



**Australian Government**

**Department of the Environment, Water, Heritage and the Arts**

# Review of the *Protection of Movable Cultural Heritage Act 1986* and *Protection of Movable Cultural Heritage Regulations 1987*

## Report of public consultation

2009

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# 1 Review Terms of Reference

1. A review of the operation of the *Protection of Movable Cultural Heritage Act 1986* (PMCH Act) and the *Protection of Movable Cultural Heritage Regulations 1987* (PMCH Regulations) will be carried out.
2. In particular the review of the PMCH Legislation will examine:
  - a. the operation of the PMCH Legislation generally;
  - b. the extent to which the objects of the PMCH Legislation have been achieved;
  - c. the appropriateness of the current arrangements and categories under the National Cultural Heritage Control List for achieving the effective operation of the act;
  - d. the operation of the National Cultural Heritage Account; and
  - e. the effectiveness of the current permit system for protecting both Australia's and foreign countries' movable cultural heritage.
3. The review will be guided by key Australian Government policy objectives:
  - a. to protect and conserve Australia's most significant movable cultural heritage and to promote Australian arts and culture;
  - b. to work in partnership with the states and territories within an effective federal arrangement;
  - c. to facilitate delivery of Australia's international obligations;
  - d. the Australian Government's deregulation agenda to reduce and simplify the regulatory burden on people, businesses and organisations; and
  - e. to ensure activities under the PMCH Act represent the most appropriate, efficient and effective ways of achieving the Government's outcomes and objectives in accordance with the Expenditure Review Principles.
4. The review will seek input from state and territory governments, members of the community and industry.
5. The review will be commenced as soon as possible and be completed by 31 May 2009.

## 2 Executive Summary

This targeted review has been undertaken by the Department of Environment, Water, Heritage and the Arts, according to its Terms of Reference, to consider the operation of Australia's Protection of Movable Cultural Heritage (PMCH) legislation and the extent to which it is achieving its purpose. Specifically, the review sought to identify ways to improve the operation of the PMCH legislation and did not canvass more fundamental change. It also invited views on whether the PMCH legislation currently achieves the right balance in protecting Australia's most significant cultural objects without unreasonably restricting the normal and legitimate trade in cultural property. The review looked at ways to enhance and streamline Australia's ability to enforce the protection of both Australian and foreign objects of national cultural and artistic significance.

The legitimate trade and exchange of cultural property between nations brings economic benefit as well as enhancing international appreciation of a nation's cultural diversity and creativity. It generates worldwide interest in the careers of individual artists, inventors and creators, as well as ideas, people and movements that have shaped history. However, when objects are traded illegally it can lead to the loss of significant aspects of a nation's cultural heritage. When that illicit trade also severs an object from its context much of its meaning is lost and that can impoverish us all.

The *Protection of Movable Cultural Heritage Act 1986* (PMCH Act) commenced operation on 1 July 1987. The PMCH Act gives effect to the United Nations Educational, Scientific and Cultural Organisation (UNESCO) *Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property 1970* (the 1970 UNESCO Convention). Australia ratified the 1970 UNESCO Convention on 30 October 1989 and it entered into force in Australia on 30 January 1990.

In the 17 years since the PMCH Act was last formally reviewed, many of the Australian Government's overarching policy, governance and regulatory frameworks have changed. This review has provided the opportunity to simplify and modernise the PMCH Act and the *Protection of Movable Cultural Heritage Regulations 1987* (PMCH Regulations), including the assessment and permit processes operating under the legislation.

As a Party to the 1970 UNESCO Convention, the Australian Government has a responsibility to preserve and protect objects that are culturally important and whose loss would diminish Australia's heritage. The PMCH

Act provides the legal framework to support this mandate to protect our most significant movable objects.

In recognising the need for the PMCH Act, it is also important to remember that whilst collections are made up of movable cultural heritage, this material is not solely located in national collecting institutions. There are highly significant objects and collections of Australia's movable cultural heritage in public and private hands all over the country.

The PMCH Act aims to protect and, where possible and appropriate, make the most significant of these objects accessible to Australians in order to preserve our cultural heritage. The obligations mandated under the PMCH Act reflect the Australian Government's recognition of the importance of objects in representing our cultural identity, and their role in strengthening Australians' sense of the value of our culture. Cultural objects provide valuable insights into the formation of Australia's national identity. For these reasons, the PMCH Act is a vital piece of legislation.

The issues surrounding the identification and protection of our most significant cultural heritage objects, as well as protected objects illegally exported from other nations, are complex. This has been confirmed and demonstrated by the diversity of views expressed in the public submissions to the review.

Overall, strong support was expressed for the aims of the PMCH legislation and for using an export Control List with a broad range of categories, rather than a national register, to protect culturally significant objects. However, many submissions also indicated that a lack of consistency in the application of significance criteria across the Control List categories, together with a lack of clear guidance on how to determine significance, has resulted in confusion and uncertainty for applicants, expert examiners, and law enforcement and Australian Customs and Border Protection Service (ACBPS) officers. This uncertainty causes difficulties in administering and enforcing the PMCH legislation.

The question of the treatment of significant Aboriginal and Torres Strait Islander objects (Indigenous objects) under the PMCH legislation elicited the greatest range of views out of all the discussion topics canvassed in the review. The classification and assessment of Indigenous objects of secret sacred significance was a particularly contentious issue with no consensus.

This report contains 74 recommendations, which are designed to address the PMCH review's objectives and terms of reference (see section 1 and

section 4.2). Due to the complex nature of many of the issues discussed throughout the review, the implementation of these recommendations, if they are accepted, will involve a staged process of short, medium and longer term goals based on significant further consultation with relevant stakeholders.

Some of the review recommendations deal with relatively straightforward amendments to the PMCH Regulations and current administrative processes. Other recommendations will require Australian Government agreement before legislative processes to amend the PMCH Act can be commenced. A number of recommendations highlight the need for further targeted consultation with key stakeholders, including other government agencies.

### National Cultural Heritage Control List

The majority of submissions felt that the current list performed relatively well given its complexity, and supported the current level of protection afforded to the Indigenous Australian Protected Objects categorised as Class A objects. However, there was no consensus about the appropriateness of the categories that currently comprise the Control List or the age and monetary thresholds that apply.

Each of the current object categories generated a diverse range of views with many specific to just one Part of the Control List. The report's recommendations reflect this by highlighting the need for further targeted consultation with stakeholders on the composition of the Control List, including object categories and age and monetary thresholds, and on the management of the List.

### Control List thresholds

There were a range of views from submitters on the appropriateness of the current age and monetary thresholds used in the Control List. Some submissions argued for revising the thresholds, others supported retaining those currently in use. A number of others questioned their usefulness, preferring their replacement by a more rigorous process of significance assessment.

Due to the diversity of opinion and the complexity of the issues raised, the report recommends further targeted consultation on the use of thresholds and the most appropriate levels for them to be set.

There was consensus that the thresholds be reviewed every five years to take account of changes in the market and to continue to use "current Australian market value" to determine monetary thresholds.

## Significance assessment and the Control List

Submitters supported consistency in the use of significance terminology across the PMCH Act and the PMCH Regulations to provide greater certainty about the legislation and enhance its effective administration and enforcement.

There was broad support for the adoption of the Collections Council of Australia (CCA) document *Significance 2.0: a guide to assessing the significance of collections* as a standard for assessing significance under the PMCH legislation. However, there were a few areas where *Significance 2.0* was felt to be less relevant – Indigenous objects, archival material and objects of fine or decorative art. Because of this, the review recommends considering amending the definition of ‘significance to Australia’ in the PMCH Regulations to make it consistent with the Significance 2.0 criteria. Because of the specific issues highlighted for Indigenous objects, archival material and objects of fine or decorative art, this consideration would involve further consultation with relevant stakeholders for these categories.

### Indigenous objects

While most submissions supported special protection for Indigenous cultural heritage objects under the PMCH legislation, consideration of the significance assessment of Indigenous objects elicited widely divergent views on the process and criteria that should be adopted, in particular the categorisation and assessment of secret sacred material. As there was no clear way forward the report recommends retaining the status quo. Submissions to the review which addressed this issue were largely from those engaged in the sale of Indigenous art, expert academics or professionals working in the collections sector. This is an important area that will require further attention in the medium term with targeted consultation with relevant stakeholders and representative bodies.

### A national register?

There was little support for a national register as an alternative to the Control List. Most submissions did see value in an informal register which could be used as a guide for expert examiners, export permit applicants, collecting institutions and the public to assist in determining whether an object is an Australian Protected Object.

### Streamlining the export permit application process

Contributors to the review strongly supported placing greater obligations on export permit applicants, including the possibility of introducing user



charging. Many of the delays in the current permitting process are due to applicants providing scant information, including details about their acquisition of the object and provenance and poor quality images. This greatly increases the amount of original research that is required to be done by expert examiners in making a proper assessment of significance.

There will be instances where applicants do not have comprehensive documentation relating to the objects they are seeking to export, but where it is available it should be provided. Strengthening requirements in relation to provenance is also recognised as an important component of any strategy to counter illicit trade.

Submitters recognised that applicants will have different levels of expertise and familiarity with cultural heritage terminology and access to research sources and databases. The current permit application form could be redesigned to give clearer instructions about the information and documentation required. This could be supplemented by clear, plain English guidelines which provided examples and a list of suggested resources for provenance and other information.

While there was strong support for the introduction of fees for the processing of applications, a cost benefit analysis is an essential first step to ensure that introducing such a system would be financially and administratively viable.

Submissions were divided on whether the department should have a greater role in the decision making process. While it may reduce processing delays and improve efficiency there were concerns expressed about the specialist expertise of departmental officers and the potential for a reduction in appropriate protections. There would be value in exploring delegating decision making to departmental officers in circumstances where an expert examiner has assessed an object as an APO and as adequately represented in public collections. There are currently streamlined arrangements for the export of fossils and meteorites where an expert examiner has determined that the object does not meet the Control List criteria and does not need an export permit. The report recommends an evaluation of how this arrangement is working in practice.

The current system for processing temporary export permit applications lacks flexibility for those objects, for example vintage cars or philatelic exhibits, which are regularly shown or toured overseas. The report recommends the introduction of multiple use temporary export permits for approved purposes and within a set timeframe.

The current two year time period for temporary export permits was regarded as too restrictive by some submitters, particularly where the export was for research purposes. Extending the period beyond two years was seen as potentially problematic, for keeping track of the objects and enforcing the legislation. The report recommends amending the PMCH legislation to allow for five year permits where appropriate on the proviso that the permits are monitored and appropriate enforcement action taken if any breaches occur. There was also support for extending the range of organisations eligible to apply for a General Permit, which exempts them from the Temporary Export Permit process.

