

REVIEW OF THE PROTECTION OF MOVABLE CULTURAL HERITAGE ACT 1986

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Image: Holden prototype car No. 1, made in 1946. National Museum of Australia.

Photo: Lannon Harley

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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.

Such 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 retain that balance.

Although there have been a number of reviews over the life of the Act, the Act has not been significantly amended since its inception. I have considered the public contributions made to the previous reviews and, in particular, the 118 submissions made to the 2009 review. This has helped to identify the key problems and limitations of the current scheme and to develop a new model. In the research and analysis phase, numerous other models were considered, including those used internationally as well as various options suggested by previous reviews.

The 2015 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 (at Appendix 3), 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 material?
- How other international conventions (such as the UNIDROIT *Convention on Stolen or Illegally Exported Cultural Objects* 1995) might enhance the effectiveness of Australia's international obligations in respect of the protection of significant cultural heritage objects?

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 analyses of the Act will show, is that the problems of the Act are systematic. They cannot be dealt with by tinkering amendments.

Because the flaws in the current Act have become so profound, 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 wholly the current scheme.

2 Methodology

The review is being conducted in three broad stages:

- research and development of a model that will modernise the framework for protection of cultural heritage (including consideration of material provided to previous reviews and input from key parties involved in the operation of the current Act);
- targeted consultation inviting input from select acknowledged experts, followed by broader consultation, including travel to states and territories and a more general consultation by conducting a national on-line survey to ensure wider input regarding a proposed model; and
- finalisation of the model and report to Government.

This position paper divides the scheme into the following components:

- classification, assessment and export control of Australian cultural material (Part B);
- protection of foreign cultural material and international obligations (Part C); and
- compliance and enforcement provisions (Part D).

The model presented in this document is what I consider to be the most appropriate regulatory framework for both current and future Australian conditions. I am seeking comments and feedback from the sector to strengthen and refine the model before finalisation.

3 Limitations of the current model

The key limitations identified during analysis of the current scheme and the information provided through previous review processes 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 as to what must be proved in cultural property cases and by whom.

4 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 objects being regulated;
- clear, practicable, criteria for determining the significance of an object;
- an articulated process to assess the significance level of an object;
- a more efficient assessment process by requiring a greater degree of title, provenance and asset description information from applicants applying for permits;
- 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, territory and, possibly, local 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 will enable the new legislation to be 'ratification-ready' for 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.

Part B: Protection of Australian cultural material

5 Definitions

The legislative definitions relating to 'cultural material' and 'Australian' have proved very troublesome. As they delineate the material that is to receive protection, they go to the very core of the legislation. Accordingly, if they are not clear and easily understood, even the most streamlined decision-making processes will be compromised.

5.1 Definition of cultural material

The Act seeks to protect a very diverse range of cultural objects, both natural and man-made. It is clear from the inclusive language and exhaustive descriptions of such 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.

Given that 'cultural' objects are generally considered to be products of human endeavour it is incongruous that the system also covers fossils, meteorites, gems, rocks, minerals and all the other natural materials that have little to do with the term 'cultural'. Accordingly, the question must be asked: should the name of the Act and its language be changed so that it better reflects an intention to protect both natural and cultural movable objects of significance?

Perhaps more importantly, unhelpfully, the 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 object. 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 objects.

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, the new model should include a broad and encompassing provision to describe the diverse range of cultural and natural material that may be protected by the legislation. It should then leave the description of the classes of protected material in the one place – the Control List, which would be part of the Regulations.¹

The following is how a simpler definition of 'movable cultural heritage' might look:

A reference to the movable cultural heritage of Australia is a reference to objects that are of importance to Australia, or to a particular part of Australia, for ethnological, archaeological, historical, literary, artistic, scientific, spiritual, or technological reasons, being objects falling within one or more of the National Cultural Heritage Control List categories.

¹ The suggested new Control List is set out in Appendix 2.

5.2 'Australian' and 'related to Australia'

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

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 objects which could be described as national treasures. Objects may be of outstanding significance and worthy of protection, notwithstanding that they relate only to a 'part' of Australia. Objects that have state and regional significance still play an important part in telling the stories of Australia.

It is proposed that the new model incorporates a single definition of 'Australian' and 'Australian-related', which can be applied across the entire range of regulated material.

The following is how such a provision might look:

An Australian-related object means any one of the following:

- *an object recovered from:*
 - *the land, soil or inland waters of Australia;*
 - *the coastal sea of Australia or the waters above the continental shelf of Australia; or*
 - *the seabed or subsoil beneath the sea or waters referred to in the above subparagraph; or*
- *an object made in Australia, or with substantial Australian content, or that has been used extensively in Australia, being one or more of the following:*
 - *an object designed or made by an Australian citizen or resident, inside or outside of Australia;*
 - *an object designed or made in Australia or which has substantial content made in Australia (including those designed or made by a non-Australian citizen);*

- *an object not made in Australia but altered or modified in Australia for the Australian market or conditions, or extensively used in Australia;*
- *an object with subject-matter or motifs related to Australia;*
- *an object strongly associated with an Australian person, activity, event, place or period in science, technology, arts or history.*

6 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 proposed model adopts a new three-tier classification structure. It is intended to provide greater clarity and specificity about the objects regulated by the Act and the conditions placed on exporting them. The three classifications are:

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

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 objects 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.² The following sections describe the proposed classification system in more detail.

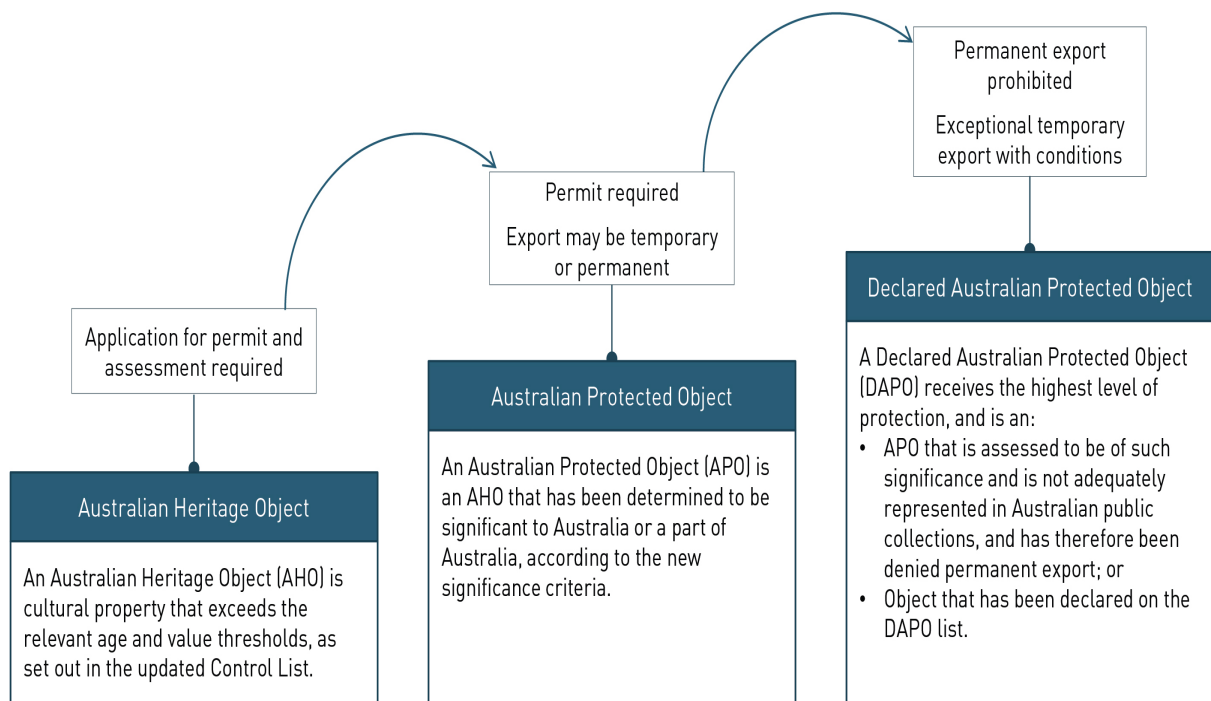


Figure 1 – New classification structure

² Offence provisions are further discussed in Part D.

6.1 Australian Heritage Objects

The first classification is that of Australian Heritage Object. These are objects which either:

- exceed the relevant age and value thresholds as set out in the Regulations; or
- are stated in the Regulations to be an Australian Heritage Object;³ or
- notwithstanding that they do not fall within the above, are of such significance that they have been determined to be an Australian Heritage Object by the Minister, responsible for the Act.

The owner who is considering the export of cultural material must apply the relevant age and value thresholds. If it does not exceed both the age and the relevant value threshold (and if the object is not prescribed on the Declared Australian Protected Object list), no export permit is required and it may leave the country. The application of the thresholds is a matter of self-assessment.⁴

If it exceeds both thresholds, it is an Australian Heritage Object.

An owner (or agent) who wishes to export an Australian Heritage Object must apply for an export permit. This application will allow assessment of the object against standard criteria, including significance and representation in Australian public collections.

For example, assume the object was a painting. Applying the (revised) thresholds that apply to works of art, one would ask:

- Is the artist still living?
- Is the painting valued at less than \$150,000?
- Is the painting less than 50 years old?

If the answer to any of those threshold questions was 'yes', then, although the painting would still be 'cultural material' and 'Australian or Australian-related', it would not be classified as an Australian Heritage Object. It does not meet the

³ For example, meteorites or fossils.

⁴ Self-assessment does not mean lax or self-serving assessment. Sanctions are applicable (see Part 24).

minimum thresholds. Therefore it could be exported without the need for further assessment.

If the answer to each of the threshold questions is 'no', then the object is an Australian Heritage Object and the owner must apply for an export permit.

6.2 Australian Protected Objects

Australian Protected Objects are Australian Heritage Objects that have been either:

- determined to be significant to Australia, or a part of Australia, according to the significance criteria set out in the Regulations; or
- determined by the Minister to be an Australian Protected Object.

An Australian Protected Object can only be exported with a permit. That may be a permit for either permanent or temporary export.

Australian Protected Objects would be granted temporary export permits based on an assessment of the risk by the Department regarding potential non-return to Australia.⁵

Not all significant objects 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 benefits in promoting business opportunities, professional reputations and the promotion of Australian culture overseas.

Accordingly, the proposed Control List provides that both significance and representation must be considered before an export decision is made. In certain circumstances, the permanent export of an Australian Protected Object may be granted even though the object has been found to be significant.

⁵ Temporary export permits are further discussed at Part 10.

For example a work of art may be granted a permit for permanent export notwithstanding that it is above the age and value thresholds and is considered significant – where there are sufficient other comparable works in public collections.⁶ Such a work, although an Australian Protected Object, may be granted a permanent export permit.

6.3 Declared Australian Protected Objects

Declared Australian Protected Object is the proposed classification for objects of outstanding significance and which require the highest level of protection. The permanent export of Declared Australian Protected Objects would be prohibited.

Such objects 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 (detailed in Appendix 1). Everything currently protected as Class A objects would be included in the list of Declared Australian Protected Objects.

There would be three ways that objects could be added to the list of Declared Australian Protected Objects:

- if the Minister declares it to be of such outstanding significance; or
- if an Australian Protected Object is denied a permanent export permit; or
- if an owner applies for declared status. 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.

⁶ Representation is discussed in Part 8.3.

While Declared Australian Protected Objects cannot be exported permanently under the proposed model, a permit for their temporary export may be granted under strict conditions. Temporary export would only be permitted in very restricted circumstances:

- where the temporary export is for public exhibition, scientific examination and research, conservation or ceremonial purposes; and
- where the decision is made in consultation with experts or the relevant community (as applicable); 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.

For example, assume that a temporary export was sought in respect of a Declared Australian Protected Object that was to accompany an Aboriginal or Torres Strait Islander elder attending an overseas ceremony for the handing-back of human remains. Consultation would be required with the relevant traditional owners; the purpose of export would be limited to the specific ceremonial purposes; and the temporary permit would be limited to the period of the trip. There might also be a range of other required conditions (which would be identified through the consultation process).

Just as objects may go onto the list, they may be removed from the list.

Acknowledging that significance and representation can change over time, the model will include 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.

6.4 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.

It is not recommended at this stage.

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 ongoing administration to remain effective. Many of its advantages can be achieved by the Declared Australian Protected Object system. Through the Declared Australian Protected Object system, a version (if not an equivalent) of a National Register will organically emerge.⁷

7 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. The current Control List is an odd assortment and requires recasting so that it has 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 object, research the contents of public collecting institutions⁸ 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 proposed 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 an object meets the threshold criteria, and if so, by subsequent assessment, (b) an object's significance.

⁷ 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.

⁸ To properly determine 'adequate representation'. See Part 8.3.

7.1 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
- 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 independent analysis.

7.2 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 threshold to be the initial thresholds to determine whether or not an object 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 and Torres Strait Islander Material
- 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 appropriate subject matter. The thematic headings are then broken down into more detailed subject descriptions and sub-categories.

