, such as the *Historic Shipwrecks Act 1976*, the *Charter of the United Nations Act 1945*, the *Criminal Code Act 1995* and the *Customs Act 1901*.

59.2 Powers

- (1) The new model includes a revised and modernised range of powers over suspected material, including search, holding, seizure and forfeiture powers.
- (2) A power to hold cultural material for protection or safekeeping upon suspicion that it is illegally exported, stolen or looted.
- (3) A power to apply for a warrant to search, seize and hold the material, available to an authorised Inspector under the Act (where there is reasonable suspicion that an object would be liable to seizure).

59.3 Initiation of procedure

- (1) Cultural material may be held for protection or safekeeping upon suspicion that it has been illegally exported, stolen or looted or is otherwise illegally imported. For example, this may include a suspicion that the material was subject to protection or from a site protected by the Blue Shield or that the trade in the material is currently restricted or prohibited under a United Nations Security Council resolution.
- (2) If material is held, pending seizure, the Department will seek to identify the material and initiate communications with the relevant foreign government or relevant authorities.

59.4 Time limits for making claims

- (1) There must be clear temporal boundaries for a claim for the return of cultural material on the grounds of illegal export, theft or looting. There are two sensible options (which one is chosen is a matter for Government).
- (2) The first option (which is in accord with the UNIDROIT Convention 1995) is that the foreign claim must be brought within:
 - (a) 50 years of the date on which that material:
 - was unlawfully exported; or
 - should have been returned to that State under a permit for temporary export issued by that State; or
 - was stolen; or
 - was looted.

- (b) Two possible exceptions:
- where the material is inventoried material stolen from a public collection, 50 years is replaced by 75 years; or
 - where the material is an object made by a member or members of a tribal or indigenous community for traditional or ritual use by that community and is to be returned to that community, 50 years is replaced by 75 years.
- (3) The second option (and perhaps the one more aligned with the UNESCO Convention 1970) is to apply the date that the UNESCO Convention 1970 came into force, namely, 24 April 1972.
- (4) Whichever option is chosen, the model incorporates a three-year period within which the claim must be made. This is three years from the date on which the claimant knew:
- (a) the location of that object; and
 - (b) the identity of the possessor of that object.

59.5 Warrant in respect of cultural material

- (1) The Australia Federal Police (AFP), Border Force or Departmental Inspectors may apply for a warrant for the seizure of the cultural material. This provides an opportunity for further investigation and discussions with both the relevant foreign claimant and the Australian possessor. This application is based on a reasonable suspicion that the material was illegally exported, looted or stolen. That suspicion may be based on relevant evidence from any source.
- (2) A request from a foreign government is not necessary to begin this process.
- (3) Warrant applications would be made to an authorised issuing officer, who would be a judge or AAT member acting in their personal capacity.
- (4) These authorised officers would scrutinise the evidence forming the basis of the application and could apply conditions to the seizure, such as the length of confinement of the object.
- (5) If a warrant is granted, seizure would trigger the need for a Departmental decision regarding the cultural material.

59.6 Period of seizure

- (1) The initial period of seizure is up to six months (renewable).
- (2) Where there is no clear foreign claimant/government at the time, for example material originating from an armed conflict zone, the period of seizure can be extended until the end of the conflict (or at the Government's discretion).

59.7 Information gathering and sharing

- (1) The Department will seek evidence about the seized foreign cultural material from the Australian possessor and any foreign claimant.
- (2) During this period, the possessor may either:
 - (a) cede possession and ownership of the material to the Commonwealth or the foreign claimant; or
 - (b) provide the Department with evidence that establishes to the reasonable satisfaction of the Department:
 - the country of origin of the material;
 - that the material was lawfully exported from the country of origin;
 - that the object was not the product of illicit excavation or theft; and
 - that it conducted proper due diligence enquiries prior to purchase.
- (3) Time limits would apply to the provision of information to ensure no unnecessary delays are experienced during this process.
- (4) The decision-maker would also be able to seek information from any other relevant source.
- (5) If the possessor fails to provide that information within the time or the decision-maker is not satisfied by the information provided, the officer may order the forfeiture of the material.