A number of submissions argued for the Minister to have the power to grant both temporary and permanent export permits for Class A objects, for overseas exhibition and research, on the advice of the NCHC and where specific conditions had been met. While the thought of allowing the permanent export of Class A objects may appear a radical shift in policy, the example cited was a bone fragment of Indigenous human remains which required radiocarbon dating. The most accurate dating of this particular fragment required export because the relevant technology and expertise were located overseas. While the application had appropriate and contemporary Indigenous consent, as a Class A APO, the Minister (or his delegate) did not have the power to grant an export permit.

#### Expert Examiners and the National Cultural Heritage Committee

There was general support for a number of the proposals canvassed in the review discussion paper - reviewing the register every five years, consideration of payments for expert examiners and provision of greater support and training for expert examiners.

Submissions addressing the function and composition of the NCHC mainly dealt with proposals to expand Indigenous representation on the Committee and to set up new arrangements to providing advice to the NCHC on Indigenous objects and issues.

#### The National Cultural Heritage Account

There was strong support for increasing the funding to the account, which has remained at \$500,000 each financial year since it commenced operation in 2000-01. Submitters noted that market prices for cultural heritage objects had significantly increased and most proposed an increase to \$5m.

A number of submissions also proposed broadening the purpose of the Account beyond support for the purchase of nationally significant objects by Australian cultural organisations. Many suggested it be used to fund

conservation and interpretation of the objects, particularly for smaller collecting organisations. Another suggested that a conservation management plan be made a condition of funding.

Submissions also addressed other potential mechanisms for increasing Account funds including exploring options for tax deductibility status with the Australian Taxation Office. There was also support for exploring the potential for linkages between the PMCH legislation and the Cultural Gifts Program, particularly for facilitating the acquisition by collecting institutions of objects which had been denied an export permit.

### Compliance and enforcement provisions

The broad range of the object categories covered by the PMCH Control List add to the complexity of putting in place an effective compliance and enforcement framework and strategy. Compliance relies on good awareness of the legislation through well targeted communication and education campaigns aimed at the general community, key stakeholder groups, expert examiners and our enforcement partners. The review also recommends consultation with the Australian Bureau of Statistics and the Australian Customs and Border Protection Service to explore the feasibility of integrating cultural property export declarations with the Australian Harmonised Export Commodity Classification codes used by the Australian Customs and Border Protection Service.

A number of submitters with a specialist interest in meteorites and fossils were concerned about the interaction of the various pieces of Commonwealth and State and Territory legislation covering the protection of these objects.

The review canvassed harmonising enforcement elements of the PMCH legislation with those in other relevant departmental legislation, in particular the *Environmental Protection and Biodiversity Conservation Act 1999* (EPBC Act). There are a greater suite of regulatory options available under the EPBC Act, for example civil remedies and administrative actions, as well as greater clarity about the powers of Inspectors under the legislation.

There was only one submission that supported a removal of merits based review of Ministerial decisions under the PMCH Act and as a result the review report recommends its retention.

### International obligations and collaboration

A number of submissions supported Australia ratifying or considering the ratification of the International Institute for the Unification of Private Law

(UNIDROIT) Convention on Stolen or Illegally Exported Cultural Objects 1995 (the UNIDROIT Convention). The UNIDROIT Convention was intended to complement the 1970 UNESCO Convention which enables State Parties and individuals to make private legal claims regarding stolen objects. It establishes uniform minimum legal rules, including time limits for claims for restitution, and provides for compensation for innocent third parties who have purchased an object in good faith and have exercised due diligence in doing so.

There was also some support for enhancement of the Australia Government's ability to seize objects suspected to have been illegally exported from a foreign country. This recognises the difficulty foreign governments may have in meeting the current requirements before Australia can Act under the PMCH Act.

The report also notes that currently Australia has very little bilateral engagement or involvement with international fora dealing with issues around international co-operation to address international illicit trade in movable cultural heritage.

One issue that was not addressed in the review discussion paper but which has emerged during the course of the review is that Australia has no legislation which grants cultural heritage material on loan from overseas institutions and individuals immunity from seizure in response to third party claims. We understand that this issue is increasingly a factor in negotiating loans of objects for exhibition in Australia from foreign owners and collecting institutions. The report recommends targeted consultation with stakeholders on this issue.

#### Impacts on broader arts and cultural policy

The review considered whether the PMCH legislation was having unintended consequences for other arts and culture policy objectives, particularly the legitimate export market for Indigenous Australian cultural objects and the recognition of and career enhancement of Australian artists and their communities. The report notes that there is no evidence to date, nor were there any submissions made to the 2007 Senate inquiry into the Indigenous visual arts and craft sector to indicate that the PMCH legislation has had an adverse effect on the export of Australian art, the international art market, or the indigenous art market. However, we have recommended that the department continues to monitor the impact of the PMCH legislation on the contemporary indigenous art market to assess any negative impact together with any concerns that the legitimate trade in cultural property is being excessively restricted.

## **3 Recommendations**

The following list of recommendations covers a wide range of initiatives of differing degrees of implementation difficulty. Within these categories, there are some recommendations that are dependent on others, and so need to be implemented sequentially. Understanding the degree of connections between initiatives will help establish a future work-plan and assist with implementing recommendations.

For the purposes of implementation the recommendations fall into three broad categories:

### **1. Short term recommendations**

These recommendations include initiatives that are essentially stand-alone or can be implemented within existing resources and frameworks.

### **2. Medium term recommendations**

These recommendations require further investigation and/or development, targeted consultation with relevant stakeholders and in some instance require changes to be made to the PMCH Regulations.

### **3. Long term recommendations.**

These include initiatives and recommendations that are currently unfunded, require considerable research and consultation to inform policy development, and in many instances, will require amendments to be made to the PMCH Act.

## ***The National Cultural Heritage Control List***

### **Short Term**

1. Review the National Cultural Heritage Control List categories every five years in consultation with the National Cultural Heritage Committee, to ensure they continue to adequately and clearly capture Australia's most significant cultural objects.
2. Gather comparative data on applications for export permits under each Control List category, and the assessment outcomes for objects examined under each category, in order to inform reviews of the Control List and assist expert examiners.
7. All current Control List categories, including Part 7 - Numismatic Objects, Part 8 - Philatelic Objects and Part 9 – Objects of Historical Significance should remain listed as separate items.

### **Medium Term**

3. Undertake targeted consultation with relevant stakeholders to examine the effectiveness of the current Control List in protecting Australia's movable cultural heritage, and determine whether the categories of significant objects outlined in section 7 of the PMCH Act and the Control List should be harmonised.
4. Undertake targeted consultation with relevant stakeholders to consider the cases made to the review for extending Class A protection to additional objects, or classes of objects, of exceptional national significance.
5. Undertake targeted consultation with relevant stakeholders to consider the cases made to the review for expanding the Control List to include additional Class B objects, or classes of objects, and to the arguments made for removing the Australian protected objects status of certain objects or classes of objects.
6. Develop indicative lists of objects for inclusion in each category of the Control List to provide greater clarity for export permit applicants. The indicative lists of objects should not exclude the assessment of other objects under the Control List categories.

## ***Control List thresholds***

### **Short Term**

9. Review the Control List thresholds every five years to ensure they remain appropriate and representative of market fluctuations.
10. “Current Australian market value” should continue to determine monetary thresholds under the PMCH legislation.

### **Medium Term**

8. Further research and consultation with relevant stakeholders should be undertaken to consider the cases made to the review to alter the monetary and age thresholds for certain categories of objects. Changes to the thresholds should be made where evidence and expert opinion indicates that this would enhance and streamline the identification and protection of Australia’s most significant items.

### **Long Term**

11. The PMCH Act be amended to grant the Minister, in consultation with the National Cultural Heritage Committee, the power to determine objects of national significance which are under age or monetary thresholds.

## ***Significance assessment and the Control List***

### **Short Term**

- 15** Develop and make publicly available, a reference list of specialist significance assessment guidelines commonly used by the collecting sector, such as those used by archivists and state and territory governments, to assist expert examiners and the public.

### **Medium Term**

- 12.** Consideration should be given to amending the definition of “significance to Australia” in the PMCH Regulations to be consistent with the Collections Council of Australia’s *Significance 2.0* criteria. This would allow the definition of significance to include important elements, such as spiritual significance, which have not been explicitly incorporated previously. The acceptance of *Significance 2.0*’s treatment of Indigenous objects, archival material and objects of fine or decorative art will require further consultation with relevant stakeholders.

### **Medium to Long Term**

- 13.** The consistent use of significance terminology should be adopted across the PMCH Act and PMCH Regulations.

### **Long Term**

- 14.** Investigate the appropriateness of using “national significance” criteria to identify Indigenous objects, and conduct targeted consultation to inform who should undertake the assessment of Indigenous objects.



## ***Indigenous objects***

### **Short Term**

17. Given the widely divergent views contained in the submissions it is recommended that at this time the current arrangements be maintained.

### **Medium Term**

18. Undertake targeted consultation with relevant stakeholders and representative bodies to determine whether Indigenous artworks of secret sacred significance should be granted Class A protection under the PMCH Control List
19. Investigate the introduction of significance criteria for Indigenous objects and works of art which take into account spiritual significance and cultural significance, as well as the age and monetary thresholds specified under the PMCH Regulations.

### **Long Term**

16. Investigate the most appropriate way to protect Indigenous heritage material under the PMCH legislation. Issues to examine further include which Indigenous objects should be restricted from export or subject to export permits, how Indigenous objects and works of art should be defined and categorised under the Control List, how Indigenous consultation on the assessment of Indigenous objects may be effectively utilised, and how protection of Indigenous objects under the PMCH legislation will relate to, and interact with, other Commonwealth, state and territory legislative regimes, including the outcomes of the review of the *Aboriginal and Torres Strait Islander Heritage Protection Act 1984*.

## ***A national register?***

### **Short Term**

- 20.** Compile a publicly available list of examples of nationally significant objects, including objects which have been denied export permits and objects which have been purchased using the NCH Account, to assist export permit applicants and expert examiners to comparatively assess national significance. Legal issues with publishing this information will also need to be investigated.
- 21.** All objects placed on a publicly available list of examples of nationally significant objects be accompanied by a statement of significance.
- 23.** Liaise with relevant state and territory departments to determine whether the criteria used in other jurisdiction's state and territory registers of national significance align with national significance criteria. Where alignment is evident, establish procedures for referring Australian protected objects denied export permits to state or territory registers, and for states and territories to refer objects of potential national significance to the department for inclusion on its list of nationally significant objects.