For example, it is proposed that ‘Part 4: Historically Significant Material’ be broken down into sub-categories:

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

Under each of these categories it is proposed that there be an explanation or 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 at Appendix 2.

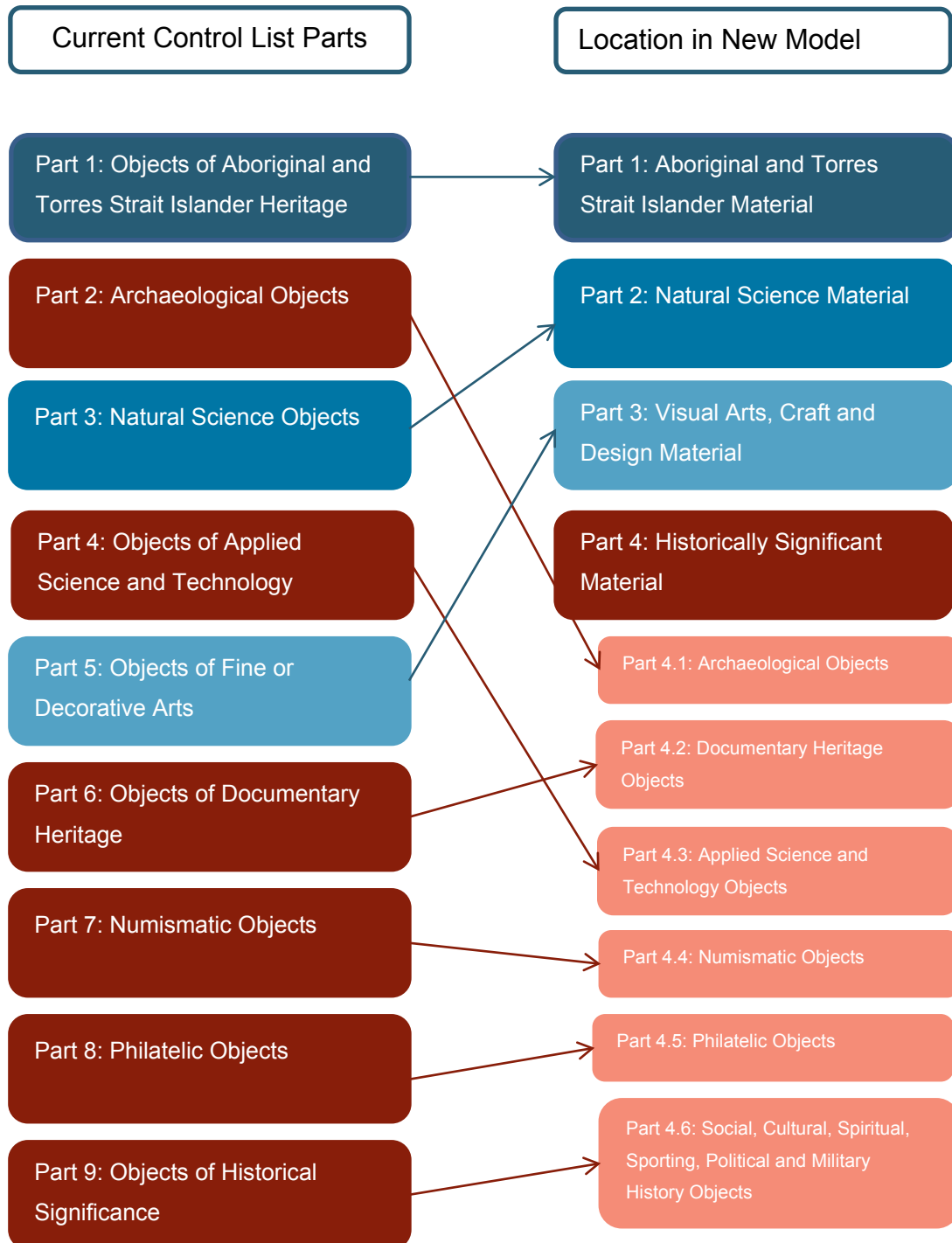


Figure 2 – National Cultural Heritage Control List summary

7.3 New Part 1: Aboriginal and Torres Strait Islander Material

In the present Control List there is unnecessary confusion between Part 1 (Objects of Aboriginal and Torres Strait Islander Heritage) and Part 5 (Objects of Fine and Decorative Art). There is misunderstanding 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.

It is proposed that all works of visual art, craft and design made with the intention to sell should be treated the same, irrespective of the artist's race. 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.

In addition, concern had been 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 significance of the works. The new approach to significance assessment makes clear that **all** elements of an object's significance must be considered, regardless of the Part under which the object falls.

It is intended that the new approach to the classification of material strengthen the protection given to important material. It is proposed that all the material currently described as Class A would become Declared Australian Protected Objects.

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

It is also clear that there are other items and categories of Aboriginal and Torres Strait Islander Material that should be provided that high level of protection. The express protection granted to a wider group of Indigenous heritage material will give greater certainty to Aboriginal and Torres Strait Islander 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 Objects 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 Objects, 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.⁹

7.4 New Part 2: Natural Science Material

From the submissions to the 2009 Review, it appears that the natural science objects described as being Class B objects are still the most important and, in general, are adequately described. Therefore the proposed formulation of this Part remains for the most part unchanged.

That said, as with the other Parts of the current Control List, significance and representation aspects should be more standardised and streamlined.

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 it is common that the purpose of the intended export is to perform this study.

Accordingly, it would be more straightforward if fossils were all Australian Heritage Objects and thus required an 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 permit greater certainty as to which objects are subject to export control and greater flexibility as to the export approval process.

Similarly, there are issues with the bulk export of rocks in which fossils may be present where those rocks are being exported for processing. It is impracticable for exporters to seek permits prior to testing or processing. The proposed regime would provide a temporary permit for bulk material export that is conditional upon the return of significant material discovered as a result of the study or processing.

⁹ The detail of the objects proposed to receive this protection is at Appendix 1.

7.5 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.

In addition, the proposed scheme makes no distinction between art, craft or design that is Indigenous or non-Indigenous. While there may have been a justification for this distinction in the past, those days are gone. Indigenous art is now a central to the Australian contemporary art market.

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

7.7 New Part 4.1: Archaeological Objects

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

This category is augmented to include an express reference to objects (forming part of, discovered on or otherwise) associated with any place listed on the Australian National Heritage List, the Commonwealth Heritage List and Australian places on the World Heritage List. This is a very important oversight in the current Control List.

This Part must be aligned with regulation under the *Historic Shipwrecks Act 1976*. Any duplication of regulation should be minimised. One possibility is to require that any export application for an object covered by both Acts must already have obtained a Historic Shipwrecks permit as a pre-condition to application under the Act.

7.8 New Part 4.2 – Documentary Heritage Objects

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.

7.9 New Part 4.3 – Applied Science and Technology Objects

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 objects, not itemising individual object types. More detailed examples can be provided in the explanatory guidelines on the Department's website. They do not need to be in the Regulations.

The other major change is that the current exclusion of 'artistic activity' does not go far enough to prevent material being considered under multiple parts of the list. This Part should expressly exclude all other Parts. The present situation whereby objects 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.

However, it should be noted that 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 and 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 any activity that could have been contemplated when the Act was first drafted. A new provision will need to take into account a distinction between the means and the product: it is the means that may be protected under this heading, whereas the product is properly protected under the new Part 3 (Visual Arts, Craft and Design Material).

7.10 New Part 4.4 – Numismatic Objects

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 receive maximum protection as Declared Australian Protected Objects.

It is suggested that this level of protection should also be extended to two other medals of extraordinary significance:

- the George medal; and
- the medal of 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 award as it does to its highest military award. Both honours are given in recognition of an extraordinary contribution to the nation.

7.11 New Part 4.5 – Philatelic Objects

Over the life of the Act, there has been discussion as to whether philatelic objects should be combined with numismatic objects. 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.

7.12 New Part 4.6 – Social, Cultural, Spiritual, Sporting, Political or Military History Objects

The proposed section for objects that relate 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.

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. Clearly the provision would benefit from staying at a higher level and leaving the detail to explanatory notes and examples in guideline documents.

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

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, it is suggested that words such as 'direct and substantial' be added to the association test.

This test should also be widened, from 'person, activity, event, place or business enterprise, notable in Australian history' to also include 'movement or period.'

7.13 Treatment of collections

The current scheme is designed 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.¹⁰ All other types of objects must be considered on an individual basis. This has proved problematic for both administration and significance assessment.

There are several classes of objects that may run into hundreds of thousands of individual objects, more or less organised into a whole.¹¹ For each of these constituent objects 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 may 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 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.

There may also be an argument for assessing a collection 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 new interpretation, of the life of a significant Australian. Individually, the documents may not be significant, but taken as a whole they may be.

The significance may not arise only because of the association with a significant person, nor might that archive contain a single significant item – yet the collection might be significant. For example, a 25-year correspondence between ordinary parents and an ordinary child may contain no individual document of enormous

¹⁰ Ethnographic collections under Part 3 and stamp collections under Part 8 of the current Control List.

¹¹ For example, an archive of documents or a collection of photographs from a theatre company, or a collection of rocks or insects.

important 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. That may well be significant.

Also, the significance might arise from its association with other objects. For example, a collection of documents may have significance due to the relationship of the documents to other objects.

All of the examples above have concerned collections of a single object-type. Particular issues can arise where the collection involves a wide range of object-types. For example this may occur where (part of) the significance arises from the fact that collection was amassed and curated by a particular collector – for example, objects from the extraordinary and diverse Kerry Stokes Collection.

Extending the concept of collections to objects that cross multiple parts of the Control List runs into practical difficulties. Questions of which monetary threshold criteria would apply, which expert examiners 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 object within it. This would result in unintended consequences: (a) a higher regulatory burden on applicants, and (b) the unnecessary protection of objects and thus an unjustifiable restriction of ownership rights.

For these reasons, it is recommended that only collections of the same type of object be able to be assessed for a single permit. Of course should they choose, owners should be able to break their collection into sub-collections of single types of objects for assessment as single object-type collections.

7.14 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'.

The 2009 submissions reveal that the lack of consistency on this issue has led to objects 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 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 all 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.

8 Significance and representation

The concept of 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 and the process and principles by which it is evaluated is unclear and confusing, particularly for private owners of objects.

The meaning of 'significance' is confusing. 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 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, it 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 revised model must meet this challenge and provide an appropriate definition and decision-making process for the determination of ‘significance’.

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.

8.1 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 draft criteria described below are based on those in *Significance 2.0*.¹² As such, they have wide acceptance in the collections sector. They are based on the principle that the assessment of significance should consider not only the material object itself but also its cultural context and associations.

It is recommended that when undertaking a significance assessment, consideration first be given to a set of **primary criteria**, being the object's:

- historic values;
- aesthetic or artistic values;
- scientific, technical or research potential; 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.

Having applied the primary set of criteria, the level of the significance should then be benchmarked using **comparative analysis criteria**. The use of evidence-based arguments founded on comparative evaluation should be able to 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 should be applied:

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

¹² *Significance 2.0: a guide to assessing the significance of collections*, Roslyn Russell and Kylie Winkworth, Collections Council of Australia Ltd 2009.

Guidelines can provide further explanation of these criteria. These may include:

- 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?
 - 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?

Evidence is required to demonstrate the extent of research, consultation and analysis undertaken. Example documents and images should be used.

The application of these primary and comparative criteria will enable the assessor to determine whether an object is significant.

8.2 Levels of significance

After finding an object to be significant, two further questions must be asked to determine the level of that significance:

- Is the object is an outstanding example of its type?
- Is there already adequate representation of that object (or in some situations that genre of objects) in Australian public collections?

These two questions are vital to the decision as to whether an object should be retained in Australia.

It should be noted that significant heritage value to the nation does not necessarily mean that an object has to be important to all Australians. An object may be highly significant to a part of Australia, a group of Australians,¹³ or may connect to a national theme.

8.2.1 Significance over time

The relative significance of an object may change over time. For example, further information and context might be discovered or cultural attitudes change so that what is rated as not of outstanding significance today may become significant in several years' time. The reverse is also possible.

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.

8.2.2 Recognition of significance assessments made by other levels of government

Several of those who have made submissions to previous reviews misunderstand the degree of significance that is required: to be protected an object does not have to be a national treasure. The Act is explicit – if the object is of significance to the nation or to any part of it, that significance can justify export protection of the object.

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 many objects that are already on national, state or territory heritage lists that have already been assessed as significant to the nation, or to a particular state, region, place or community.

There are several reasons for this recommendation:

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

¹³ Whether grouped by ethnicity, beliefs, profession or other criteria.

- 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.

It is proposed that objects assessed as significant to local regions of Australia, under legislative schemes of state and territory governments, be automatically treated as Declared Australian Protected Objects. This would ensure that the Act is able to act as a safety net, providing automatic protection to objects that the state and territory governments have given the highest degree of protection within their control.