59.8 Evidence to be provided by possessor

- (1) The possessor must provide evidence of the due diligence undertaken prior to acquisition.

59.9 Evidence to be provided by foreign claimant

- (1) If the foreign claimant makes a formal claim for return, it must adduce the evidence supporting its claim within required time limits.

- (2) Any claim by a foreign claimant for the seizure and return of cultural material is expected to be accompanied by:
 - (a) a detailed description of the material;
 - (b) evidence that the material is likely to be from the claimant country;
 - (c) where the return is sought on the grounds of illegal export, identification of the laws that make the export illegal; or
 - (d) where the return is sought on the grounds of theft or looting, evidence supporting the allegation such as proof of ownership or inventory; and
 - (e) all information that the claimant has in relation to the object, which may include its known provenance, the circumstances of the export of the object and discovery of the identity of its possessor.
- (3) Where the claim is for the return of illegally exported material, the burden of proof is on the possessor:
 - (a) to establish that the material originated from the claimed country of origin;
 - (b) that the export from the country of origin was lawful; and
 - (c) to provide documentary evidence of lawful export.¹⁸⁵
- (4) Where the claim is for the return of inventoried cultural material the foreign claimant has an evidentiary burden to provide evidence of the inventory or other identification of the material.

59.10 Information sharing

- (1) The decision-maker must provide the information and evidence received from each party, to the other.¹⁸⁶
- (2) Each party will be given a period within which to respond to the information provided by the other.
- (3) If resolution is reached between the parties, the Department will assist the parties to implement the agreed outcomes.

¹⁸⁵ One of the great problems in bringing successful prosecutions is the difficulty of proving the exact country of origin where national boundaries cross-cultural regions (eg Mesopotamia). To overcome this it is essential that the burden be reversed so that it is upon the possessor of the object to provide evidence of lawful export.

¹⁸⁶ Subject to limited exceptions where it is not appropriate to provide the information, such as national security considerations.

59.11 Departmental decision

- (1) If negotiation and informal exchange of evidence does not result in a settlement of the claim, an SES officer of the Department will decide the claim.
- (2) The officer will consider the information provided by the possessor and the foreign claimant and decide:
 - (a) whether the seized foreign cultural material has been illegally exported, stolen or looted; and
 - (b) order either the forfeiture of the material or its return to the Australian owner; and
 - (c) any claim for compensation.
- (3) Rules of procedural fairness apply to the making of this decision and affected parties must be given an opportunity to respond to adverse material before a final decision is made.
- (4) An SES officer (a Deputy Secretary or delegate) would be the responsible decision-maker. If the decision is made by a delegate rather than a Deputy Secretary, there would be an opportunity for internal review of the decision by the Deputy Secretary.
- (5) If the possessor chooses to not challenge a forfeiture decision within the limitation period, the material will be forfeit and transferred to the foreign claimant.

59.12 Alternative dispute resolution in the Administrative Appeals Tribunal

- (1) A person whose interests are affected by the Departmental decision is able to seek merits review of the decision in the Administrative Appeals Tribunal (AAT). This includes Australian possessors and foreign claimants. It can include individuals, corporations and governments.
- (2) The initial stage of a review process before the AAT requires an Alternative Dispute Resolution (ADR) process. Different dispute resolution models are available within the AAT and the model applied will depend on the particular issues in dispute. ADR processes used in the AAT include conferencing, conciliation, mediation, case appraisal and neutral evaluation.