### **Medium**

- 22.** Update the Guidelines for Expert Examiners to require experts to use the list of nationally significant objects as a guide in undertaking significance assessments.

### **Medium to Long Term**

- 24.** The PMCH legislation should require owners of all Australian protected objects denied export permits to register their contact details and the location of their object with the department, to keep these details up to date, and to assist with any audit checks. This register would be administered and used by the department and Australian Customs and Border Protection Service officers and would not be publicly available. The department should be appropriately resourced to maintain this register.

### **Long Term**

- 25.** Undertake further consultation with relevant stakeholders to determine whether assisting owners of objects prohibited from export with their preservation and conservation is an appropriate objective for the PMCH legislation.

**26.** Investigate defining and introducing the destruction or damage of an Australian protected object prohibited from export by its owner as an offence under the PMCH legislation, with an associated pecuniary penalty. Under a civil regime, pecuniary penalties could be awarded by a court on a case by case basis depending on the severity of the damage caused.

## ***Streamlining export permit applications***

### **Short Term**

- 27.** Require applicants for export permits under the PMCH Act to provide more rigorous documentation, including undertaking provenance and significance research for objects they are exporting. A guide which includes examples and a list of suggested resources to research provenance could also be made available to assist applicants to provide an appropriate level of relevant information.
- 34.** Objects continue to be assessed on the criteria set out in the National Cultural Heritage Control List. A lack of interest from a public collecting institution should not influence a decision on whether to grant or refuse a permit.

### **Medium Term**

- 33.** Evaluate the effectiveness of the current process for expert examiners issuing letters of clearance for the export of fossils and meteorites.
- 38.** Develop criteria for extending general permits to non-institutional applicants.

### **Long Term**

- 28.** Consider amending the legislation to strengthen the requirement for the applicant to provide adequate information when submitting an export permit application.
- 29.** Investigate introducing an application fee for permits under the PMCH Act. This should include undertaking a detailed cost benefit analysis to establish whether introducing a user pays system for permit applications is financially viable. The development of an online permit application system to support efficient processing should also be investigated.
- 30.** If application fees are introduced, the development of a payment scale is recommended to cover the different categories of permits (for example temporary and permanent permits and certificates of exemption) and applicants (such as individuals versus companies).
- 31.** The commencement of a fee system would need to coincide with the implementation of set timeframes for processing applications.

- 32.** Consider amendments to the PMCH Act to streamline the decision-making process for permit applications where an expert examiner advises that an object is an Australian protected object and adequately represented in Australian collections.
- 35.** Multiple use temporary export permits, for approved purposes and within a set timeframe, should be allowed for certain types of objects which regularly travel, including philatelic exhibits, cars, aircraft and international sporting trophies.
- 36.** Consider amendments to the PMCH legislation to allow the issuing of permits for the temporary export of Class B Australian protected objects for a period of up to five years, on a case by case basis. The return of the objects should be reported by the exporter and compliance monitored. There should be substantial penalties for non-compliance.
- 37.** The granting of general permits to allow principal collecting institutions which have responsibility and ownership for Class B Australian protected objects to loan them overseas for research, public exhibition, or a similar purpose, should be extended to include other institutions and organisations.
- 39.** Amend the PMCH legislation to allow the Minister, in consultation with the NCHC, to consider granting a permanent or temporary export permit for Class A objects, where satisfied that a valid reason exists and specific conditions have been met.

## ***Expert examiners and the National Cultural Heritage Committee***

### **Short Term**

- 40.** Institute five year tenure for registered expert examiners and a five yearly review of the register of expert examiners.
- 43.** Expert examiners to be routinely provided with feedback by the department on the outcome of their recommendations on matters referred by the National Cultural Heritage Committee.

### **Medium Term**

- 41.** Develop and implement a training program for registered expert examiners to ensure their understanding of the operation of the PMCH legislation, and to support the provision of a high standard of advice to the National Cultural Heritage Committee.
- 42.** Investigate options for payment for the work undertaken and expenses incurred by expert examiners. This would also form part of the consideration of the introduction of an application fee (Recommendation 29).
- 44.** Investigate other measures to assist expert examiners to perform their role under the PMCH legislation.

### **Long Term**

- 45.** Investigate and consult with relevant stakeholders on the composition and functions of the National Cultural Heritage Committee.

## ***The National Cultural Heritage Account***

### **Short Term**

49. Investigate, in consultation with relevant stakeholders, whether the provision of emergency or ex-gratia funding should be a function of the National Cultural Heritage Account, or provided through another mechanism.
53. Undertake further work to identify potential links between the Cultural Gifts Program and the PMCH legislation, particularly possibilities for facilitating the acquisition of objects by collecting institutions for which export permits have been refused.

### **Medium Term**

46. Amend the PMCH Regulations to correctly reflect the National Cultural Heritage Account and its operations, consistent with the FMA Act.
50. Revise and update the guidelines for the National Cultural Heritage Account to support decision-makers and individual applicants, such as smaller communities or organisations, and to enhance accountability and transparency.
51. Better promote the National Cultural Heritage Account, particularly amongst Indigenous, rural and regional organisations and communities.
52. Consult with the Australian Taxation Office and other relevant stakeholders to explore options for tax deductible donations to the National Cultural Heritage Account.

### **Long Term**

47. Consider increasing Australian Government funding to the National Cultural Heritage Account to at least \$5 million per annum. This amount should be reviewed against market prices every five years, and should be considered in conjunction with other issues examined in this review, such as the monetary thresholds and method of calculating market value under the Control List.
48. Allow all unspent National Cultural Heritage Account funds to carry over into future financial years.

## ***Compliance and enforcement provisions***

### **Short Term**

- 63.** Retain the current provision for merit based review by the Administrative Appeals Tribunal for certain decisions of the Minister, available under section 48 of the PMCH Act.

### **Medium Term**

- 54.** Develop a communications strategy including targeted public awareness and education campaigns to address the Australian community's lack of knowledge about the PMCH legislation.
- 55.** Develop targeted training packages to assist key stakeholders such as expert examiners and Australian Customs and Border Protection Service officers.
- 62.** Consult with the Australian Bureau of Statistics and the Australian Customs and Border Protection Service to explore the feasibility of integrating cultural property export declarations with the Australian Harmonised Export Commodity Classification codes used by the Australian Customs and Border Protection Service.

### **Long Term**

- 56.** Undertake further consultation with relevant stakeholders on how protection of fossils or meteorite objects under the PMCH legislation should relate to, and interact with, other Commonwealth, state and territory legislative regimes, taking account of outcomes of the review of the EPBC Act.
- 57.** Align the PMCH Act compliance and enforcement provisions with the *Environment Protection and Biodiversity Conservation Act 1999*. Through the introduction of a variety of sanctions and remedies, including criminal penalties, civil remedies and administrative actions, the PMCH Act would provide greater flexibility and efficiency in enforcing the protection of significant objects.
- 58.** Strengthen inspector provisions in the PMCH Act to require persons to comply with any direction given by an authorised inspector, and make it an offence for a person to obstruct an inspector in the course of their duties.



- 59.** Strengthen seizure and forfeiture powers under the PMCH legislation to make both forfeited objects and evidentiary material seizable based on reasonable grounds of suspicion, and consider extending the current 60 day retention period.
- 60.** Amend the PMCH Act so that export is deemed to have occurred at the time an object is in the control of the Australian Customs and Border Protection Service or an Export Declaration Number is issued.
- 61.** Investigate broadening the provisions in the PMCH legislation covering unlawful imports to include objects listed on Interpol's database of stolen cultural property and the Art Loss Register.

## ***International obligations and collaboration***

### **Short Term**

- 64. In addition to the current PMCH Act provisions which allow state to state action for the seizure and return of illegally exported objects, consider ratification of the UNIDROIT Convention to provide the right of private action by individuals, bodies or states (foreign countries).
- 69. Monitor, report and consult on implications for the PMCH legislation should the Australian Government ratify the 2003 UNESCO Convention for the Safeguarding of the Intangible Cultural Heritage or the 2001 UNESCO Convention on the Protection of the Underwater Cultural Heritage.

### **Medium Term**

- 66. Liaise with relevant Commonwealth agencies to explore opportunities to support enhanced international collaboration with other nations, with the objective of improving compliance and enforcement mechanisms and outcomes under the PMCH legislation.
- 67. Liaise with relevant Commonwealth agencies, and monitor the outcomes of the review of the *Environment Protection and Biodiversity Conservation Act 1999*, to consider whether the PMCH legislation can be amended to enhance the Australian Government's capacity to seize illegally exported foreign objects.
- 68. Undertake targeted consultation with stakeholders on the need for legislative amendments to safeguard cultural property on loan from overseas institutions from seizure by law enforcement authorities.
- 70. Undertake targeted consultation with stakeholders on the potential impacts of becoming a party to the 1954 and 1999 Protocols to the 1954 Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict.

### **Long Term**

- 65. Undertake a process of consultation on whether Australia should withdraws its reservation to Article 10 of the 1970 UNESCO Convention.

## ***Impacts on broader arts and cultural policy***

### **Short Term**

- 71.** Monitor the impact of the PMCH legislation on the contemporary Indigenous art market to assess whether it is having any negative impact.
- 72.** Continue to monitor concerns that the legitimate trade in cultural property, including visual arts and craft, is supported in line with the Australian Government's broader policy objectives, and is not excessively restricted under any amendments to the PMCH legislation.
- 74.** Ensure that the treatment and definition of secret sacred objects and burial goods under the PMCH legislation and other Commonwealth legislation, policies and programs are consistent by liaising with the RICP Program Management Committee and the Heritage Division of the department.

### **Medium Term**

- 73.** Undertake further consultation with relevant stakeholders on the need for the PMCH legislation to align with complementary operational principles in relevant Commonwealth, state and territory heritage legislation.

## 4 2009 Review Purpose

### 4.1 Review timing

The 2009 review of the PMCH legislation was announced by the Minister for the Environment, Heritage and the Arts, The Hon Peter Garrett AM MP, on 15 January 2009. This review represents the first opportunity to evaluate the efficacy of the PMCH legislation since the PMCH Act was reviewed in 1991 and the PMCH Regulations were reviewed in 1995.

The review was undertaken by the Australian Government Department of the Environment, Water, Heritage and the Arts (the department). The department released the Review of the Protection of Movable Cultural Heritage Act 1986 and Regulations Discussion Paper<sup>1</sup> (the discussion paper) in late January 2009 and invited public submissions by 6 March 2009. Consultation also occurred within the department in relation to issues where there were overlapping policy and legislative interests.