As a further way in which the Act can assist the states and territories to control their cultural property, it is recommended that one of the elements to be taken into account when determining whether an export permit should be granted is whether the object has been removed or traded in breach of a state or territory law.

Some local governments also protect cultural objects that are 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 variances, it is tentatively proposed that objects on a list of significance maintained by a local government be automatically Australian Heritage Objects irrespective of their age or value. Accordingly they would require an application for export and the Department may require a full significance assessment before making its export decision.

Feedback is sought as to whether and how objects listed on local government heritage lists should be protected and if so, whether they should be recognised as Australian Heritage Objects, Australian Protected Objects or Declared Australian Protected Objects.

8.3 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 object 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 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, it is 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 are *'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.*

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 in public collections thus diminishing the rationale for requiring this example to be retained in Australia.

8.4 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 a protected object and to assist those charged with the responsibility for determining whether an export permit should be granted or denied.

The Explanatory Statement to the Act gives several examples of 'equivalent quality'. These should be captured in the Regulations so as to provide more 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 objects 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 object.

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.

The proposed model would make it clear that:

- 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 objects – distinctions as to age, model, condition, completeness and significant amendments, repairs, additions or adaptations; and that
- 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 regulations should require that the following aspects be considered when assessing ‘representation in Australian public collections’:

- the number of objects 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 comparison with objects of the same class / style / make and model in public collections;
- whether there are unique features or adaptations made to the object that should be considered; and
- comparison with objects either of the same or similar subject matter or the same or similar association with events, persons or places.

8.5 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 owned and publicly accessible.

Currently there is a definition in the Act regarding ‘principal collecting institution’ however there is no definition under the Regulations when it comes to representation in a public collection in Australia. 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 either:

- Established under a law of:
 - the Commonwealth; or
 - a State or Territory; or
 - Local Government; or
- Owned and controlled by a not-for-profit organisation that:
 - owns publically accessible collections; and
 - is eligible under the Cultural Gifts Scheme.

8.6 Test for the significance threshold

Over the years there has been litigation as to the significance threshold required to deny export. Currently the test is set out in section 10(6) of the Act:

In considering the application, an expert examiner, the Committee and the Minister:

- (a) shall have regard, among other things, to the reasons referred to in subsection 7(1) that are relevant to the object to which the application relates; and*
- (b) if satisfied that the object is of such importance to Australia, or a part of Australia, for those reasons, that its loss to Australia would significantly diminish the cultural heritage of Australia—shall not recommend the grant of a permit, or grant a permit, as the case may be, to export the object permanently.*

It is extraordinarily and unnecessarily difficult to establish proof of a negative. In effect it means that unless an object is (currently) classified as Class A, it is hard for Government to establish the grounds for refusing permanent export as it would have the burden of proving what would happen to Australia if the individual object 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.

However, it would be a much more constructive approach to replace the negative test of 'importance to Australia' with a positive one and to require consideration of the cultural significance of an object in terms of its contribution to the richness of Australian cultural and natural heritage.

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 Australia*' – rather than, '*that its loss to Australia would significantly diminish the cultural heritage of Australia*'.

8.7 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 summary of the meaning and importance of the object, which articulates 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 information in regard to the representation of the object (or, where applicable, class of object), in public collections.

This report will enable the decision-maker to make an evidence-based decision as to the granting or refusal of export.

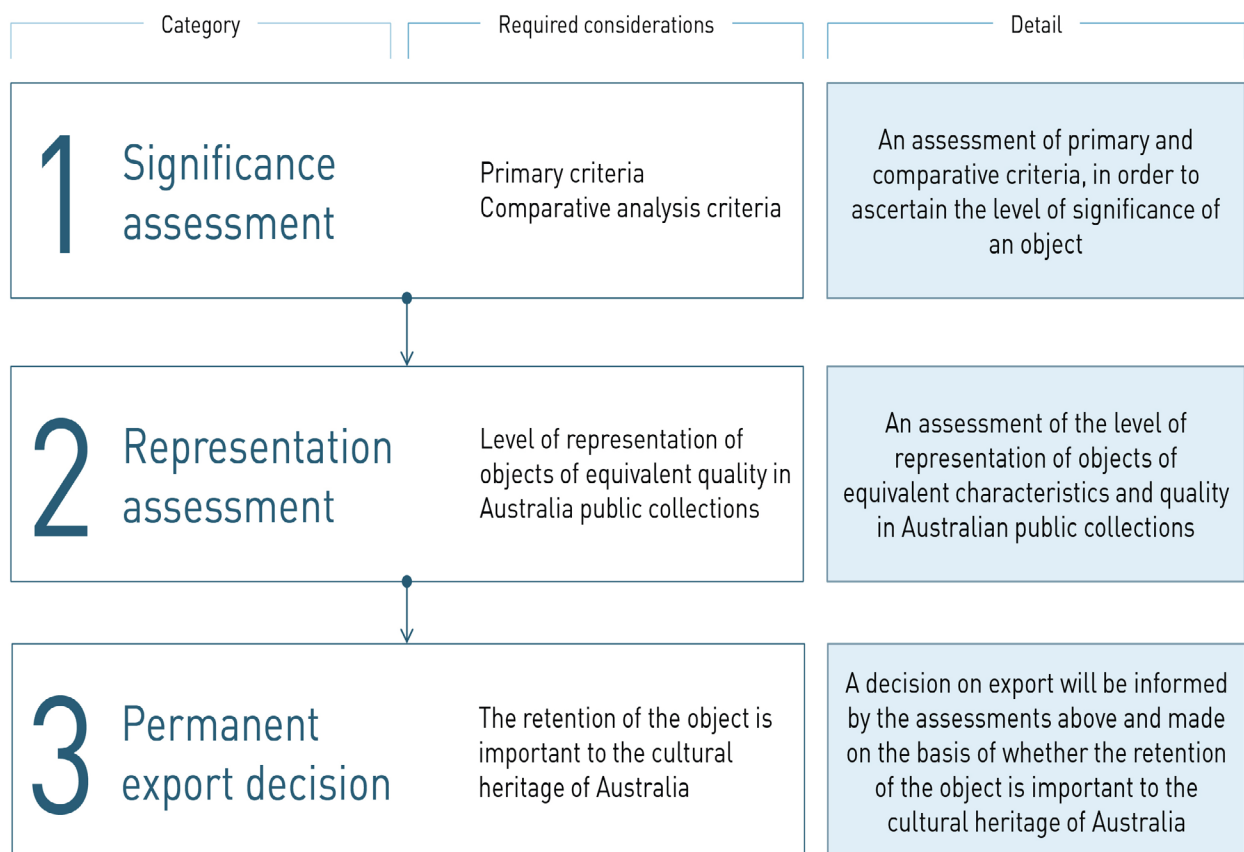


Figure 3 – Significance and representation summary

9 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.¹⁴ However, in reality the Committee is overwhelmed by compulsory roles in relation to administrative matters so that the overall intention of its existence has not been achieved for some time.

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 is 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 are very straightforward and could be easily and cheaply dealt with as an administrative matter. There is no great purpose achieved by putting most applicants through the current procedure.

9.1 Re-configuration of the Committee function

Having a standing committee is not the most efficient way of achieving the purposes of the system. 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, high-level advice to the Department and to the Minister requires different expertise and experience to that required by specialised and

¹⁴ Section 16 of the Act.

complex significance assessments, or the establishment and maintenance of 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 of Cultural Property Experts would be a flexible reference group from which the Department and the Minister can call for advice from an appropriate number of people with the most appropriate experience and expertise.

As well as all of the approved Expert Examiners, the Register would include senior administrators of collecting institutions and other acknowledged leaders in various fields of cultural property.

9.1.1 Advice as to Significance or contentious applications

When the Department or the Minister wishes to confer on difficult decisions as to significance assessment, the Department will be able to choose appropriate persons from the Register to form a panel to give that advice. In reality, this is not hugely different from what happens now – it just does it faster and with less bureaucracy.

In this way, experts in the relevant specialty will determine 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 rather than the present Committee (with one specified Indigenous position) who, rather inappropriately, may be expected to be able to advise on all Indigenous material.

9.1.2 Advice as to sectorial issues

Where the Department or the Minister requires a 'second opinion' or particular sectorial advice is required, the Department would be able to select those on the Register of Cultural Property Experts who can 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.

9.1.3 Processes

The process by which the 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 process is 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.

The legislation should neither prescribe nor proscribe the manner in which advice can be sought or given. For example, unlike the current provisions, all communication technologies should be available to assist the advice givers to provide their counsel.

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. For example, if the Minister seeks advice on whether particular objects should be Declared Australian Protected Objects, 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.

It is important that the pool of expertise on the Register be expanded and this is a matter that already needs attention. 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.

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

Experts would continue to be paid for their significance assessments. Similarly, experts who are called on to form a panel and participate in strategic level meetings or provide advice other than significance assessment would be paid appropriate sitting fees.

9.2 The role of Expert Examiners

At the moment the significance assessments are undertaken by persons called Expert Examiners. These experts provide an invaluable service 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 hesitate 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 would be absolutely clear that the role of the expert is to assess the significance of the material for which export permission is sought. It would no longer be the expert's role to make recommendations as to export permission. If their task is limited to describing the significance of the object and provide information regarding representation, experts will be better able to give fearless advice.

To make clear this change of function it is recommended that the term 'Expert Examiners' no longer be used and in its place, the term 'Expert Cultural Significance Assessor' ('Assessors') might be adopted.

9.3 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.¹⁵

That said, the method of identifying and qualifying Assessors needs attention. As has been noted in previous reviews of the Act, this is a long-standing problem and concerted effort must be put into expanding the pool of expertise. With the removal of the Committee, the process for identification, selection, training and oversight of the Assessors should be a function of the Department.

¹⁵ As outlined in Part 10.5

The term of appointment for Assessors should be for renewable periods of three or five years. There should 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 able to be removed from the Register when focusing on other work.

As a secondary matter, new assessment reporting forms should be drafted in such a manner that they facilitate the provision of factual information, the assessment of provenance, lead to the determination of a significance level based on the appropriate factors and provide comparative information in regard to representation in public collections.

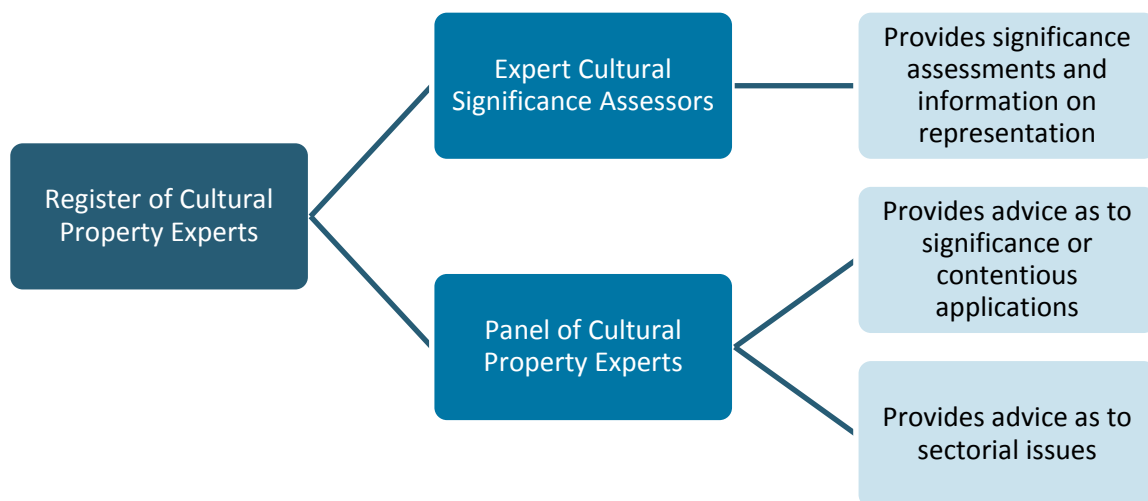


Figure 4 – Register of Cultural Property Experts

10 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 medal awarded in World War II.

Some exemptions, known as General Permits, are made for public collecting institutions temporarily exporting objects from their own collection, but otherwise all exports are dealt with according to the same process.

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.

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 objects exported from Australia prior to 1987.

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 public collecting institutions). The new model would retain the ability to place conditions on all types of permits, but would provide new tools to speed and simplify the temporary export permits process.

10.1 New and extended temporary export processes

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 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 international competition; an auction house touring works to promote an upcoming sale within Australia.

10.2 Streamlined procedure for short-term temporary export permits

The Department should be empowered to issue temporary export permits for periods of less than six months without the need for a Significance assessment, unless:

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

10.3 Extension of General Permit system

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

The proposed model would extend the eligibility criteria for General Permits to other trusted organisations thereby allowing the General Permit system to deal with a greater number of the temporary export applications in a prompt and cost-effective manner. Organisations would be approved according to risk.