59.13 Determination of the matter in the AAT

- (1) If engagement with an ADR process does not lead to resolution, a party can seek listing of their application for hearing by the tribunal. AAT proceedings are designed to be quick, informal, economical, fair, and accessible for all parties.
- (2) The AAT may inform itself on any matter it thinks fit in undertaking the review and is not bound by rules of evidence.
- (3) Full merits review would be available at this stage, affording parties the opportunity to have all aspects of the Departmental decision reviewed.
- (4) In reviewing a decision on its merits, the AAT will make the legally correct decision or, where there can be more than one correct decision, the preferable decision.

59.14 Judicial review

- (1) A person will have the opportunity to appeal to the Federal Court of Australia for judicial review of an AAT decision on a question of law. Alternatively, judicial review of the original decision of the Department may be available under the *Administrative Decisions (Judicial Review) Act 1977*.

59.15 Compensation

- (1) An innocent purchaser of cultural material that is returned to a foreign claimant on the basis of illegal export or theft of non-inventoried material may seek just compensation¹⁸⁷ where it is able to demonstrate that it undertook due diligence prior to acquisition and did not know nor ought reasonably have known at the time of acquisition that the object had been illegally exported or stolen.
- (2) An SES officer will decide the award of compensation. That decision may be appealed by either party to the AAT.
- (3) There will be no eligibility for compensation from a foreign claimant where the import is related to the theft of inventoried or looted cultural material.
- (4) The foreign claimant and the possessor may negotiate an alternative to compensation. This can be facilitated by the Department.

¹⁸⁷ The UNIDROIT Convention 1995, Art 6, uses 'fair and reasonable' but does not define those terms.

- (5) The cost of returning a forfeited object is a matter for Departmental discretion. The Commonwealth also has the right to recover those costs from ‘the person who was the owner of the object immediately before it was forfeited’.

60 Specific provisions—illegally exported cultural material

60.1 The right to seek return

- (1) The claim for the return of illegally exported cultural material must be made by the government of the country of origin.
- (2) There is no right to seek return under the Act if the material was imported into Australia before 1 July 1987.
- (3) There are some additional matters which can be added to the model following further Government consideration. These include that there would be no right to seek return under the Act if:
 - (a) the export of the material is no longer unlawful in the foreign State at the time that the object was imported into Australia or its return is requested; or
 - (b) the foreign material is visual arts, craft and design material and was exported from the relevant State during the lifetime¹⁸⁸ of the person who created it.

61 Specific provisions—stolen cultural material

61.1 Claimant

- (1) Claim for restitution of stolen cultural material is available to all owners—not just governments.

61.2 No innocent purchaser defence

- (1) No good faith, innocent purchaser defence is available against restitution claims for stolen inventoried cultural material.

¹⁸⁸ New Zealand adds 50 years after the death of that person but this is not supported. The analogy with copyright law (as the term was at the date of the UNIDROIT Convention is fallacious).

62 Specific provisions—looted cultural material

62.1 Claimant

- (1) Claim for restitution of looted cultural material is available to all owners—not just governments.

62.2 No innocent purchaser defence

- (1) No good faith, innocent purchaser defence is available against restitution claims for looted cultural material.

62.3 Safeguarding of cultural property

- (1) There is an obligation to take into custody cultural material imported into Australia, either directly or indirectly, from an occupied territory (either automatically upon the importation of the material or, at the request of the authorities of that territory) for the purposes of safeguarding.
- (2) There is an obligation to return such material, at the close of hostilities, to the competent authorities of the territory previously occupied.

62.4 Recognition and protection of the Blue Shield emblem

- (1) Legislative protection is given to the Blue Shield emblem to prohibit its unauthorised use.
- (2) Provision of a legislative implementation framework to allow the authorised use of the emblem on movable cultural heritage material.

62.5 Offences and sanctions

- (1) A new range of offences is introduced to include the import of cultural material that is stolen, looted, and unlawfully removed from a zone of armed conflict, whether by military or non-military personnel.
- (2) Existing sanctions are modernised and the penalties made appropriate.