At the request of several key stakeholders, including state governments and national collecting institutions, the closing date for submissions was extended until 4 April 2009. This extension allowed a number of key stakeholders to contribute to the review process.

In this first stage of review consultation, 118 public submissions were received from a diverse range of stakeholders, including national and state collecting institutions, industry councils, state governments, Australian Government agencies, industry professionals and members of the public.

The department also conducted additional consultation meetings with key stakeholders, including state and national collecting institutions, academic specialists, expert examiners, government agencies and businesses involved in the import and export of cultural property.

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<sup>1</sup> See Appendix A

## **4.2 Review objectives**

The objective of the review was to examine the following aspects of the PMCH legislation:

- a) the operation of the PMCH legislation generally;
- b) the extent to which the objectives of the PMCH legislation have been achieved;
- c) the appropriateness and effectiveness of the current arrangements and categories under the National Cultural Heritage Control List;
- d) the operation of the National Cultural Heritage Account; and
- e) the effectiveness of the current permit system for protecting the movable cultural heritage of both Australia and foreign countries.

The review was also guided by the following Australian Government policy objectives:

- a) to protect and conserve Australia's most significant movable cultural heritage and promote Australian arts and culture;
- b) to work in partnership with the states and territories within an effective federal arrangement;
- c) to facilitate delivery of Australia's international obligations;
- d) to implement the Australian Government's deregulation agenda to reduce and simplify the regulatory burden on people, businesses and organisations; and
- e) to ensure that activities under the PMCH Act represent the most appropriate, efficient and effective ways of achieving the Australian Government's outcomes and objectives in accordance with the Expenditure Review Principles.

## **5 Introduction**

### **5.1 About movable cultural heritage**

Objects that people create or collect can be an important part of our cultural heritage. These objects can be artistic, technological or natural in origin. Portable cultural objects are also referred to as movable cultural heritage.

As the trade and exchange of movable cultural heritage between nations continues to increase, international appreciation of cultural diversity can be enhanced. However, unregulated exchange of cultural and heritage objects can also lead to the loss of significant aspects of a nation's cultural heritage.

The PMCH legislation protects Australia's heritage of movable cultural objects and also supports foreign countries' right to protect their heritage of movable cultural objects. It achieves this by implementing a system of export permits for certain significant heritage objects defined as Australian protected objects (APOs) under the PMCH Regulations.

The department administers the PMCH Act and Regulations.

### **5.2 Protecting cultural objects – getting the balance right**

A key challenge for legislation regulating trade in cultural objects is achieving a balance between retaining objects of outstanding cultural significance to the nation in the public interest, and protecting the interests of individuals who own cultural objects and wish to export them.

It has always been the intent of the PMCH legislation to strike a balance between facilitating legitimate, and indeed desirable, international trade and retaining Australia's most significant cultural objects for the Australian community.

### **5.3 Stakeholders**

A large and diverse range of stakeholders have an interest in the PMCH legislation. The most obvious are exporters and importers of cultural objects, including auction houses and dealers, together with freight forwarders, couriers, brokers and others involved in the trade. Collecting institutions, universities, national and international heritage bodies,

heritage groups and individuals who have an interest in the protection of Australian or international movable heritage are also important stakeholders, as are state and territory governments and government agencies at all levels, including the Australian Government agencies which help enforce the legislation. The submissions made to the review came from across this broad spectrum of stakeholders and reflect the importance of the PMCH legislation to the Australian community.

## 6 Areas of Discussion

### 6.1 The National Cultural Heritage Control List

#### Overview

The PMCH Act establishes as the movable cultural heritage of Australia the National Cultural Heritage Control List, which consists of categories of objects specified in the PMCH Regulations. The Control List was developed taking into account categories of objects referenced in the 1970 UNESCO Convention and in the Canadian *Cultural Property Export and Import Act* (R.S., 1985, c. C-51).

The criteria (which define the categories) include historical association, cultural significance to Australia, representation in an Australian public collection, age and financial thresholds. The Control List includes a specific list of Class A objects regarded as having such significance to Australia that they may not be exported:

- Victoria Cross medals awarded to Australian service personnel as listed in item 7.3 of Schedule 1 to the Regulations;
- Each piece of the suit of metal armour worn by Ned Kelly at the siege of Glenrowan in Victoria in 1880 specified in item 9.2A; and
- Aboriginal and Torres Strait Islander objects which cannot be exported (see item 1.3). These are:
  - Sacred and secret ritual objects
  - Bark and log coffins used as traditional burial objects
  - Human remains
  - Rock art
  - Dendroglyphs (carved trees).

It also comprises Class B objects, which require a permit to be exported and fall within the following nine categories:

1. Objects of Aboriginal and Torres Strait Islander heritage;
2. Archaeological objects;
3. Natural science objects;
4. Objects of applied science or technology;
5. Objects of fine or decorative art;
6. Objects of documentary heritage;
7. Numismatic objects (coins and medals);
8. Philatelic objects (stamps); and



## 9. Objects of historical significance.

Class B objects also need to meet certain additional criteria, such as age, monetary value and significance to Australia.

The majority of the stakeholders consulted and the submissions to the review made suggestions for improving the effectiveness of the National Cultural Heritage Control List (the Control List). However, many submissions also acknowledged that the Control List performs relatively well given the diversity of the objects the PMCH legislation regulates.

Generally, the responses to the review indicated that whilst changes should be made to the Control List's categories to enhance its protective capabilities, most stakeholders felt the "worst possible outcome" would be to remove the PMCH legislation's protection of Australia's movable cultural heritage. The widely diverging views expressed in the submissions discussing the Control List means that any action to alter the Control List will require continued research and consultation with relevant stakeholders.

### ***Does the current Control List capture Australia's most significant cultural objects?***

A widely disparate range of opinions was expressed by respondents to the review with regard to the efficacy of the Control List and its categories of objects. Some respondents stated that the Control List is "narrow and limited", although these limitations were not specifically articulated. A few other submissions also broadly claimed that the Control List was not meeting the objective of protecting Australia's most significant objects, and that too many objects are able to be illegally exported with relative ease.

Other respondents believed the Control List to be a sufficient and reasonable mechanism or "means to an end" for the difficult task of defining and protecting Australia's movable cultural heritage. For example, Dr Philip Jones commented that "it is difficult to identify gaps in the list, either in types or categories. The relative significance of a...suite of objects might rise or fall, but it is always within the broader net, and any object falling within the grid has the potential to become a contentious APO."

Some respondents desired substantial alterations to the Control List, such as amalgamating the Class A and Class B categories to create a "Master List", or abandoning the current arrangement of Control List categories altogether in favour of a new model of significance assessment and protection. However, these suggestions were not

accompanied by detailed propositions for how to legislate these alternative models.

Most submissions and experts consulted acknowledged that it is a practical impossibility to capture absolutely all of the precious cultural material leaving Australia, whilst simultaneously allowing trade and the cultivation of private collections. As such, many respondents to the review felt the categorisation of objects under the Control List was a concise and practical measure to ensure that potentially significant objects come under the purview of expert examiners prior to export. On balance, those submissions recommending a complete overhaul or replacement of the Control List mechanism were in the minority, although they raised several important issues for consideration.

Several respondents also questioned what they felt were ambiguities or overlaps in the Control List categories, and made suggestions for amending or clarifying the categories to implement more extensive and efficient coverage of potentially significant cultural objects. These submissions to the review highlighted that the Control List and its categories of objects should be regularly reviewed and updated to reflect emerging concerns and trends. A few submissions proposed that non-exclusive listings of examples of the types of objects which might fall under each Control List category could be inserted into Schedule 1 of the PMCH Regulations to provide more clarity and certainty. These lists or notes could “include, but not be limited to” examples of objects which have been assessed previously under each category.

Those submissions asserting that the Control List categories are too narrow in scope believed that certain objects are not being adequately protected and that greater flexibility is required to capture and protect significant objects which cannot be defined to fit a neat category. The New South Wales (NSW) Government in particular believed that there should be a more understandable method for export permit applicants to determine which Control List category an object falls under, if it appears to be potentially significant. The NSW Government submission highlighted as an example whether textiles should be considered artworks or objects of applied science or technology, and noted that certain works of art, such as photographs, may also constitute documentary heritage. It should be noted that expert examiners are able to identify that an object is significant under several categories of the Control List when assessing export permit applications.

Both the Victorian and NSW governments also recommended that the Control List be supplemented by improved guidance for expert examiners and the public on significance assessment criteria for cultural objects. While the NSW Government recommended using the Collection Council

of Australia's (CCA) *Significance 2.0 - A guide to assessing the significance of collections* criteria as a broader approach to assessing and protecting cultural objects, the Victorian Government suggested that a two tier system of significance assessment could be implemented to streamline the export permit application process. The first stage would involve quickly identifying whether an object is of 'potential significance' and falls under the Control List, followed by a second stage of more detailed significance assessment.

As discussed further in the chapter on the export permit application process, the current system already involves a two tier assessment mechanism. The department may inform owners in the first instance if an object is clearly not an APO, without referring this decision to the National Cultural Heritage Committee (NCHC). If the review's recommendation that the department to be granted the power to inform owners that an object is an APO, but is not significant due to previous assessments by the NCHC as to its adequate representation in Australian collections is accepted, the process can be streamlined further.

A few submissions also mentioned inconsistencies between the categories of significant objects set out in section 7 of the PMCH Act and the Control List categories in the PMCH Regulations may be confusing. However, the degree to which genuine confusion has arisen due to differences between section 7 of the PMCH Act as the headline statement identifying potentially significant Australian objects, and the Control List as the detailed description of regulated APOs, is unclear.

Several submissions also asserted that "ethnological objects", "ethnographic significance" and "historical significance" should be better defined in the PMCH Act, and that phrases such as "the Aboriginal race of Australia" should be updated.

Finally, several respondents to the review suggested that the efficacy of the Control List could be assessed by commissioning studies to determine which categories receive the most applications. The results of these studies, as well as comparative details of APOs previously granted or denied export permits and typological analyses of themes likely to relate to the significance of particular objects, could then be provided to expert examiners to assist with streamlining significance assessment. The Victorian Government felt that these measures would boost the efficacy of the Control List and consolidate the link between the Control List's categorisation of objects and the practical assessment of their significance. Dr Philip Jones also believed the relevance of the Control List would be maintained by its regular review by the NCHC.