For example an approved vintage car club could export a vintage car to attend a rally in an overseas country on the basis that it 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: sanctions for a breach would include revocation of the General Permit, fines and forfeiture of the object.

Accordingly, it is proposed that there be a new, three-tiered system of General Permit by which Australian Heritage Objects and Australian Protected Objects (but **not** Declared Australian Protected Objects) may be exported on a temporary basis. The following organisations could apply to operate under a General Permit:

- collecting institutions;
- auction houses; and
- other established and trusted organisations (special interest groups).

Standard conditions may differ according to the type of organisation or the activity being undertaken. The conditions may include the regularity of reporting (e.g. annually versus on each use of the permit); length of the export period (e.g. two years versus three months); and the eligible purposes for export (e.g. exhibitions, research, participation in events).

All General Permits would be issued by the Department for a set period at which time they would be reviewed. General Permits could be revoked at the discretion of the Department at any time if misused. 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.

To ensure that objects exported under a General Permit are returned, the legislation should provide for severe sanctions for the breach of any conditions of the permit.¹⁶

10.3.1 General permits granted to collecting institutions

The range of collecting institutions eligible for a General Permit would be increased to include any non-for-profit, publicly accessible collection that is eligible to receive donations under the Cultural Gifts Program. In this category it is expected that most permits would be valid for five years and renewable. The permit would allow the organisation to take out of Australia, for the purpose of public exhibition, conservation, research or education an Australian Heritage Object or Australian Protected Object that:

- is from its own collections; or
- is borrowed pursuant to a formal loan agreement for the purpose.¹⁷

¹⁶ These are further outlined at Part 24.

The permit would allow for objects to be exported for a period of up to two years. As is currently the case, the institutions would be required to report annually to the Department detailing activity under the permit.

10.3.2 General permits granted to auction houses

It is proposed that auction houses be eligible to apply for a category of General Permit, restricted to touring material which will be returned to Australia for sale in Australia.

At the moment, the auction house 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 approved auction house would need to provide a report to the Department detailing matters relevant to the temporary export and return of the material each time the permit was used. The permit would restrict export to a period of three months.

Should an object be subsequently sold at the auction in Australia to a buyer who wishes to export it, the usual processes, criteria, permissions or constraints, would apply.

Auction houses have made submissions to this and previous reviews that their foreign clients need to know the export permit status of an object before a sale so that they can be reassured that they will be able to export their purchases.

While understanding the need for certainty by the auction houses and their buyers, the intention of the new model is to make the system faster and less burdened by unnecessary applications. It would be an unacceptable inefficiency to allow large

¹⁷ It is recommended that the formal loan agreement in this situation be defined as an agreement in writing whereby the institution undertakes responsibility for the care and the return of the object to the owner in Australia.

numbers of export applications based on a possibility that they might be exported if bought by a foreign buyer, and so a balance will need to be found between certainty and efficiency.

The certainty required is best delivered by providing a readily understandable system of object categorisation and significance assessment coupled with a process that is rapid, efficient and transparent. Feedback is sought from the sector on whether this balance can be achieved by a degree of self-regulation, perhaps combined with a cap on the number of pre-sale permits allowed in a year.

10.3.3 General permits granted to other organisations

Not-for-profit, special interest groups should be eligible to apply to the Department for a General Permit. 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.

Once approved the organisation would then provide a report to the Department detailing matters relevant to the temporary export and return of the material, each time the permit was used. It is proposed that this category of General Permit would restrict export to a period of three months.

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

Sometimes, the owner of an object exported from Australia prior to 1987 (when the legislation was first enacted) may wish to re-import that object 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 object to be re-exported without being subject to the Act. This is a useful and important mechanism, which 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. The Certificate of Exemption allowed this collection (which would undoubtedly meet the criteria as an Australian Protected

Object) to be exhibited in Australia, but returned to their lawful owner without retrospective regulation. It is proposed to retain this mechanism.

10.5 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 delay and red-tape for applicants, and expense for government, that is unwarranted. 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:

- clarity on whether an application is required;
- 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.

10.5.1 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.

The current requirements for applications should be maintained, including that the application be made in writing in a form prescribed by the Department.

However it is proposed that the new framework clearly place the onus on the applicant to provide more information regarding the current owner, the description of the object and all provenance information.

It should be the responsibility of the owner to provide, to the extent possible, the information required for good decision-making. The Department should 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.

10.5.2 Application fee

At the moment the application process is free. Some of the previous submissions have suggested 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 proposed revision of the Act should include the necessary authority to charge fees. However the decision to charge and the setting of the fee is a matter for the implementation of this report, as administration of a fee could impose a regulatory cost and burden that outweighs the funds collected.

10.5.3 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.

On receipt of an application that contains sufficient information, the Department should check, by applying the statutory tests/thresholds, whether the object is:

- an Australian Heritage Object; and if so
- whether the object is likely to be an Australian Protected Object or a Declared Australian Protected Object.

An object that does not pass the statutory age and value thresholds is not an Australian Heritage Object 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 any object that does not fall within the thresholds. For example this may happen if there is uncertainty over whether an object meets the criteria or if a potentially significant item comes to the attention of the Department in some other way.

If an object exceeds a preliminary age and value threshold, it is an Australian Heritage Object. 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 either:

- grant the export permit sought;
- grant the permit subject to conditions;
- refuse the permit sought (for example objects which are clearly within the definition of a Declared Australian Protected Object); or
- if there is any doubt as to the object's potential significance, send the application for external, formal, significance assessment.

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

10.5.4 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 in the event 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 object, owners may be less inclined to such behaviour.

The proposed model intends to retain this administrative mechanism, as it fulfils an important need for owners of objects that are not regulated under 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.

10.5.5 Assessment of Australian Heritage Objects 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, may 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 Heritage Significance as to the significance of the object is not unanimous, or the Department wishes to seek further advice, the Department will refer the matter to a panel from the Register.

The panel may recommend that the Department:

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

10.5.6 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 an Australian Heritage Object, 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 proposed 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.

10.5.7 Department's decision

The Department considers the expert significance and representation assessments (and where applicable the reasoning and findings of the panel) and decides:

- whether the Australian Heritage Object has the appropriate national or regional or local significance to be an Australian Protected Object;
- if so, whether the object 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 an Australian Protected Object may be:

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

To ensure that the process is as speedy as possible, the Department should 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 should be required to provide the applicant with the reasons for the refusal.

As a safeguard, the legislation should ensure that the Minister has the legislative powers to override age and value thresholds and:

- determine that an object is an Australian Heritage Object and requires a significance assessment; or
- to declare an object to be a Declared Australian Protected Object.

10.5.8 Conditions

Any permanent or temporary export permit, for any class of object, should 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 object is to travel has immunity from seizure legislation (to ensure that the object would not be subject to a claim in that jurisdiction and be prevented from returning to Australia).

10.6 Appeal

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

10.7 Transparency

Comments to previous reviews have indicated that it would be valuable if information about permit applications and the assessment of those objects were publicly available. For example, if such information is available, people in the relevant sector might be better able to provide information on unlawful practices or purposes which may not otherwise be known by the Department.

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

- applications for export permits, including detailed object information, current owner and provenance (excluding current location for security reasons);
- significance reports prepared by Expert Cultural Significance Assessors, including the surname¹⁸ of the expert who prepared the assessment; and
- decisions, with reasoning, as to the granting or refusal of export permits.

It is envisaged that this information could be made available online. Its availability would enhance accountability for applicants, assessors and decision-makers.

In addition, consideration is being given to whether there should be a short period for public submissions in regard to permanent export applications.¹⁹ The main reason for this is that where the applicant has little information about the provenance of the object it may be possible that additional information can be provided by the public to assist in the assessment of that object.

Having such information publicly available would address several potential deficiencies (intentional or not) in both applications and assessments. It would provide an excellent informal way of enhancing and invigorating the quality and completeness of both applications and reports. It would also contribute to the deepening of knowledge about particular objects and classes of objects. Also, as the information is likely to be accessed by members of what are often very niche sectors, incorrect or incomplete information is likely to be brought rapidly to the attention of the Department.

¹⁸ Or some other identifier such as their initials or an Assessor number.

¹⁹ This would only be used in exceptional circumstances, for example, as is used by the Australian Government Department of the Environment for exceptional wildlife trade permit applications.

11 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*.

11.1 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 an 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 an protected object. The Second Reading Speech made when the Act was introduced into Parliament²⁰ 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 – thus 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.

²⁰ 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.

11.2 New, widened purpose of the Account

The assistance that the Account provides should be focused 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 be amended to reflect a 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 objects denied export have been assessed to be of the highest importance to Australia and it is in the public interest that they be available to the public. The Account should provide funds to this end.

11.2.1 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 public, not-for-profit organisations and must be utilised for the retention, public access and preservation of Australian cultural material.

11.2.2 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, it is recommended that the guidelines for the use of the Account provide that the priority of expenditure be as follows:

- the acquisition of Declared Australian Protect Objects, in Australia and overseas, for retention in Australian public collecting institutions;
- the acquisition of Australian Protected Objects, in Australia and overseas, for retention in Australian public collecting institutions; and
- other activities related to, or which will facilitate the acquisition of, Declared Australian Protect Objects and Australian Protected Objects (such as transportation, professional advices, conservation and specialised storage systems – including digital storage).

11.3 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 if required.

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 object;
- 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 object;
 - 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).

11.4 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.

The 2009 Review Report noted:

...as the [National Cultural Heritage] Account currently operates, unspent funds are carried into the next financial year, but new funds are only contributed to return the balance to \$500,000. The accumulation of funds into future financial years would increase the capacity of the [National Cultural Heritage] Account to respond to fluctuations in the availability and price of significant heritage items on the market. Consideration of emergency or ex-gratia funding for items of particularly high value, such as an entire collection, would also improve the [National Cultural Heritage] Account's ability to respond to the market with more flexibility.(p.92)

Since its fund 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 \$1.8m 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 Government:

- 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.

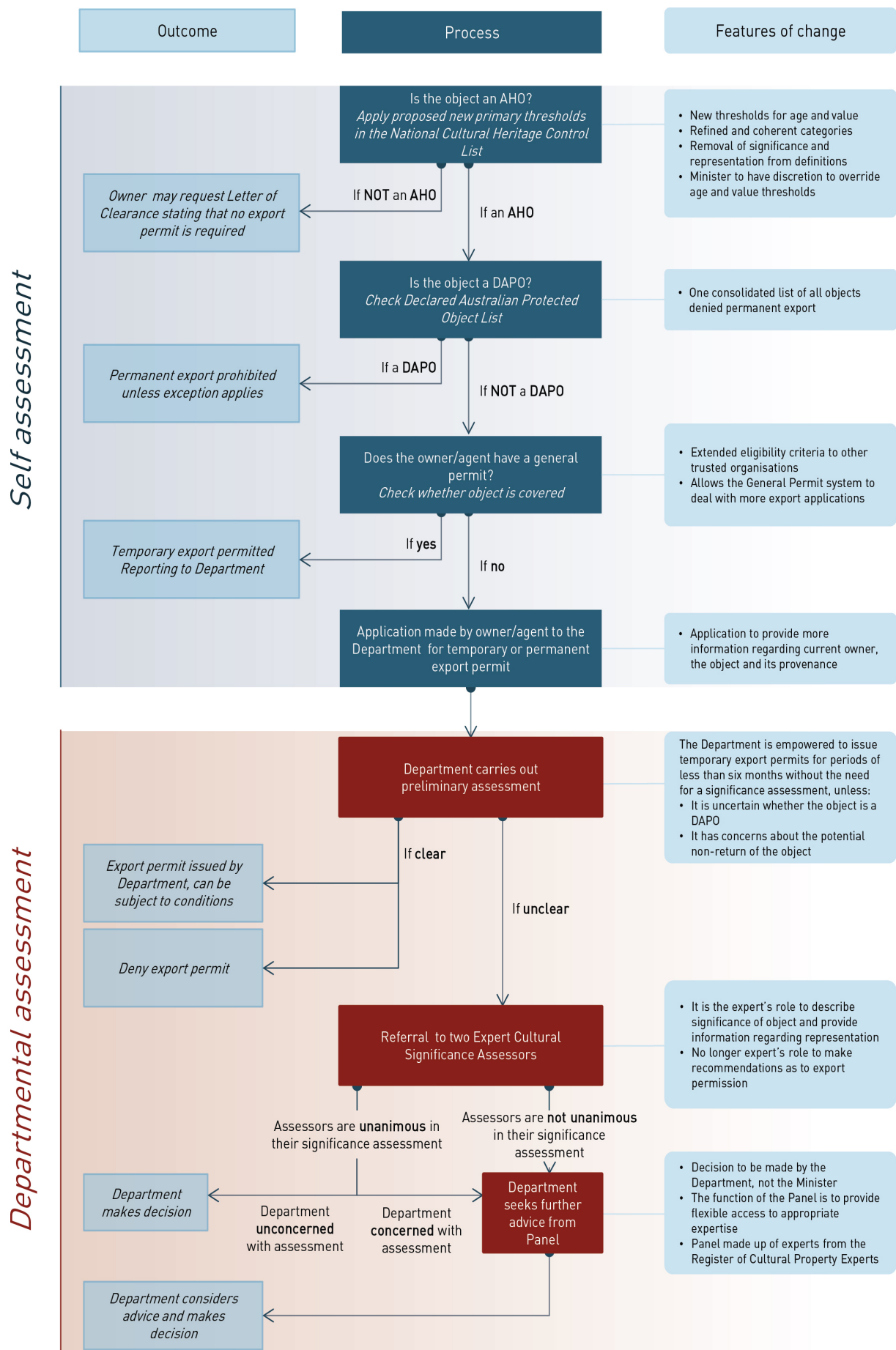


Figure 5 – Proposed export process

Part C: Protection of foreign cultural material

12 Introduction – Australia’s international commitments

Australia has made a long and deep commitment to the international community to protect the cultural property of foreign countries. It was one of the original signatories to the Hague Convention 1954 and in 1989 it ratified the UNESCO Convention 1970, which is given domestic effect through the *Protection of Movable Cultural Heritage Act 1986*. In more recent times, it 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. 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. No Australian law specifically protects against the import of cultural material that has been stolen or looted in time of war.