An analysis of applications received since 1987 reveals that the majority of applications for export permits fall within certain categories such as Indigenous art, fossils, agricultural or other vehicles and military objects or weapons. Objects in other categories – documentary, numismatic, archaeological and Indigenous heritage – have been the subject of few or no applications. In the fine and decorative art category, almost all applications have been made by auction houses and relate to Indigenous art. Applications for objects of historical significance, a broad category that includes objects at least 30 years old that are not represented in at least two public collections, have almost exclusively concerned military and sport-related objects. Similarly, in applied science or technology, most applications relate to agricultural machinery and road or rail transport. However, there is a high likelihood that objects potentially falling within all the Control List categories and sub-categories are leaving the country illegally either through deliberate breach of the PMCH legislation or because exporters are unaware of the requirements of the legislation.

***Recommendation 1:*** Review the National Cultural Heritage Control List categories every five years in consultation with the National Cultural Heritage Committee, to ensure they continue to adequately and clearly capture Australia's most significant cultural objects.

***Recommendation 2:*** Gather comparative data on applications for export permits under each Control List category, and the assessment outcomes for objects examined under each category, in order to inform reviews of the Control List and assist expert examiners.

***Recommendation 3:*** Undertake targeted consultation with relevant stakeholders to examine the effectiveness of the current Control List in protecting Australia's movable cultural heritage, and determine whether the categories of significant objects outlined in section 7 of the PMCH Act and the Control List should be harmonised.

### ***Are the Class A objects listed in the Control List still our 'most significant'?***

Most respondents to the review who discussed the Control List supported the continuation of a Class A type category which restricts the export of Australia's most nationally significant objects. However, many submissions to the review expressed reservations about the current scope of the Class A category. These submissions stated that the current Class A category does not represent Australia's most significant objects, account adequately for people, places or achievements of national significance, or appear to have a coherent theoretical or philosophical underpinning for protecting the objects listed.

Numerous submissions made cases for the accession of additional cultural objects, or categories of objects, to the Class A list. The Australian War Memorial (AWM) also suggested that the Class B objects assessed by expert examiners could be reviewed each year to see if any of these items, or types of items, should become Class A objects, in order to maintain an up to date and adaptable Class A list.

In reviewing specific categories of objects, most submissions considered the current Class A Indigenous objects listed under Control List Part 1 – Objects of Aboriginal and Torres Strait Islander Heritage to be Australia's most culturally significant and/or sensitive Indigenous objects, and approved of their restriction from export, although one submission questioned whether bark and log coffins lacking human remains should be unconditionally protected. Another submission also believed that case by case assessment should be undertaken for all secret sacred Indigenous objects to ensure they are assessed on their individual merits.

However, the majority of submissions indicated that, if anything, the current Class A listing of Indigenous objects is likely to be "conservative". Many submissions discussing Indigenous objects and works of art also supported the inclusion of a defined subset of early Papunya Tula boards in the Class A category, due to their outstanding historical and aesthetic significance and secret sacred subject matter. These issues are discussed in more detail in the chapter on Indigenous objects.

A number of submissions asserted that whilst the Class A list protects Indigenous objects well, it is not so effective or thorough in protecting Australia's nationally significant non-Indigenous objects.

Several submissions called for the Class A list to be extended to protect key documentary and other materials related to the foundation of the Australian colonies and nation, including objects central to Australia's political, civil and democratic history. Some of the objects suggested included James Cook's journal and log, the Mabo papers, the Eureka flag, and high level awards or numismatic objects granted to Australian citizens which are on par with the Victoria Cross medals currently granted Class A protection. A few submissions also believed that significant items associated with Australian political history, including recent political history, such as the documents and portraits of political leaders, should be specified and protected more clearly under Part 6 - Objects of Documentary Heritage or Part 9 - Objects of Historical Significance of the Control List.

The National Association for the Visual Arts (NAVA) stated that the

Class A category should include more objects of nationally significant fine or decorative art, such as works epitomising the style of major Australian artists and/or representing their body of work. NAVA also recommended that the wording of the Control List category title for Part 5 – Objects of Fine or Decorative Art should be changed to “Part 5 - Visual Art, Craft and Design” to reflect current terminology. The National Film and Sound Archive (NFSA) felt that defined items of original audiovisual footage should be Class A protected.

Another submission argued that the Charlotte Medal, a significant item of convict heritage, should be added to the Class A list and claimed that it could have been lost overseas had the Australian National Maritime Museum (ANMM) failed to purchase it at auction in July 2008 using funds from the NCH Account. It should be noted, however, that if an overseas buyer had purchased the Charlotte Medal and applied for an export permit, it would have been denied because of its outstanding national significance as a Class B object under three of the Control List categories, including Part 2 - Archaeological Objects, Item 2.3(c), Part 5 - Objects of Fine or Decorative Art, Item 5.3, and Part 7 - Numismatic Objects, Item 7.4.

The Australian Antique and Art Dealers Association (AADA) also advocated for Class A protection of nineteenth century Australian gold cups as key representations of the genesis of Australia’s wealth through gold mining. The Federation of Australian Historical Societies (FAHS) also requested that native specimens of flora and fauna at risk of extinction should also become Class A protected. Both the Victorian Government and Museum Victoria advised that Part 9 - Objects of Historical Significance, Item 9.2A of the Control List, should be updated to include all pieces from the four suits of armour worn by the Kelly Gang at the siege of Glenrowan in 1880. Currently, only Ned Kelly’s armour is Class A listed. This was recommended both on the basis of historical significance to Australia and due to enduring uncertainty about which Kelly gang members wore which pieces of armour.

Several submissions to the review and experts consulted expressed particular concern over the PMCH legislation’s failure to adequately protect opalised fossils. The ease with which individuals or companies with a mining licence can remove, destroy or cut up significant opalised fossils, including unique skeletons, together with the frequently observed sale overseas of important opalised fossils unrepresented in Australian collections were raised as concerns. One palaeontologist emphasised that out of the world’s four existing opalised plesiosaur skeletons, three have already been exported from Australia to the United States. This was seen as indicating a lack of awareness about these objects and their significance. Another respondent to the review cited evidence that

microfossils extracted for industrial commercial purposes have been exported in contravention of federal and state legislation governing petroleum exploration.

Overall, most submissions or experts discussing opalised fossils asserted that any specimen that is complete or near complete is likely to be nationally significant. They also recommended action to police the significant illegal trade in fossils, opalised fossils, minerals and meteorites as it prevents scientific examination and description of specimens before their release for export. Most of these submissions called for the extension of Class A protection to all 'type' fossils, fossils which are illustrated in scientific literature and reference samples which are vital to the repeatability of the scientific assessment of a fossil, mineral or meteorite.

The trade in significant fossils, minerals and meteorites was acknowledged to be particularly difficult to regulate, due to their portability and the highly specialised knowledge and time consuming analysis required to identify them. The determination of their cultural and scientific significance further requires knowledge of their precise original locality, which can be easily compromised or fabricated as soon as these objects are moved. These objects are also frequently loaned to scientific institutions or scientists overseas without established systems for their mandatory return should they subsequently be revealed to be significant. We note that as a signatory to the 1970 UNESCO Convention, Australia can make a request for the return of illegally exported cultural heritage material. Outside of that framework there are no mechanisms to enforce the mandatory return of objects from outside Australia.

Additional suggestions for improving the protection of significant fossils, minerals and meteorites included implementing sustained public awareness campaigns about the responsibilities of collectors in finding, identifying and exporting these items, streamlining the use of key expert examiners by developing a straightforward referral system for particular object types to be examined by specialists and instituting a system for the mandatory return of exported fossils subsequently found to be of national significance to Australia. Several submissions also suggested that departmental officials should attend international geological trade shows and conventions in order to check that opalised and other fossils being sold have been legitimately exported from Australia. This issue is further canvassed in the section on compliance and enforcement.

Respondents to the review dealing with the field of meteorites found the current variation between state and territory legislation which regulates the collection and treatment of meteorites to be problematic. Whilst Western Australia (WA), the Northern Territory (NT), Tasmania and South

Australia (SA) all regulate the acquisition, reporting and disposal of meteorite finds, no such laws exist in NSW, Victoria, Queensland or the Australian Capital Territory (ACT). This legislative diversity is credited with allowing collectors to collect potentially significant meteorites illegally and then sell or export them from states lacking restrictions.

While most meteorites are likely to be released following examination and description by an expert, some respondents believed that the PMCH legislation has driven traffic in meteorites underground as collectors fear declaring their finds lest they be confiscated. Some respondents, including a dealer consulted in the review process, felt that this illicit activity could be addressed by introducing financial incentives (compensation or rewards) to encourage collectors to report their finds of meteorites and opalised fossils to museums, which could then decide whether to acquire them. Increasing the funding available from the National Cultural Heritage Account to assist collecting institutions acquire these objects was also suggested as was the provision of clear guidelines for collectors. One submission also recommended allowing the export of all meteorites where a type specimen exists in a public institution.

The Western Australian Museum (WAM) believed that more aggressive enforcement of the PMCH Act is required to alleviate the illegal trade in meteorites. WAM suggested that efforts to improve the protection of meteorites could include: closer liaison between the department, Australian Federal Police (AFP) and expert examiners; providing rewards (funded by the National Cultural Heritage Account) to collectors placing meteorites in museums and those offering tip offs about illegal trafficking; ensuring that exporters demonstrate legal ownership of specimens; and actively pursuing the return of illegally exported meteorites. WAM's suggestions highlight the fact that the efficacy of the Control List is highly dependent upon the resources available to support compliance with the PMCH legislation and encourage Australian collecting institutions to purchase and preserve nationally significant objects.

Finally, several submissions declared that Australia's heritage of steam engines and other machinery is particularly at risk and that defined subsets of these objects deserve Class A protection. These respondents declared that it is currently too easy for steam engines and other heritage machinery to be broken into parts for illegal export as scrap metal. They also asserted that collectors and dealers in Australia peddle inflated local prices for these items in order to create an excuse to favour purchases by the eager United Kingdom market. These practices were believed to have contributed to the loss of significant elements of Australia's transport history, or up to one third of Australia's stock of significant steam engines. Numerous respondents emphasised that steam heritage machinery is of



national significance because it is no longer made and the role it played in building the Australian nation.

Submissions discussing heritage machinery generally agreed that all steam engines and heritage machinery more than fifty years old should be Class A protected. One submission asserted that all steam road locomotives, steam wagons, or steam engines built in Australia before 1940 or used before 1930 should be restricted from export. Other submissions believed that a minimum number of examples of an applied science object (suggestions ranged from two to five) must be held in Australian collections before a similar piece may be exported. It was also suggested that a register of heritage machinery equipment should be established in order to assist with the identification of illegal exports. Whilst establishing a register of items such as fossils and minerals would be impossible due to the numbers involved, the known number of Australian steam engines is much smaller and could possibly be included under Part 4 – Objects of Applied Science or Technology of the Control List.