The obligations under the Hague Convention 1954 are primarily implemented through non-legislative means, including training provided to the Australian Defence Forces and the creation of specific criminal offences under the *Crimes Act 1914* and *Criminal Code Act 1995*. Security Council sanctions are enacted through Regulations to the *Charter of the United Nations Act 1945*.

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 state-sanctioned looting of Jewish cultural material during the Holocaust.

It is also imperative for Australia to recognise, by the ratification of international instruments and in its domestic legislation, the rising role that looted and stolen

cultural material plays in not only in the destruction of the heritage of our international colleagues, but also in the funding of terrorist groups.²¹

Many of the decisions regarding the shape and detail of the appropriate model for the protection of foreign material are dependent on the outcome of ongoing policy deliberations of Government, including the possible ratification of international conventions. For this reason, the elements of the model relating to foreign material have far less granular detail than those relating to the protection of Australian cultural material.

Taking into consideration other international approaches, I have outlined the principles that would support a successful model. I also provide an example of the type of model that I believe would deliver on those principles and am seeking to test those proposed principles and the proposed model for the protection of foreign material.

In my view, a clear and explicit prohibition against the importing of stolen and looted cultural material should be included in the new model. Further, given that one of the principal purposes of the proposed revision is to make the laws relating to cultural property easily accessible and understood, that aim is enhanced if they are in one place and subject to one, consolidated, regime.

To achieve this, the proposed model would have as its central feature a legal forum in which cultural property matters can be considered and determined. That forum should have articulated procedures and be public.

Consideration is also being given to the appropriate process for the seizure and restitution of objects stolen or looted from war zones, and objects stolen from inventoried collections.

This should be done in such a way as to implement Australia's current international commitments, including the Hague Convention 1954 and the UNESCO Convention 1970 and also provide the domestic legal framework which would enable future Australian Government ratification of the First and Second Protocols to the Hague

²¹ Meeting of Minister of Foreign Affairs, Julie Bishop 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>.

Convention 1954 and the *UNIDROIT Convention on Stolen or Illegally Exported Cultural Objects 1995* (UNIDROIT Convention 1995), if so decided.

Finally, the present legislation does not provide a coherent range of tools to assist law enforcement officers to deliver Australia's obligations regarding the protection against and prevention of illicit trade in cultural material. It should be an aim of the proposed system to do so by encompassing a range of powers over suspected objects, including injunction, search and seizure powers. These powers should be available either at the request of a foreign government or without a specific request, where there is suspicion that an object should be safeguarded or would be otherwise liable to seizure.

13 Current provisions of the 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 and with the introduction of the UNIDROIT Convention 1995 and the Second Protocol to the Hague Convention 1954, the international framework has also shifted.

Issues identified include the lack of clarity and transparency around the processes for demonstrating that objects have been illegally exported and the out-dated provisions relating to enforcement mechanisms. 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.

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 owner and the burden of proving the legality of the import lies on the Australian Government.

A more desirable position would see the responsibility for commencing legal action on the foreign claimant, and the burden of proving the legitimacy of the import on the owner.

Under the current Act, Australian Government agencies (for example, the Australian Border Force or the Australian Federal Police) periodically identify cultural objects that appear to have been illegally exported. The relevant foreign government is then 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, and the Australian Government is left monitoring (or in some cases holding) the object, unsure of whether further action will be required, and unable to seize the object without a formal government request.

In addition, the Act does not explicitly recognise one of the greatest problems for the international community: the regulation of looted materials from public collections, monuments, religious or identified significant sites, particularly in war zones and other high-risk situations.

14 Principles of proposed model

There are five key principles that should be at the centre of the new model for the protection of foreign cultural material under Australian law. These are:

- clarity;
- due diligence;
- transparency;
- appropriate responsibility; and
- consolidation.

14.1 Clarity

The new scheme must provide clarity to all stakeholders, including institutions, dealers, collectors and foreign claimants. Their responsibilities and the actions available to them should be clearly explained. The processes to determine whether or not a disputed object is to be seized and returned to its country of origin under the legislation should also be easily navigated.

14.2 Due diligence

The new model should set clear expectations of purchasers of cultural objects so as to both require and permit them to undertake a practicable degree of due diligence as to title and provenance. These expectations should be within temporal boundaries.

14.3 Transparency

The processes for assessing claims and counter-claims relating to disputed objects should be done in a manner transparent to both the owner of the object and the foreign government. This should be principally achieved through a court-based mechanism. Where appropriate, evidence relating to the object should be publicly available.

14.4 Responsibility for commencing legal actions

Australia recognises the right of a sovereign state to protect its significant cultural material. It therefore follows that the responsibility to argue this in specific cases should fall to that state. With exceptions where necessary, this approach would limit the role of the Australian Government to the identification, initial seizure, safeguarding of the objects, and communication with both parties. The responsibility to commence and conduct required legal action should fall to the claimant. This approach would be consistent with Australia's obligations under the UNESCO Convention 1970.

14.5 Consolidation of Australia's international obligations regarding cultural property

The proposed scheme seeks to consolidate Australia's legal obligations and processes relating to the protection of foreign cultural property. The new model would continue to implement the UNESCO Convention 1970 and give protection to objects identified under the Hague Convention 1954, its two Protocols, and the United Nations Security Council sanctions and resolution regimes.²²

²² For example, those made under the *Charter of the United Nations (Sanctions-Iraq) Regulations 2008*.

15 Suggested model

The model would continue to implement Australia's obligations under the UNESCO Convention 1970 but do so in a way that provides greater breadth, clarity and transparency. It should ensure that appropriate protection processes are available for objects that have been:

- illegally exported;
- stolen from inventoried collections; or
- looted from war zones.

It should also be framed in such a way as to enable consolidation of Australia's international obligations – both existing and future.

In all cases, the Australian owner of an object that has been seized should have the benefit of transparency and an opportunity to demonstrate their legitimate ownership of the object. Principally, this should be through a court-based mechanism, as per the approach under the UNIDROIT Convention 1995. As outlined later in the paper, while the decision to ratify this Convention is a decision for Government, the intellectual rigour that has gone into the development of these common law mechanisms provides a ready-made model provision for inclusion in Australian legislation.

The model would also encompass a range of powers over suspected objects, including injunction, search and seizure powers. These powers should be available either at the discretion of an authorised Inspector under the Act, at the request of a foreign government, or at the direction of the Department (where there is reasonable suspicion that an object would be liable to seizure).

Under the current provisions, a request for seizure must come from the country of origin of the material. This has proved to be a weak point in Australia's ability to combat illicit trafficking in these objects. In an increasingly globalised world, trafficked commodities may move through a variety of jurisdictions to mask their point of origin, before being sold in Western countries. The proposed model should include a power to seize cultural objects that appear to be illegally exported or stolen without the need to wait for a formal request from a foreign government. This will permit them to be 'safeguarded' for a time-limited period (for example, up to three

months) and provide an opportunity for further investigation and discussions with both the relevant foreign government and the Australian owner. In the majority of cases under the proposed model, seizure would be merely to safeguard rather than be a process that necessarily led to forfeiture.

It would be sensible if the model were to require that, by the end of this period, one of the following actions must have been taken:

- the **owner** has ceded possession of ownership of the object to the foreign claimant; or
- the **foreign claimant** has commenced action in the Federal Circuit Court for the return of the object; or
- the **Minister** has determined that it is not feasible for the foreign claimant to commence action in the three month period and has exercised a discretion to hold the object for an extended period.²³

Should one of these actions not be taken, the object would be returned to the Australian owner from whom it had been seized.

15.1 Seizure of material looted from inventoried public collections

Although the general approach should be that any claim for the restitution or return of cultural objects should be made through a court process, there are some cases where this will not be appropriate.

One of the great problems for the international community is the regulation of materials looted from public collections, which may include institutions, monuments, religious or identified significant sites, which are particularly vulnerable in war zones and other high-risk situations. Recognition of existing international mechanisms for identifying looted material or objects at risk (such as ICOM's Red Lists²⁴) would provide an express power to seize on the basis of suspicion, without the need for a formal request from the foreign state.

²³ For example, where there is a situation of civil war which renders the sovereign government unclear.

²⁴ International Council of Museum's (ICOM) Red Lists available at the <icom.museum> website.

What needs attention in respect of material looted from inventoried collections is the process by which the rights of retention, restitution or return are determined.

Although the general approach should be that any claim for the restitution or return of cultural objects should be made through a transparent open court process, where an object has been clearly described on the inventory of a museum, monument or site, the general approach would be a waste of resources. Further, it may also not be compatible with some international obligations, including United Nations Security Council sanctions.

Material looted from inventoried collections should be an exception to the general approach and the process by which such claims are resolved should be an improved version of that which currently applies to claims of unlawful export.

The following process could apply to claims for restitution of objects suspected of being looted from an inventoried public collection:

- if an object is suspected of having been looted from an inventoried public collection, it would be seized;
- the foreign government would be given a period within which to demonstrate to the satisfaction of the Minister that the object had been looted from an inventoried collection.²⁵ If the foreign government chooses not to provide this information, the object would be returned to the Australian owner;
- information provided would be made available to the Australian owner where appropriate;
- as per the current legislation, the owner would then have a time-limited opportunity to commence legal action against the restitution claim; and
- if the information is provided and the Australian owner chooses to not challenge the seizure within the limitation period, the object would be forfeit to the Commonwealth and the object returned to the foreign claimant.

It is a process that might be wholly dealt with as an administrative matter (thereby saving considerable time and expense for the parties) or, if the Australian owner chooses, it may be determined through the process of the court. If the UNIDROIT

²⁵ This period should be flexible, to accommodate situations of armed conflict and any obligations under the Hague Convention 1954.

Convention 1995 model were adopted, the parties would be the Australian owner and the foreign claimant – not the Commonwealth.

15.2 Alternate dispute resolution

While the general proposition to use a transparent, court-based mechanism may meet many of the requirements of an improved model, it is acknowledged that it would involve expense both for claimant governments and Australian owners. It could also incur a limited resourcing cost for the court system.

To address this, the new model could include as a compulsory initial step, an informal alternative dispute resolution mechanism. This could be facilitated by the Department and provide an opportunity for the foreign government and Australian owner to exchange information as to relevant areas of provenance, including existing documentation, authenticity and country of origin.

15.3 Advantages of the suggested model

The advantages of this type of model are:

- increased transparency for Australian owners;
- most claims would be dealt with inter-parties – without significant involvement by the Australian Government;
- matters may be resolved quickly and cheaply through alternative dispute resolution processes;
- if not informally resolved, claims would be dealt with by a transparent court process which would result in court orders as to the rights of ownership and possession; and
- a distinct, but still more transparent, process is provided for material that has been looted from an inventoried public collection.

15.4 To which countries should protection be given?

Under the current Act, protection is extended to the cultural material protected by the laws of all foreign countries, whether or not they are signatories to the UNESCO Convention 1970. This is a generous implementation of the UNESCO Convention 1970, which requires, under Article 7(b)(ii), only that protection is given 'after the entry into force of this Convention in both States concerned'.

Although several other countries, like the USA, take the narrow view, it is my view that Australia should maintain its wider approach. Some of Australia's important international partners, such as Indonesia, are yet to ratify the UNESCO Convention 1970 but Australia has deepened its relationships with some of these countries by assisting our international partners to protect their cultural heritage.

It may also be hoped that, by demonstrating a broad commitment to the protection of foreign cultural material, other countries will acknowledge the importance of cultural property and be encouraged to become state parties to the UNESCO Convention 1970.

15.5 Issues of timing

When considering the import of illegally exported foreign cultural material into Australia, 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.

15.5.1 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 unclear aspects of the Act. The current legislation provides no explicit date after which the illicit export must have taken place. Accordingly, as a matter of interpretation, Australia recognises as illegal any export that was in breach of the laws of a country of origin at the time of export, irrespective of the date of that export.