***Recommendation 4: Undertake targeted consultation with relevant stakeholders to consider the cases made to the review for extending Class A protection to additional objects, or classes of objects, of exceptional national significance.***

***Is the list of Class B objects too broad or too narrow?  
There have been calls for Part 4 - Objects of Applied Science or Technology to be broadened to include space and satellite, alternative energy, solar, nuclear, computing, and medical innovations.***

As mentioned previously, some submissions to the review believed that the Class B list is “narrow and limited”, whilst others supported it as the most practical available mechanism for identifying and protecting Australia’s movable cultural heritage. Several other submissions also called attention to a separate issue - the cohesiveness of the Class B list. Museums Australia (MA) related the Control List directly to significance assessment criteria in its assertion that there appears to be no “cohesive framework to link the [categories] effectively”. MA recommended that the Australian Government develop a “cohesive framework encompassing the sweep of Australia’s natural and cultural experience through time...to guide the development of all PMCH-associated [categories]”, harmonise all existing Australian lists of significant items or places, and develop a standardised set of assessment thresholds. The Victorian Government also called the Class B list “an odd assortment”. Significance assessment

criteria and their relationship with the PMCH legislation are discussed further in chapter three of this report.

On the whole, most respondents, including the Victorian Government, believed that it was best to keep the Class B list relatively broad and not too prescriptive to allow the flexibility to capture the majority of potentially significant cultural objects.

The majority of submissions considered that the ambit of Part 4 – Objects of Applied Science or Technology, and particularly Items 4.4(b) and 4.4(f), already sufficiently cover medical, military, computing, telecommunications, space, satellite and alternative energy technologies, and that these objects do not need to be further specified under this category. Although some submissions believed that the protection of more recent innovations in these areas is problematic, this would stem from the age threshold of 30 years under Part 4, rather than the specificity of the category itself. It should also be noted that this issue would be addressed should the recommendation be accepted for the Minister and NCHC to be able to determine objects of national significance outside age or monetary thresholds.

Other suggestions to improve the clarity and protective capabilities of the Control List included adding a distinct category for audio visual objects and accounting more specifically for objects associated with the performing arts. The Australian National Herbarium also recommended that a definition of ‘epitype’ be added to Item 3.5 – Natural Science Objects in accordance with the International Code of Botanical Nomenclature, in order to capture ambiguous species of potential significance.

Views on the inclusion of philatelic objects in the Control List varied widely. The Australian Philatelic Traders Association (APTA) took the view that philatelic objects were mass produced, that “no philatelic item is of “significance to Australia” and that philatelic objects should therefore be removed from the Control List and the ambit of the Act.” Several submissions discussing philatelic material noted that although items such as antiquarian books are far more valuable than philatelic objects and have equivalent or greater significance, they are not categorised as part of the Control List. Those seeking the removal of this category argued that philatelic objects were best cared for by private collectors and that most collecting institutions had little interest in the acquisition or display of this class of object.

Others held the view that philatelic objects had significance because of their philatelic importance (one considered that there were strong candidates in this category for Class A status), or for cultural and historic reasons.

The Australian Philatelic Traders Association (APTA) also noted that Item 8.3(c)<sup>2</sup> in Part 8 – Philatelic Objects is inappropriate, because such awards have little bearing on their significance, noting that “many collections that have satisfied the exhibiting criteria for the award of a Large Gold Medal, have not enjoyed the same level of regard within the wider philatelic community”.

Other experts discussing opals and gemstones, and to a lesser degree minerals, felt that as these objects are also commodities traded primarily as collectables and usually lack scientific importance. They did note that occasionally an object like a large gold nugget may have historical or social significance. Setting a very high monetary threshold was one suggestion to capture only objects of outstanding significance and to focus only on important items completely unrepresented in Australian collections. Alternatively, it was suggested that their APO status be removed altogether.

***Recommendation 5: Undertake targeted consultation with relevant stakeholders to consider the cases made to the review for expanding the Control List to include additional Class B objects, or classes of objects, and to the arguments made for removing the Australian protected objects status of certain objects or classes of objects.***

***Recommendation 6: Develop indicative lists of objects for inclusion in each category of the Control List to provide greater clarity for export permit applicants. The indicative lists of objects should not exclude the assessment of other objects under the Control List categories.***

***Do all categories on the Control List need to remain separately listed? For example, could philatelic objects become a sub-category of Part 9 - Objects of Historical Significance?***

A few submissions suggested that Part 8 - Philatelic Objects could become a sub-category of another area of the Control List. However, proposals to make Part 8 and Part 7 - Numismatic Objects, individual

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<sup>2</sup> (c) a stamp collection of substantial importance that:

- (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.

sub-categories of a new, overarching category were as popular as the discussion paper's suggestion of making Part 8 a sub-category of Part 9 – Objects of Historical Significance.

Overall, consolidated support was not expressed for combining any current Control List categories. The majority of submissions believed that specificity in the Control List is required for expert examiners and the public to most practically and easily define and assess the value of Australia's "inventory" of movable cultural heritage. Respondents to the review indicated that, should the categories become overly broad in description or content, it would become more difficult to decide whether and why an object is significant, account for its cultural context and decide which Control List category it falls under.

Submissions from philatelic specialists further noted that, as an extremely well described and delineated form of movable cultural heritage, philatelic objects may sit awkwardly within a broadly defined category.

***Recommendation 7: All current Control List categories, including Part 7 - Numismatic Objects, Part 8 - Philatelic Objects and Part 9 – Objects of Historical Significance should remain listed as separate items.***

## **6.2 Control List thresholds**

### ***Overview***

The age and monetary thresholds are designed to ensure that only objects with a genuine chance of being nationally significant must be assessed by an expert examiner and the NCHC prior to export.

While many respondents to the review made suggestions for changing the age and monetary thresholds currently used to define APOs under the Control List, others believed they were appropriate and some supported eliminating them completely.

Once again, the lack of consensus expressed by respondents to the review in relation to the Control List's thresholds means that considerable further research and consultation will be required to determine how the thresholds could be amended to ensure their effectiveness.

***Are the age thresholds still appropriate? Given the pace of technological change do the age thresholds specified make it likely that significant objects will be lost to Australia?***

Some respondents to the review believed that age and monetary thresholds are not useful yardsticks for determining the potential significance of an object at all and that rigorous significance assessment criteria should be applied to both contemporary and older objects instead. Other submissions recognised that the thresholds provide a practical trigger or initial criteria for embarking upon a more detailed significance assessment of a cultural object.

A number of respondents believed that the current age thresholds are sufficient and “have an underlying logic”. At the other end of the spectrum, several submissions advocated increasing the Control List age thresholds to the same 50 year minimum threshold used for *all* cultural objects by Canada, the United Kingdom and New Zealand. These nations also stipulate higher age thresholds for certain items under their movable cultural heritage legislation, such as 75 years for means of transport, 100 years for books, archaeological objects and elements of dismembered artistic, historical or religious monuments, and 200 years for printed maps.

Most submissions supporting the use of age thresholds also cautioned that some flexibility should be provided to capture the majority of potentially significant objects, although they did not outline how such flexibility could be fairly applied.

Many submissions also advocated the reduction of the age threshold for Part 4 - Objects of Applied Science or Technology to 10 or 20 years, in order to adapt to the contemporary proliferation of new technologies. However, other respondents such as Dr Philip Jones, were wary of ascribing the same level of significance to contemporary technologies as to inventions developed during the nineteenth or twentieth centuries. The desired flexibility in the Control List could also be achieved if the recommendation is accepted for the Minister and NCHC to determine objects of national significance outside the age and monetary thresholds.

Most submissions discussing Part 3 - Natural Science Objects, supported the current lack of an age threshold for this category because it allows significance and protection to be applied immediately upon the discovery of a specimen. A few respondents supported the extension of the age threshold for philatelic and numismatic objects to 30 years, stating that they would acquire significance at the same rate as other non-Indigenous artefacts.

The majority of respondents to the review affirmed that the current 50<sup>3</sup> and 30<sup>4</sup> year thresholds applying to a number of Parts are appropriate in capturing all objects likely to be significant without impacting on technology still in use commercially. However, some submissions also advocated extending the current 20 year age threshold for Indigenous fine or decorative art to 30 years to be in line with non-Indigenous works of art under Part 5. It should also be noted that one submission asserted that age thresholds are not appropriate for documentary heritage, as more recent electronic documents can have heritage significance. Some submissions also opposed the use of age thresholds for works of art, asserting that they can achieve significance and even national significance in shorter time periods.

In addition to advocating a general age threshold of 30 years for Indigenous art, one submission dealing predominantly with Indigenous art recommended that the following more specific age thresholds also be defined in Part 5 of the Control List:

- Pre 1974 Western Desert paintings.
- Pre 1965 Arnhem Land and Tiwi Islands bark paintings and sculptures.
- Pre 1975 Kimberley region bark paintings and sculptures.
- All nineteenth century Indigenous artworks, including William Barak and Tommy McRae works.
- Pre 1991 Major East Kimberley School paintings, such as Rover Thomas and Paddy Jaminji works.

In relation to Indigenous objects under Part 1 of the Control List, several submissions supported keeping the 30 year age threshold, noting that it allows for a sufficiently detached appraisal of the significance of material. One expert consulted also proposed that the age threshold could be extended to 50 years, although consultation with the NCHC was also recommended. Several respondents opposing any age thresholds for Indigenous artefacts noted that age or monetary values may not be relevant to the cultural significance of an Indigenous artefact and that contemporary cultural artefacts can also achieve significance.

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<sup>3</sup> Part 2 – Archaeological Objects (remaining for at least 50 years in the place from which it was removed)

<sup>4</sup> Part 4 – Objects of Applied Science and Technology, Part 5 – non-Indigenous works of fine and decorative art, Part 6 – Objects of Documentary Heritage and Part 9 – Objects of Historical Significance.

### ***At what level should the monetary thresholds for the object categories be set?***

The opinions expressed by respondents to the review in relation to the monetary thresholds used in the Control List again ranged from support for eliminating them altogether, to acceptance of the current thresholds as appropriate, to suggesting alterations.

The most contentious objects discussed were Indigenous objects and Indigenous works of fine or decorative art. Some submissions commented that monetary values cannot reflect the cultural significance of Indigenous objects or account for the intersection of aesthetic and spiritual significance in certain types of Indigenous art. One expert consulted pointed out that the monetary values assigned by an aesthetics-driven art market may not appropriately represent the significance of certain early Papunya Tula boards depicting secret sacred material. In these cases, the expert believed that market assessments can only confirm the aesthetic esteem in which the market holds an item at a given time, rather than indicating an enduring appreciation of national cultural significance.