I understand that the current Act is deliberately wide and unrestricted in this respect because it was the original intent of the drafters to give fullest expression to

Australia's ratification of the UNESCO Convention 1970 – notwithstanding that it was expressly worded only to have effect after both parties have ratified.²⁶

However, this means that there are no words of limitation in the Act and therefore 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.

The desirability of Australia's position has been the subject of debate since the introduction of the Act, and views on it remain divided.²⁷ The current position inarguably creates a considerable burden for the collecting community given the difficulties of determining the applicability and enforceability of foreign laws – 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.

To address these issues, the proposed model could provide for periods of limitation for the bringing of claims. For example, Articles 3 and 5 of the UNIDROIT Convention 1995 provide that a claim for illegal export needs to be brought within three years of the foreign government knowing the location of the object and the identity of its owner, and 50 years from the date of illegal export.

With regard to looted objects, UNIDROIT Convention 1995 sets no time limit for the removal from the country of origin but the claim would need to be made within three years of the foreign government knowing the location of the object and identity of its owner.

The adoption of periods of limitation like these would balance the interests of an Australian owner to have quiet enjoyment of its property, with the rights of a foreign government to obtain the return of cultural property.

15.5.2 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.

²⁶ Article 7(b)(ii). Acceptance by Australia was in 1989.

²⁷ See the Ley Report, pp127-130 for a summary of the options.

That said, all cultural material imported into Australia after 1987 should be examined to ensure that the export from the country of origin was carried out with the appropriate permissions under the applicable law of that country, whenever that export took place.

15.6 Due diligence and compensation

The UNESCO Convention 1970 establishes access to just compensation for an innocent purchaser where an object has been returned. The UNIDROIT Convention 1995 builds on this to provide guidance as to how an ‘innocent purchaser’ is defined through a clear articulation of an acceptable standard of due diligence. The proposed model could adopt these mechanisms so that an owner would receive just compensation where it was able to demonstrate that due diligence had been undertaken.

Under Article 4 of the UNIDROIT Convention 1995, due diligence includes consideration of all aspects of the acquisition, including:

- the character of the parties;
- the price paid;
- whether any reasonably accessible registers of stolen cultural objects were consulted;
- any other relevant information and documentation which could reasonably have been obtained;
- whether any accessible agencies were consulted; and
- any other reasonable steps which could have been taken in the circumstances.

The proposed model could incorporate similar criteria to demonstrate due diligence and eligibility for compensation.

16 Ethical considerations

16.1 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 under the current Act, the Australian collecting community is 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 just 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 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 from 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.

Alternatively, 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.

16.2 Transparency

While the new model would see a limitation placed on future 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 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.

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.

16.3 Leadership

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. The legal framework can be designed in any number of ways but it is only a tool – ethical leadership is also necessary.

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, such as the Washington Principles, make it clear that collecting institutions have an ethical responsibility to conduct diligent provenance research. It is not merely a ‘box-ticking’ procedure.

Australian public collecting institutions and the various Government departments responsible should consider the leadership role that Australia can play in providing guidance for the ethical collecting of material – in particular material from Asia and the Pacific.²⁸

²⁸ For example, like the American Association of Art Museum Directors’ taskforce on archaeological materials and ancient art.

17 The Hague Convention 1954

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 intra-national 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 various parties to the conflict as a bargaining tool; at other times as a weapon, a target, or 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.²⁹ 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.

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.³⁰ This initiative was followed over the years by various treaties and

²⁹ 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.

³⁰ 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

declarations. The most important of these were, the *Declaration of Brussels* of 27 August 1874,³¹ the 1907 Hague Convention *Respecting the Laws and Customs of War on Land*³² and the *Roerich Pact* of 1935.³³ 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.

Coming out of the horrors of World War II and the destruction of cultural property inflicted by both sides, it was timely for the nations to recognise the losses 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 for the Protection of Cultural Property in the Event of Armed Conflict*.³⁴ The Hague Convention 1954 is supplemented by two Protocols: the First Protocol, which entered into force at the same time as the Convention itself, and the Second Protocol, which entered into force in 1999.³⁵

Although Australia was one of the signatory parties to the Hague Convention 1954, it did not ratify it until 19 September 1984 and it did not come into force in Australia until 19 December 1988.³⁶ Because of its importance to the discussion that follows, it

Legislation', K Fitz Gibbon, *Who Owns The Past? Cultural Policy, Cultural Property and the Law*, Rutgers University Press, 2005, pp3-9.

³¹ '... 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.

³² Hague Convention (IV), which forbids damage to 'institutions dedicated to religion, charity and education, the arts and sciences ... historic monuments, works of art ...'.

³³ 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.

³⁴ The text of the Convention may be found on the UNESCO website at <www.unesco.org>.

³⁵ 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.

³⁶ 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

is important to outline the ambit of the Hague Convention 1954 as it places obligations on Australia during peacetime as well as during times of armed conflict.

17.1 Structure

The Hague Convention 1954 may be divided into the:

- Preamble, which sets the tone and purpose of the treaty;
- forty articles in its General Provisions, which define the terms used and outline the scope of the convention; and
- Regulations, which set out the processes for appointment of the delegates and the Commissioner General, their function and processes for the registration of cultural property.

17.2 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 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’.*³⁷

‘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.

³⁷ Article 1.

Paragraph (a) of the above definition relates to movable cultural property – the subject of the Act. The other paragraphs concern immovable cultural property.³⁸ Although immovable cultural property is not explicitly mentioned in the Act, if anyone were to dismember a part of the immovable cultural property in order to import or export the item, the removed item would logically become movable and thus covered by the Act (for instance, a statue or fixture removed from a protected building).

Currently, Australia meets its principal obligations to the Hague Convention 1954 without specific legislation. While some aspects are covered by specific provisions in existing legislation such as the *Criminal Code Act 1995*³⁹ and the *Crimes Act 1914*,⁴⁰ others are met through mechanisms including Defence practices, doctrine and training.

17.3 Enhancement of ratification

Given that Australia ratified the Hague Convention 1954 more than 30 years ago, sufficient time may have 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.

17.4 Protection of the Blue Shield Emblem

The Hague Convention 1954 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

³⁸ Australia protects immovable cultural property through a variety of Commonwealth, state and territory legislation, including the *Environmental Protection and Biodiversity Conservation Act 1999*.

³⁹ 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).

⁴⁰ 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.

identification and protection of these sites and materials, both in relation to armed conflicts and disaster mitigation more broadly. While Blue Shield Australia works proactively, particularly in relation to disaster planning, the symbol itself is unprotected under current law. This should be remedied. Legal protection could easily be given, in the same way that the Red Cross emblem (along with others) are protected under the *Geneva Conventions Act 1957*.

18 The First Protocol to the Hague Convention

While the Hague Convention 1954 focuses on the protection of cultural property in situ in war zones, the First Protocol extends this protection to cultural property which has been looted during armed conflict.

The First Protocol was concluded on 14 May 1954, the same date as the principal 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.

The First Protocol is brief. First, each party undertakes:

- to prevent the exportation of cultural property, from a territory that it occupies during an armed conflict;
- to take into its custody any cultural property imported into its territory either directly or indirectly from any occupied territory;
- 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.

Further, if a party has an obligation to prevent the exportation of cultural property from the territory that it occupied, it must pay an indemnity to the holders in good faith of any cultural property that has to be returned in accordance with the preceding paragraph.⁴¹ Cultural property coming from the territory of a party may be deposited

⁴¹ 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

by it in the territory of another party for the purpose of protecting it from the dangers of an armed conflict. At the end of hostilities the material must be returned to the competent authorities of the territory from which it came.⁴²

18.1 Should Australia ratify?

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, and 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.

It is timely that Australia ratify the First Protocol. 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.

Ratification 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 organize and carry out terrorist attacks'.⁴³

By including provisions relating to looted cultural material, a new model would ensure the Act is ratification-ready if and when the Australian Government decides to ratify the First Protocol.

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.

⁴² Part 11, paragraph 5. Note that whereas the earlier paragraphs do not apply to internal conflicts, this paragraph applies to both internal and external conflicts. There have been several examples of the reluctance of countries to return material: see Patrick O'Keefe, 'The First Protocol to the Hague Convention fifty years on,' *Art Antiquity and Law*, 2004:9 pp111-112.

⁴³ Meeting of Minister of Foreign Affairs, Julie Bishop 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>.

19 The Second Protocol to the Hague Convention

In 1995 UNESCO sponsored a meeting to discuss improvements to the Hague Convention 1954 and its 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.

19.1 Should Australia ratify?

It should be noted that some 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. Ultimately the question of ratification is one for the Australian Government.

For the purposes of this Review, the key element of the Second Protocol is the introduction of criminal sanctions. By including specific criminal offences in respect of trading in and dealing with looted cultural material and appropriate criminal sanctions for such offences, a new model could assist in providing the legal framework to enable Australia to ratify the Second Protocol, if and when Australia decides to do so.⁴⁴

⁴⁴ Partners that have ratified the Second 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. In January 2008 the UK published the draft legislation that would allow it to implement the Convention and the Protocols: *Cultural Property (Armed Conflicts) Bill*.

20 UNIDROIT Convention 1995

A common problem with both the UNESCO Convention 1970 and 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 rectified by the development of the UNIDROIT *Convention on Stolen or Illegally Exported Cultural Objects* 1995. The UNIDROIT Convention 1995 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.

As outlined above, whether or not the Australian Government decides to ratify the UNIDROIT Convention 1995, a new model could replicate its features to provide a clearer and more transparent model for addressing the issues that arise from the theft and illegal export of cultural material.

20.1 Should Australia ratify?

Replication of key features of UNIDROIT would involve Australia giving effect to the public laws of foreign jurisdictions. While, in general, there is reluctance to do this, the UNIDROIT Convention 1995 provides an exception to this general approach within limited confines and for internationally agreed, principled purposes.

Adopting the approach of the UNIDROIT Convention 1995 would have several benefits. It would:

- provide a transparency as to foreign claims that is presently lacking;
- ensure that the foreign claimant has a right to commence proceedings in Australia for the return of the object in dispute;
- ensure that the owner of the object has an opportunity to defend its interest in the property; and
- provide for alternate dispute resolution opportunities prior to undertaking the full court process.

Under a UNIDROIT style model, the onus to begin court proceedings shifts to the foreign claimant. The Federal Circuit Court would hear and determine the claim. The claimant and the owner would then have the normal right and opportunity to present and test evidence in open court.

By putting the strategic dynamic into the hands of the foreign claimant, the role of the Australian Government in most cases would be limited to giving effect to the decision of a court.

This mechanism has been in effect in New Zealand since 2008. It has not been used. Indeed, because the foreign government has responsibility for commencing any legal action, it is unlikely to go to such trouble or expense unless it has clear evidence and the cultural value of the material is high.

While ratification of the UNIDROIT Convention 1995 is supported, it would also be open to the Government to adopt key features, which would facilitate the ratification if and when the Government sees fit to do so.

21 United Nations Security Council Sanctions – current and future

From time to time, sanctions regimes adopted by the United Nations Security Council relate to the protection of 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 2199⁴⁵ condemning the destruction of cultural heritage in Iraq and Syria, particularly by ISIL and the Al-Nusra 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*.

21.1 How can the Act enhance United Nations sanctions?

Regulations under the *Charter of the United Nations Act 1945* are currently the appropriate mechanism for ensuring rapid formal implementation of these types of resolutions. This review is considering how categories of objects identified by United Nations sanctions could be dealt with by the same processes as other protected foreign cultural material. This would ensure a consolidated and cohesive system, which streamlines the procedures and avoids overlap between Government agencies.

⁴⁵ Available at the United Nations website <www.un.org>.