Some submissions also believed that this problem extends to all cultural objects – that is, monetary thresholds can never truly reflect significance. The NSW Government expressed concern that a significant object may fall beneath a monetary threshold simply because a market may not exist for it. Specialists in other areas such as fossils also asserted that monetary values had no meaning for these objects, as they most often do not appear on the market at all, although one submission believed the monetary threshold for fossils should be \$5000.

Several respondents, however, did engage with the concept of monetary thresholds and acknowledged their role as a simple criterion to reduce the number of unnecessary export permit applications. A few submissions believed the current monetary threshold of \$10,000 for Indigenous art is appropriate, while others advocated bringing it into line with the monetary thresholds used for non-Indigenous art. Some also recommended supplementing an increased monetary threshold for Indigenous art with an overall consideration of cultural significance. One submission also proposed that exceptions could be made for highly significant artworks, such as rendering the following items APOs under the Control List:

- Western Desert paintings valued at more than \$50,000
- Arnhem Land and Tiwi Islands bark paintings valued at more than \$25,000

- Kimberley region bark paintings and sculptures valued at more than \$25,000
- All nineteenth century Indigenous artworks, including William Barak and Tommy McRae works, valued at more than \$25,000
- Major East Kimberley School paintings, including Rover Thomas and Paddy Jaminji works valued at more than \$250,000

This submission also recommended that should these specifications not be defined in the Control List, the monetary threshold should be raised to \$75,000, as the average lot value sold in Sotheby's last Aboriginal Art auction was approximately \$43,000. It was also recommended by at least one respondent that research should be commissioned to check which rare Indigenous artists are captured by the current monetary thresholds in order to determine their appropriateness.

The Victorian Government suggested retaining the current monetary thresholds until strong evidence arises that export permit applications are increasing due to changes in the market. The APTA sought an increase in the monetary threshold for philatelic collections (currently \$150,000) to \$1,000,000. Finally, specialists dealing with opals and other gemstones recommended very high monetary thresholds, such as \$1 million for opals, to capture only the most significant of these commodities.

**Recommendation 8:** *Further research and consultation with relevant stakeholders should be undertaken to consider the cases made to the review to alter the monetary and age thresholds for certain categories of objects. Changes to the thresholds should be made where evidence and expert opinion indicates that this would enhance and streamline the identification and protection of Australia's most significant items.*

### ***How often should the thresholds be reviewed and on what basis?***

A number of submissions believed that the monetary thresholds in the Control List should be reviewed regularly to account for inflation and market dynamism. The recent significant appreciation in the value of Indigenous visual artworks was cited as an example of market fluctuation. One submission proposed that the monetary thresholds should be indexed to the Consumer Price Index from 1987 in order to bring them up to date, while another believed economic modelling should be commissioned to consider the appropriateness of the current thresholds. The most commonly suggested timetables for review of the thresholds were annually or every five years. The department proposes review every five years, as annual review would impose significant resource burdens.



**Recommendation 9:** *Review the Control List thresholds every five years to ensure they remain appropriate and representative of market fluctuations.*

***Is ‘current Australian market value’ an appropriate benchmark?***

Many submissions were satisfied with, or did not challenge, current Australian market value being used to determine monetary thresholds in the Control List, although they may have questioned the legitimacy of the monetary thresholds themselves. At least one submission stated that current Australian market value remains the most empirical and reliable benchmark for establishing monetary thresholds under the PMCH legislation.

Those submissions questioning the use of current Australian market value as a benchmark mainly did so in the context of the export focus of the PMCH legislation, the proliferation of globalised transactions through eBay and international auction houses such as Sotheby's, and the predominance of overseas markets for certain objects, such as the high United Kingdom demand for APOs such as steam engines and heritage machinery. These submissions tended to propose “current international market value” as a more appropriate benchmark. Dr Philip Jones also noted that current Australian market value may simply mean market value, as it is likely now to be a reflection of international market value. One submission also suggested that eBay prices may be used as a benchmark or to inform thresholds.

However, it remains to be seen how an international market value would be determined, how frequently it would need to be assessed and updated, and how these updates could be reflected in the PMCH Act and PMCH Regulations without incurring significant administrative and resource burdens. A further important issue to consider should “current international market value” be adopted as a benchmark would be the need for increased funding to the National Cultural Heritage Account (NCH Account) in order to meet the comparatively elevated costs associated with purchasing significant objects under international, rather than national, market valuations.

**Recommendation 10:** *“Current Australian market value” should continue to determine monetary thresholds under the PMCH legislation.*

***Should a new category be introduced to allow the Minister to determine objects of national significance that are under age or monetary thresholds?***

The option for the Minister to determine objects to be nationally significant even if they do not meet the Control List's age or monetary thresholds was supported by the majority of submissions, as a means of enhancing the flexibility of the PMCH Regulations and accounting for national history "in the making". Such a measure was also supported to enhance in particular the protection of recent inventions and technologies of potential significance which may not meet age thresholds, such as the "winged keel" design of the yacht *Australia II*, and Indigenous items of low monetary value which may nonetheless hold intense spiritual significance. It was noted, however, that sensitivity to the ongoing commercial use of new innovations would be required if they are to be determined APOs.

Objects such as Dr Philip Nietzsche's self-assisted euthanasia machine have also been identified as potentially significant inventions which have been previously exported, as they did not meet the age or monetary thresholds in the Control List. A provision allowing the Minister to determine objects of national significance would also ameliorate the risk that ambiguity in relation to an APO's categorisation under the Control List could result in a failure to protect it. Dr Philip Jones also cautioned that compelling examples of recent technological inventions at risk of being lost to Australia would be required to justify lowering the age threshold of Part 4 – Objects of Applied Science of Technology, which could possibly be avoided if a separate provision for Ministerial discretion was introduced.

Several submissions also requested that the Ministerial decision to determine objects of national significance should only be undertaken in consultation with the NCHC, to avoid creating undue uncertainty for collectors. Professor Lyndel Prott also argued that considerations to waive the thresholds should only be applied to objects where an attempt or application to export them has been made.

***Recommendation 11: The PMCH Act be amended to grant the Minister, in consultation with the National Cultural Heritage Committee, the power to determine objects of national significance which are under age or monetary thresholds.***

### 6.3 Significance assessment and the Control List

The term 'significance to Australia' is one of the criteria in six of the nine parts of the Control List and is broadly defined. Under sub-regulation 2(1) of the PMCH Regulations the term 'significance to Australia', for an object, is defined to mean the object is of Australian origin, has substantial Australian content, or has been used in Australia, and: (a) is associated with a person, activity, event, place or business enterprise, notable in history; or (b) has received a national or international award or has a significant association with an international event; or (c) represents significant technological or social progress for its time; or (d) is an object of scientific or archaeological interest.

The criterion 'Australia-related' is used in Part 5 of the Control List (objects of fine or decorative art), while Part 9 (objects of historical significance) refers to an object's association with a person, activity, event, place or business enterprise 'notable in Australian history.' Seven parts of the Control List have as a criterion that the object is not 'adequately represented' in Australian public collections.

This lack of clarity and consequent uncertainty has been identified as an issue affecting the effective operation of the PMCH Act and its administration. Because the assessment criteria are so open to interpretation it causes problems and delays for applicants, expert examiners, members of the National Cultural Heritage Committee and for Australian law enforcement officers and Australian Customs and Border Protection Service officers in determining whether object/s are Australian protected objects and if so whether their export would significantly diminish the cultural heritage of Australia.

Section 10 of the PMCH Act makes it clear that expert examiners, the NCHC and the Minister must be satisfied that an "object is of such importance to Australia, or a part of Australia...that its loss to Australia would significantly diminish the cultural heritage of Australia" when considering the denial of an application for an export permit. This is because the legislation is intended only to stop the export of Australia's *most* significant cultural heritage objects, without impeding legitimate trade. The emphasis on 'most' significant in section 10 is not emphasised elsewhere in the PMCH Act or in the Regulations and Control List. To make this objective more prominent would assist in adding clarity to the intention of the legislation.

Broad support was expressed for the adoption of the Collections Council of Australia (CCA) document *Significance 2.0: a guide to assessing the significance of collections* as a reference for assessing significance under the PMCH legislation. The submissions supporting the use of the

*Significance 2.0* criteria believed that a uniform approach would greatly improve the transparency and reliability of the significance assessment process. One submission also credited the current departmental expert examiner guidelines, which draw on the CCA's criteria developed for the original *Significance* publication, as being "practical and useful".

Many submissions also concurrently supported the reworking and clarification of the current definition of 'significance to Australia' in the legislation to include important aspects of significance that are currently excluded. The implementation of the consistent use of significance terminology across the PMCH Act and PMCH Regulations was also called for, as the current use of variable terminology such as "significance to Australia", "Australia-related" and "notable in Australian history" was thought to create confusion, uncertainty and potential legal loopholes.

Referencing *Significance 2.0* would also seem to satisfy the calls of several submissions for a "richer assessment for significance" more accommodating of the unique aspects of certain objects dealt with under the legislation. For example, the submission from the National Association for the Visual Arts (NAVA) considered the inclusion of "artistic" as well as "aesthetic" national significance criteria vital. *Significance 2.0* does set out "artistic and aesthetic" significance criteria.

*Significance 2.0* also incorporates national criteria for "social or spiritual" significance. Several submissions commented that spiritual significance in particular, as well as aesthetic and social significance and rarity, are not adequately addressed in the current legislative definition of significance. It was argued that incorporation of these elements in the definition of 'significance' would allow the uniqueness and value of nationally significant objects to be better conveyed in non-monetary terms.

Museum and heritage consultant Kylie Winkworth further noted that the original version of *Significance* received two years of testing prior to its release and has been used internationally for nine years, making it the only significance criteria to be so comprehensively trialled.

Several criticisms of any mandatory adoption of *Significance 2.0* under the legislation were also articulated. The most common criticism was that *Significance 2.0* is intended to be of most use to curators in collecting institutions, amateur or semi-professional museum workers and the bureaucracy. Submissions noting this believed that *Significance 2.0* would not account well for other types of criteria used for certain heritage objects, such as archival material, artworks, and antiques. We note that

this view would have been based on the original *Significance* publication and that the Collections Council of Australia has developed the revised version for a broader audience,<sup>5</sup> expanded the criteria and added a consideration of national significance.