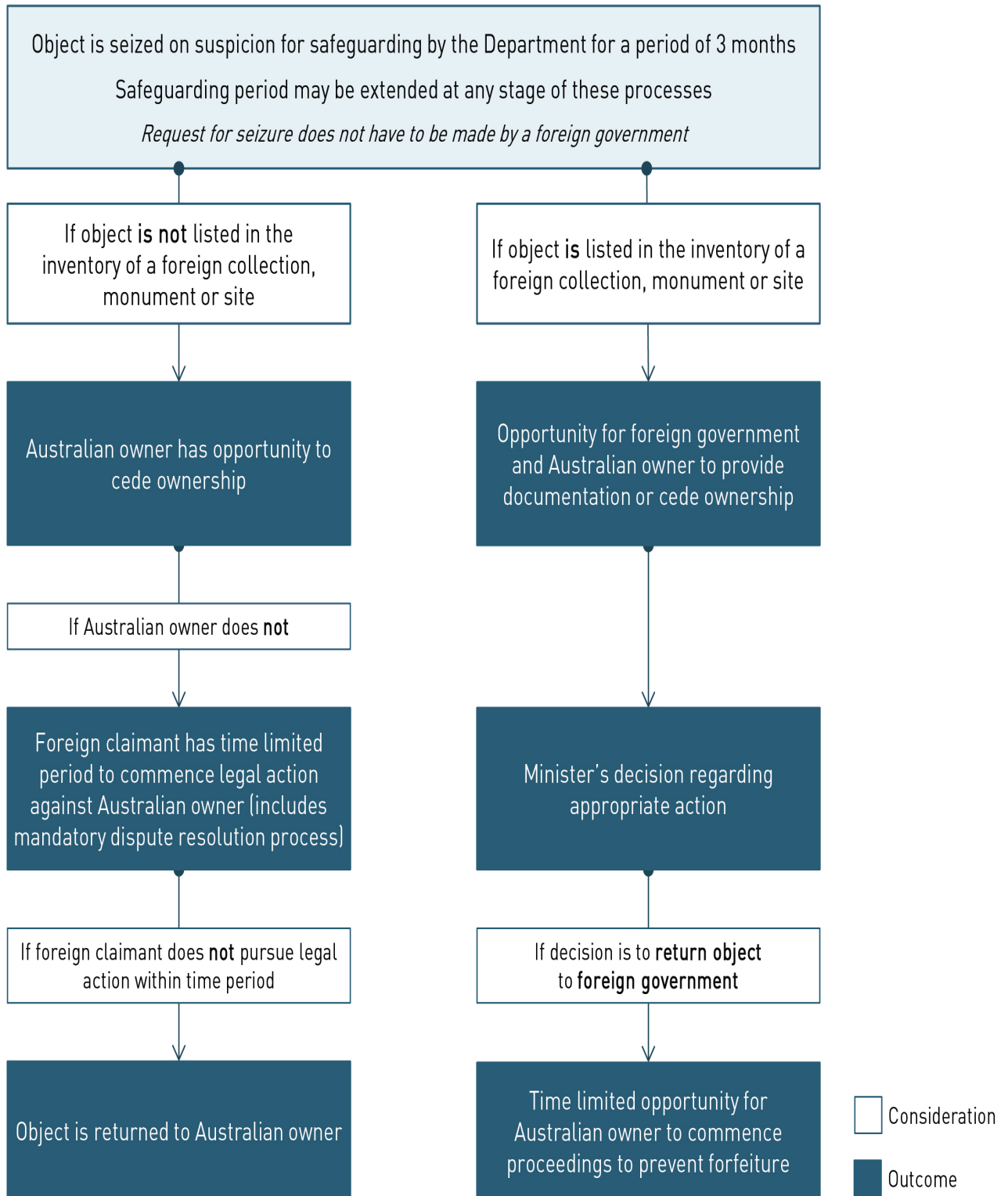


Figure 6 – Proposed process regarding foreign claims

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.

The issues outlined in this part of the paper are still being discussed with various Government agencies. The aim is to reformulate and articulate the provisions in a way that better promote the intention of the legislation.

22 Offences relating to unlawful exports

The proposed model would retain but amend the current offences of exporting or attempting to export an Australian Heritage Object⁴⁶ 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 elements⁴⁷:

	Physical Element	Fault Element
1.	Export of the object	Intention
2.	The object is an Australian protected object	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.

As to physical element 1, prior to the object leaving the jurisdiction it may be difficult for the prosecution to establish intention to export. It is therefore proposed that 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.

⁴⁶ Renamed from the current category of Australian Protected Object.

⁴⁷ See Division 5 of the *Criminal Code Act 1995*.

As to physical element 2, it is proposed that the fault element of the offence be amended. The prosecution should still need to prove that the object satisfied the criteria for a protected object. However, it is not appropriate that the prosecution prove recklessness as that standard is too high and almost impossible to satisfy in such cases.

As to physical element 3, it is proposed that that the offence be amended by requiring the defendant to establish that the object was exported in accordance with a permit or certificate. This is something most easily within the power or control of the defendant to establish and, if there is such a permit or certificate, it should be for the defendant to adduce it.

The proposed model would also retain the current offence of engaging in conduct that contravenes a condition of a permit. It would create two further offences:

- where a person engages in conduct to mislead as to the nature of an object to avoid regulation (for example, disassembling and exporting as 'spare parts'), that person commits an offence; and
- where a person exports, or attempts to export, an Australian Protected Object or a Declared Australian Protected Object without, or in breach of, a permit certificate, that person commits an offence.

Under the current model there is only one category of protected objects. Under the new model there would be three. Objects in each of these categories have different degrees of established significance and those should be reflected in the sanction provisions.

22.1 Definitions of export and attempted export

Consideration is also being given as to whether the offences of 'attempted export' be replaced with a separate offence of committing acts preparatory to export (for example entering into a contract for export).

Under the current Act it has proved difficult to stop objects as they move from 'attempted export' to 'export' – often this occurs as the ship or plane the object has been loaded on-board and leaves the country. The Act also has a very limited and exclusive definition that does not accommodate the increased use of couriers.

Further, 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 object forfeited to the Commonwealth) at a defined point of export. This should be the point at which it is clear that a person intends the object 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 object to leave Australia, such as posting the object or delivering it to a courier, shipping agent, wharf or airport for loading.

22.2 Offences relating to unlawful imports

The proposed model would retain but amend the current offence 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 recommended that consideration be given to varying the burden of proof and simplifying these hurdles. As to physical elements 1 and 3 it is proposed that the intention/knowledge element be presumed.

As to elements 2 and 4 it may be near impossible for the prosecution to prove that an object was illegally exported – and almost absurdly easy for the importer to deny all knowledge of it. 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’ – the purpose of the legislation is to require them to find out.

Accordingly, it is recommended that the onus of proof be on the importer to demonstrate that the object has been legally exported from its country of origin or was not a protected object of the foreign country.

22.3 Offences relating to stolen and looted property

The proposed model should also introduce further provisions, primarily aimed at making the model compatible with the Hague Convention 1954 Second Protocol. This includes offences in respect of trading in and dealing with cultural material stolen and looted from conflict zones and appropriate criminal sanctions for such offences:

- where a person imports stolen and looted cultural material, that person commits an offence; and
- where a person gives, trades, or otherwise transfers the title of stolen or looted cultural material, that person commits an offence.

We recognise that this may raise issues in relation to crimes where the criminality occurred in a foreign jurisdiction. This is a matter of ongoing consultation.

23 Forfeiture provisions

The power to forfeit personal property and hand that property over to another is a considerable inroad into an individual'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.

In creating the proposed model, consideration is being given to the most appropriate forfeiture provisions to reflect the difference between the export and the attempted

export of objects, and also the difference between Australian Heritage Objects, Australian Protected Objects and Declared Australian Protected Objects.

23.1 Forfeiture for unlawful export and attempted export

The proposed model would make it clear that, in relation to Australian Heritage Objects, 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 an Australian Protected Object or a Declared Australian Protected Object, **forfeiture** is recommended in both cases. This is to highlight the importance of these categories of objects and to provide an appropriate level of protection and sanction.

24 Sanctions 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 (\$8,500) or imprisonment of up to 2 years for individuals, or 200 penalty units (\$34,000) for a body corporate.

The proposed model would 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 (\$51,000) for individuals.

The sanctions should act as a suitable deterrent and differentiate between offences relating to Australian Heritage Objects and those relating to Australian Protected Objects and Declared Australian Protected Objects.

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 that is 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 Permit's the sanctions would apply to the organisation that holds the permit (in the case of the fine) as well as the individual owner (in the case of forfeiture).

25 Enforcement provisions

Likewise, the current enforcement provisions, including those covering seizure and search warrants, fail to provide a coherent range of tools to assist law enforcement officers to protect and 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. The rights of the property owner would be protected by having a time-limited period for the safeguarding.

They should also provide clear powers to seize cultural objects discovered during the course of a raid or search that is conducted in respect of other material. 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.

26 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;
- exploration of 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 authorised officers under the Act.

26.1 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/Customs system 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.

26.2 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.

These 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. The exporter is informed that the goods will not be cleared for export until that permit is presented.

There are no AHECC codes that relate directly to cultural material as it is defined by the current Act. This is, in part, due to the nature of the current Control List that utilises criteria such as 'significance' to define what is protected. The complexity of the present Control List makes it impossible to include cultural material in the computerised system by which all other goods are covered. Presently the export system, at best, only notifies the exporter that they may require an export permit but there is no oversight of the obligation.

It would be of great benefit to the enforcement of the scheme if the identification of Australian Heritage Objects could be integrated into the Australian Border Force system, either through fitting into existing AHECC codes or by the creation of new codes.

To this end, a number of the elements of the proposed scheme reflect the necessary conditions for integration. The new Control List defines Australian Heritage Objects with reference to objective criteria (class of object, age and monetary value), as distinct from the current criteria which may include both significance and representation in the definition. This makes the definition more compatible with the structure of AHECC codes, where the description of the objects is necessarily objective.

26.3 Inspectors

Under the current Act, all state, territory and federal police officers are Inspectors. The Minister may also designate particular individuals as Inspectors. The proposed model would retain these two classes of Inspectors.

26.3.1 New powers for Border Force officers

It is also recommended that Australian Border Force officers, while on controlled premises, are designated 'authorised persons' under the proposed model. This would allow objects to be seized at the border by Australian Border Force officials and would streamline the current processes. It would certainly improve the ability of officers to act quickly when dealing with a request of a foreign government. 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 *Therapeutic Goods Act 1989* could be used as the basis for such a provision.

Part E: Conclusion

Since 1987, the Act has provided the principal framework by which the Australian Government has sought to protect the nation's cultural heritage and fulfil its international obligations as to foreign cultural material. However, the passage of time and radical changes in the international trade in cultural material have shown that there are significant weaknesses in the legislation.

This position paper has taken the contributions made by stakeholders over a number of years to different reviews and seeks to create a holistic model to address the current and future protection of cultural material in Australia.

The changes outlined in the paper are intended to provide:

- a simpler legislative framework for the regulation of export and import of cultural material;
- objective standards to define objects being regulated;
- clear, practicable criteria for determining the significance of an object;
- an articulated process to assess the significance level of an object;
- a more efficient assessment process by requiring a greater degree of title, provenance and asset description information from applicants applying for permits;
- 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;
- 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, territory and, possibly, local 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 will enable the new legislation to be 'ratification-ready' for 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.

Feedback on the proposed model is being sought from stakeholders across Australia. An online survey will be available on the Ministry for the Arts website <www.arts.gov.au> and targeted consultation will be undertaken in capital cities throughout July and August 2015.

For further information please contact PMCHreview@arts.gov.au

Appendix 1 – Declared Australian Protected Objects

It is proposed that the Regulations contain a separate schedule of Declared Australian Protected Objects to ensure it is immediately clear that these objects are provided the highest level of export protection.

The list which appears in this paper includes objects which are currently protected as Class A objects and objects which have been denied permanent export under the current Act. It also includes some indicative examples of the types of objects which ought to be included on an expanded list.

Further information is sought from the sector as to the suitable inclusions for all Parts of this list.

Aboriginal and Torres Strait Islander Material

In the course of the 1999 amendments to the Regulations, particular attention was given to the protection of the early Papunya Tula boards. While they were not specified as Class A at this time the thresholds applicable to Indigenous art were shaped in a way to protect the products of this important art movement. It is proposed by making express reference to these early and unarguably significant works, their protection is assured.

In addition to the Papunya boards, the list of Declared Australian Protected Objects should include an expanded number of other Indigenous objects and classes of object. In some of these, it is proposed that there be monetary thresholds to sieve that which **might** be protected from that which **should** be protected.

The list comprises objects that include secret/sacred detail. In considering whether works have secret/sacred significance it is proposed that some information as to what must be considered is provided in the Regulations. Subject to the consultation, the following points should be included in the new model:

- any items originating from a registered Australian Sacred Site shall be presumed secret/sacred;
- works made for sale are prima facie presumed not secret/sacred in content; and

- Papunya Tula boards circa 1971-72 containing explicit depiction of ceremonial poles and or Tulkku (tjuringa) bullroarers are presumed secret/sacred.

The following material relating to Aboriginal and Torres Strait Islander peoples and their descendants are recommended for protection of the highest level – Declared Australian Protected Objects:

- human remains;
- secret/sacred ritual stone and wooden objects;
- rock art;
- dendroglyphs (carved trees);
- possum skin cloaks;
- bark and hollow log coffins and other items used as customary burial objects;
- pre-contact artefacts;
- western brass breastplates;
- artworks in the Indigenous tradition identified as having secret and sacred significance for Aboriginal or Torres Strait Islander community members.
- documentation and audio-visual material embodying secret/sacred images or ceremonies;
- objects that have been denied permanent export permission under the Act (the current prohibited export register), which will expand over time and currently includes:
 - Torres Strait Arrowhead;
 - two Queensland Gulmari Shields, c.1880s; and
 - 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;
- *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.

Natural Science Material

There are no Class A objects under this Part in the current Control List. No additional material has been suggested, but suggestions are welcomed.

National Science Material that has been denied permanent export permission under the Act (the current prohibited export register) includes:

- 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.

These would be Declared Australian Protected Objects and the list would expand over time.

Visual Arts, Craft and Design Material

There are no Class A objects under the Part in the current Control List. However, the following Visual Arts, Craft and Design Material would be Declared Australian Protected Objects:

- bark paintings and sculptures from Arnhem Land and the Tiwi Islands produced prior to 1965 and valued at more than \$25,000;
- bark paintings and sculptures from the Kimberley region produced prior to 1975 and valued at more than \$25,000;
- all nineteenth century Aboriginal artworks valued at more than \$25,000;
- East Kimberley School paintings produced prior to 1991 and valued at more than \$150,000; and
- western desert paintings produced prior to 1974 and valued at more than \$50,000.

The following Visual Arts, Craft and Design Material has been denied permanent export permission under the Act and would be Declared Australian Protected Objects:

- brooch, gold and boulder opal, made by John or Ernesto Priora;
- 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 Kalipinyapa* (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 Kalipinyapa)* (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.

The list will expand over time.

Historically Significant Material

The following Historically Significant Material would be Declared Australian Protected Objects:

- the current Class A objects:
 - Victoria Crosses with significance to Australia (either awarded to Australian citizens or to soldiers fighting in or with an Australian force); and
 - items of Ned Kelly's armour.
- additional Historically Significant Material, including:
 - the armour worn by the other members of the Kelly gang.
- additional categories of Numismatic Material:
 - the George medal; and
 - the medal of the Companion of the Order of Australia.
- The following Historically Significant Material have been denied permanent export permission under the Act and would be Declared Australian Protected Objects:
 - Sir Charles Kingsford Smith 'VH-USU Southern Cross' brooch;
 - Sir John Monash Seals;
 - 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;
 - Victoria Cross medal group awarded to E T Towner VC;
 - Steam-hoisting engine (portable steam winch);
 - Brown and May portable steam engine, c1890;
 - Victor Trumper cricket memorabilia (including cuff links, a presentation tray, signed programs and team sheets, and Trumper's 1902 Ashes diary);
 - Frodsham Regulator No 1062 (Melbourne Observatory);
 - Ruston Proctor steam traction engine number 42028;

- Thomas Walker steam centre engine;
- DAP Mark 21 Beaufighter;
- Ned Kelly armour (shoulder guard);
- 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;
- Marshall Colonial Class C oil tractor, c.1910;
- Swan, an 1884 timber hull motor launch;
- two pairs of boxing gloves, 1886 – worn on the night that Peter Jackson beat Tom Lees to become the new Australian Champion;
- George Gosse GC RANVR medal group;
- 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;
- Equal second prize winning design submitted by Donald Mackay in the 1911 Commonwealth Stamp Design Competition;
- 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;
- Ashes bail letter opener, c1883;
- Ronisch concert grand piano, c. 1880; and
- McLaren 8HP steam traction engine, 1887 works number 298.

Appendix 2 – National Cultural Heritage Control List

The new Control List is designed to provide clearer guidance to applicants and examiners, to address areas of existing confusion and strengthen the protection of culturally significant material. The Control List is designed to be read in conjunction with and supported by the list of Declared Australian Protected Objects.

New Part 1: Aboriginal and Torres Strait Islander Material

1.1 Aboriginal and Torres Strait Islander Material includes objects which:

- (a) were made by an Aboriginal or Torres Strait Islander person; or*
- (b) relate to a famous and important Aboriginal or Torres Strait Islander person, or to other persons significant in Aboriginal or Torres Strait Islander history; or*
- (c) were made on missions or reserves; or*
- (d) constitute an original document, photograph, drawing, sound recording, film and video recording and any similar record relating to objects included in this category.*

1.2 Aboriginal and Torres Strait Islander Material is an Australian Heritage Object if it is:

- (a) Australian or Australian-related; and*
- (b) more than 50 years old.*

1.3 Aboriginal and Torres Strait Islander Material is an Australian Protected Object if it:

- (a) is an Australian Heritage Object; and*
- (b) is assessed as Significant; and*
- (c) is not Adequately Represented in public collections in Australia.*

1.4 Part 1 does not apply to any work of visual art, craft or design that was made with the intention of sale.

New Part 2: Natural Science Material

2.1 Natural Science Material is an Australian Heritage Object if it is:

- (a) Australian or Australian-related; and is either*
- (b) a paleontological object; or*
- (c) a meteorite; or*
- (d) a type specimen of 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 Australian market value greater than the amount set out below:*
 - i. any mineral object not otherwise mentioned in this item, of at least \$10,000;*
 - ii. any gold nugget having a current Australian market value of at least \$250,000;*
 - iii. any diamond or sapphire having a current Australian market value of at least \$250,000;*
 - iv. any opal having a current Australian market value of at least \$100,000; or*
 - v. any other gemstone having a current Australian market value of at least \$25,000;*

2.2 Natural Science Material is an Australian Protected Object if it is:

- (a) an Australian Heritage Object; and*
- (b) assessed as Significant; and*
- (c) not Adequately Represented in public collections in Australia.*

New Part 3: Visual Arts, Craft and Design Material

3.1 *An Visual Arts, Craft and Design Material is an Australian Heritage Object if it:*

(a) is Australian or Australian-related; and

(b) is more than 50 years old; and

(c) has a current Australian market value set out below:

- i. watercolours, pastels, drawings, sketches and other similar works having a current Australian market value of at least \$40,000;*
- ii. oil and acrylic paintings, ochre paintings on bark and other similar works having a current Australian market value of at least \$150,000;*
- iii. prints, posters, photographs or similar works of art with potential for multiple production having a current Australian market value of at least \$10,000;*
- iv. tapestries and carpets having a current Australian market value of at least \$10,000;*
- v. sculptures having a current Australian market value of at least \$30,000;*
- vi. furniture having a current Australian market value of at least \$30,000;*
- vii. jewellery having a current Australian market value of at least \$40,000;*
- viii. clocks and watches having a current Australian market value of at least \$40,000;*
- ix. musical instruments having a current Australian market value of at least \$10,000;*
- x. architectural fittings and decoration, and interior decoration having a current Australian market value of at least \$15,000;*
- xi. objects made from precious metals having a current Australian market value of at least \$25,000; or*

- xii. *objects, designed with aesthetic intent that are not otherwise mentioned in this table and that are made from glass, wood, paper, plastic, ceramic, leather, ivory, natural or man-made fibre, or a base metal having a current Australian market value of at least \$5,000.*

3.2 *Visual Arts, Craft and Design Material is an Australian Protected Object if it is:*

- (a) an Australian Heritage Object; and*
- (b) assessed to be Significant; and*
- (c) not Adequately Represented in public collections in Australia*

3.3 *Visual Arts, Craft and Design Material is not an Australian Heritage Object if the person, or any of the people, who created the object are alive.*

New Part 4.1: Archaeological Objects

4.1.1 *An Archaeological Object is an object, for this Part, (whether Indigenous or non-Indigenous) that has been recovered from:*

- (a) the soil or inland waters of Australia; or*
- (b) the coastal sea of Australia or the waters above the continental shelf of Australia (including its seabed or subsoil).*

4.1.2 *Examples of Archaeological Objects may include:*

- (a) organic remains associated with, or representative of, a prehistoric or historic culture; and*
- (b) objects relating to persons, places or events significant in the history of Australia; and*
- (c) human remains (other than Aboriginal and Torres Strait Islander remains which fall under Part 1); and*
- (d) objects forming part of, discovered on or otherwise associated with any place listed on:*
 - i. the Australian National Heritage List;*
 - ii. the Commonwealth Heritage List; and*

iii. *the World Heritage List (provided the site is located in Australia).*

4.1.3 *An Archaeological Object is an Australian Heritage Object if it had remained for at least 50 years in the place from which it was removed.*

4.1.4 *An Archaeological Object is an Australian Protected Object if it is:*

- (a) an Australian Heritage Object; and*
- (b) assessed to be Significant; and*
- (c) not Adequately Represented in public collections in Australia.*

New Part 4.2: Documentary Heritage Objects

4.2.1 *Documentary Heritage Objects include any written or printed material, or any article on which information has been stored or recorded either mechanically or electronically.*

4.2.2 *A Documentary Heritage Object is an Australian Heritage Object if it:*

- (a) is Australian or Australian-related; and*
- (b) is more than 50 years old.*

4.2.3 *A Documentary Heritage Object is an Australian Protected Object if it is:*

- (a) an Australian Heritage Object; and*
- (b) assessed to be Significant; and*
- (c) not Adequately Represented in public collections in Australia; or*
- (d) an article that forms part of Government records or archives of the Commonwealth, a State or Territory; a Commonwealth, State or Territory authority, the Governor-General or the Governor of a State, if any law requires that the article must be kept permanently in Australia.*

4.2.4 *In this Part, Government records or archives has the meaning given by any relevant law of interpretation of the Government of the Commonwealth or the State or Territory that created, or has custody or control of, the records in relation to which an application for a certificate or permit under the Act has been made.*

New Part 4.3: Applied Science or Technology Objects

4.3.1 Applied science or technology Objects are objects that relate to human enterprise, invention and activity, other than Aboriginal and Torres Strait Islander Material, Natural Science Material, Visual Arts, Craft and Design Material and Historically Significant Material.

4.3.2 They include any tool, machine, invention or technology, including prototypes, models, patents, components, spare parts and equipment.

4.3.2 An Applied Science or Technology Object is an Australian Heritage Object if it:

- (a) is Australian or Australian-related; and*
- (b) is more than 50 years old (or any of its components are more than 50 years old)*

4.3.3 An Applied Science or Technology Object is an Australian Protected Object if it:

- (a) is an Australian Heritage Object; and*
- (b) is assessed to be Significant; and*
- (c) is not Adequately Represented in public collections in Australia.*

New Part 4.4: Numismatic Objects

4.4.1 The following are Numismatic Objects:

- (a) a badge, token or charm, coin or paper money; and*
- (b) a pattern, proof or specimen striking; and*
- (c) any medal or other decoration, whether of a civil or military nature (other than a campaign medal), awarded to a person:
 - i. who is a citizen of Australia; or*
 - ii. ordinarily resident in Australia at the time of the award; or*
 - iii. for a posthumous award – ordinarily resident in Australia at the time of the service or circumstance to which the award relates; and**
- (d) any citation or other document or insignia, relating to a medal or decoration mentioned in paragraph (c).*

4.4.2 A Numismatic Object is an Australian Heritage Object if it:

- (a) is Australian or Australian-related; and*
- (b) is more than 50 years old; and*
- (c) has a current Australian market value of at least \$15,000.*

4.4.3 A Numismatic Object is an Australian Protected Object if it:

- (a) is an Australian Heritage Object; and*
- (b) is assessed to be Significant; and*
- (c) is not Adequately Represented in public collections in Australia.*

4.4.4 A medal, whether it is an Australian Heritage Object or a Declared Australian Protected Object, may be temporarily exported if it is being accompanied by the awardee, or where the award was posthumous, by the awardee's next of kin.

New Part 4.5: Philatelic Objects

4.5.1 The following are Philatelic Objects:

- (a) a postal marking, or postage or revenue stamp; and*
- (b) any material used in the design, production, usage or collection of stamps;*
and
- (c) a stamp collection.*

4.5.2 A Philatelic Object is an Australian Heritage Object if it:

- (a) is Australian or Australian-related; and*
- (b) is more than 50 years old; and*
- (c) has a current Australian market value of \$10,000; or*
- (d) in the case of a collection:*
 - i. has won an award known as a Large Gold medal in international competition; or*
 - ii. has a current Australian market value of at least \$150,000.*

4.5.3 A Philatelic Object is an Australian Protected Object if it:

- (a) is an Australian Heritage Object; and*
- (b) is assessed as Significant; and*
- (c) is not Adequately Represented in public collections in Australia.*

New Part 4.6: Social, Cultural, Spiritual, Sporting, Political or Military History Objects

4.6.1 Objects in this category include objects directly or substantially associated with a notable person or business enterprise, activity, movement, period, event or place notable in Australian social, cultural, spiritual, sporting, political or military history.

4.6.2 A Social, Cultural, Spiritual, Sporting, Political or Military History Object is an Australian Heritage Object if it is:

- (a) Australian or Australian-related; and*
- (b) is more than 50 years old.*

4.6.3 A Social, Cultural, Spiritual, Sporting, Political or Military History Object is an Australian Protected Object if it:

- (a) is an Australian Heritage Object; and*
- (b) is assessed to be Significant; and*
- (c) is not Adequately Represented in public collections in Australia.*

Appendix 3 – 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 the Illicit Import, Export and Transfer 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 Prohibition and Prevention of 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.

REVIEW OF THE PROTECTION OF MOVABLE CULTURAL HERITAGE ACT 1986

POSITION PAPER 2015
SHANE SIMPSON AM



Australian Government
Attorney-General's Department
Ministry for the Arts

Ministry
for the
Arts