Several commercial art dealers called for more exacting significance criteria to be introduced in order to accurately distinguish artworks which are exceptional 'national treasures' from other 'significant' artworks which may be exported under a permit. This is because Part 5 of the Control List ("Objects of Fine or Decorative Art") currently has no requirement for the significance assessment of artworks beyond confirming their conformity with age and monetary thresholds. However, expert examiners are required by their guidelines to consider the cultural loss to Australia if an object is to be exported. This will necessarily involve an assessment of the object's significance, including its aesthetic significance. Since the PMCH legislation came into force in 1987, 27 export permits for objects of fine and decorative art have been refused, 26 paintings and one colonial blackwood table.

Most of the submissions discussing this issue supported the adoption of more exacting criteria within the existing legislation rather than advocating the adoption of *Significance 2.0*. This likely stems from the widely held view that the *Significance* criteria were useful as a guide only for professions other than the museum profession.

At its meeting of 18 June 2009, the NCHC also asked that the PMCH review record its view that the assessment criteria for Part 5 of the Control List should be amended to include a similar criterion to Item 4.3(d) of the Control List – that an artwork may be ineligible for export if "it is not represented in at least 2 public collections in Australia by an object of equivalent quality". We note that such an assessment will at times be problematic as comprehensive inventories and catalogues are not available in many cases.

Some submissions questioned the ability of the *Significance 2.0* criteria to determine national significance. Dr Philip Jones believes that whilst the Collections Council of Australia's significance criteria assist in the identification of 'significant' objects which are exemplars of their type for further scrutiny, this level of identification does not necessarily translate into accurate assessment of an object's national significance. As national

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<sup>5</sup> Significance 2.0 is 'for all collecting organisations, agencies and owners that manage or hold collections. This includes everyone working with or associated with collections in any capacity-archivists, conservators, curators, educators, heritage managers, librarians, policy officers, interpreters, private owners and collectors, registrars, researchers, scientists and students, whether as paid workers or volunteers'. p.1.

significance is a complex assessment which must include consideration of an object's contribution to the national story, its national heritage value, its place in national collections and the national 'loss' should it be exported, Dr Jones argues that the "additional assessment skills and techniques required to identify objects which might be denied permits will still involve levels of expertise which are not readily codified". As mentioned, the recently published *Significance 2.0* does contain additional criteria for assessing national and international significance.

Another issue affecting all significance criteria models is the degree to which national significance criteria composed from a 'Western' perspective can accurately interpret the significance of Indigenous objects, particularly given the localised nature of Indigenous cultures. Several submissions noted that whilst an Indigenous object may not be interpreted to be of national significance, it may nonetheless hold deep local or regional cultural significance for Indigenous people who would oppose its export. Several submissions thus advocated for regional significance to be a consideration when granting or denying export permits for Indigenous objects. The department notes that this is already available under the current legislation.

The Victorian Aboriginal Heritage Council further asserted in its submission that no Indigenous object should be exported without the consent of the relevant traditional owner, regardless of the outcome of significance assessment under the PMCH legislation. While noting that such an approach would build further significant delays into an already lengthy process, it is clear that the significance criteria for Indigenous objects must be carefully considered in further consultation with Indigenous people. The review has also highlighted that national significance criteria may not be the most appropriate standard for identifying some exceptionally significant Indigenous objects.

Some alternatives or supplements to the adoption of *Significance 2.0* as the significance criteria to be used under the PMCH legislation were also suggested. Other significance assessment models, such as the National Heritage List and World Heritage List criteria and the Victorian Government's HERCON criteria, which have been adopted by the Environment Protection and Heritage Council (EPHC), were promoted. Some submissions also requested that the legislation have regard to, rather than formally adopt, a list of commonly used significance assessment criteria, including *Significance 2.0*, whilst others called for *Significance 2.0* to be incorporated outside the legislation within the departmental expert examiner guidelines.

Several submissions also requested that further consultation take place with collectors, independent experts, expert organisations and peak bodies representing collecting institutions, such as the Council of

Australian Art Museum Directors (CAAMD) and Council of Australian Museum Directors (CAMD), to ensure that any significance assessment tools adopted or referred to under the legislation are comprehensive and regularly reviewed. The department also considers further consultation on this complex issue to be advisable.

A few submissions additionally supported the idea of introducing criteria which would allow the contextual or place-based significance of an object and the impact of an object's removal on the overall significance of a location or collection, to be assessed. These submissions asserted that the current discordance and lack of comparative analysis between the significance assessment of objects and places causes confusion in relevant industries and the general public. One respondent asked for the Australian Government to "bring together the many different lists and sets of objects of 'national' significance...and develop a standardised set of assessment thresholds – as has been achieved by the Australian Heritage Council for place-based heritage". The department notes that it has been prevented under the current legislative provisions from taking into account an object's contribution to a collection's entire significance when assessing objects derived from collections for export permits.

In summary, there was general agreement that a national standard of significance is necessary and would be of benefit to both the PMCH significance assessment process and the collections sector generally.

However, beyond the endorsement of several significance assessment models currently in use, including *Significance 2.0*, as useful tools, there were few practical suggestions for how a national standard of significance should be legislatively achieved.

There was general consensus in the submissions addressing the issue of Indigenous significance, about the need for mandatory consultation with Indigenous contemporary custodians or, where this is not possible, Indigenous heritage consultants when determining the significance of Indigenous objects. As will be discussed in more detail in the chapter on Indigenous objects, whilst the principle of Indigenous consultation is well supported, very few submissions contained practical suggestions for how to incorporate increased and effective Indigenous consultation into the significance assessment procedures currently operating under the PMCH legislation.

***Recommendation 12:*** Consideration should be given to amending the definition of "significance to Australia" in the PMCH Regulations to be consistent with the Collections Council of Australia's Significance 2.0 criteria. This would allow the definition of significance to include important elements, such as spiritual significance, which have not been explicitly incorporated previously. The acceptance of Significance 2.0's treatment

*of Indigenous objects, archival material and objects of fine or decorative art will require further consultation with relevant stakeholders.*

**Recommendation 13:** *The consistent use of significance terminology should be adopted across the PMCH Act and PMCH Regulations.*

**Recommendation 14:** *Investigate the appropriateness of using “national significance” criteria to identify Indigenous objects, and conduct targeted consultation to inform who should undertake the assessment of Indigenous objects.*

**Recommendation 15:** *Develop and make publicly available, a reference list of specialist significance assessment guidelines commonly used by the collecting sector, such as those used by archivists and state and territory governments, to assist expert examiners and the public.*

## **6.4 Indigenous objects**

### **Overview**

Those review submissions which discussed the significance assessment of Indigenous movable cultural heritage and the current categorisation of Indigenous objects under the Control List put forward widely divergent views. They did not represent a wide range of stakeholders as most were from state governments, those engaged in the sale of Indigenous art, expert academics or professionals working in the collections sector.

Generally, most submissions supported the current Class A level of protection afforded the Indigenous APOs listed under Item 1.3 of the Control List, and considered the objects included to be appropriate. Some submissions also offered suggestions for minor clarifications or additions to Item 1.3 of the Control List.

The most contentious and divisive issue discussed in almost all submissions concerned whether the PMCH legislation, and in particular the current Control List categories, allow the adequate significance assessment and protection of Indigenous fine or decorative art of secret sacred and/or exceptional significance. The treatment of Indigenous fine or decorative art of secret sacred and/or exceptional significance under the PMCH legislation was universally acknowledged as a complex issue, with many potential consequences for collecting institutions, the commercial arts industry and Indigenous artists and communities.

Submissions arguing for stronger protections for Indigenous material put the view that their loss would have result in significant loss of traditional knowledge and culture. Those supporting a freeing up of the market



argued that the current arrangements are leading to a loss of opportunity for international recognition and career progression for contemporary Indigenous artists.

The review submissions and consultations also highlighted some omissions in the PMCH legislation and aspects that could benefit from being more clearly defined. The PMCH legislation's policy objective of protecting non-Indigenous APOs in order to facilitate their availability to the Australian public is not a policy objective that can also be applied to Indigenous APOs of secret sacred significance where access is highly restricted. Additionally, the current definition of "significance to Australia" in the PMCH Regulations is seen as failing to capture the spiritual dimension of cultural significance.

### ***Should there be special protection for objects relating to Aboriginal and Torres Strait Islander heritage?***

The majority of submissions discussing Indigenous movable cultural heritage supported special protection for Indigenous heritage objects under the PMCH legislation, and particularly the protection of Indigenous objects of secret sacred significance. Most submissions also largely agreed that the Indigenous heritage objects currently listed as Class A objects under Item 1.3 of the Control List are appropriate, although some had suggestions to clarify or strengthen the wording of this provision. Several commercial art dealers supported only the continued protection of the current listing of Class A objects, with no further additions.

Both the Victorian Government and the Western Australian Museum (WAM) commented that the Control List provisions protecting Class A Indigenous objects are relevant, important and give necessary "profile to issues regarding the protection of Australia's Indigenous cultural heritage". Museums Australia (MA) also believed it would be useful for the Australian Government to develop explanatory, "plain English" guides on the management of Indigenous cultural heritage to increase public awareness of the value of Indigenous material culture.

The Australian Commercial Galleries Association (ACGA) expressed explicit opposition to any relaxation of the current export ban on the Class A list of Indigenous objects, and suggested that the Indigenous objects prohibited from export could be reviewed regularly in consultation with public collecting institutions, Indigenous cultural heritage bodies and Indigenous people to ensure they remain appropriate.

Additionally, the NSW Government (hereafter referred to as the NSW Government submission) expressed the concern that without the special reference to Indigenous objects in the PMCH legislation, Indigenous

heritage objects could receive little or no protection in cases where they fall outside the jurisdiction of state or territory Aboriginal heritage laws. Several other submissions also asserted that the state and territory regimes which regulate the sale and collection of Indigenous artefacts within Australia constitute a “confusing array” of inconsistent and conflicting policies “overlain” by Commonwealth legislation such as the PMCH Act and the *Aboriginal and Torres Strait Islander Heritage Protection Act 1984* (ATSIHP Act).

It was thus a major concern of several submissions that amendments to the PMCH legislation should have regard to, and complement, state and territory Aboriginal heritage legislation and other protections afforded under the ATSIHP Act, the *Environment Protection and Biodiversity Conservation Act 1999* (EPBC Act) and state and Commonwealth heritage listing regimes. Most of the submissions supporting special protection for Indigenous objects seemed largely satisfied with the current level of protection provided to Class A objects, and did not advocate large scale advancement of any blanket restrictions.

The NSW Government and the Aboriginal and Torres Strait Islander Arts Board of the Australia Council (ATSIAB) further suggested, however, that the PMCH legislation may potentially be rendered a ‘last resort’ mode of protecting Indigenous objects from illicit movement or sale within Australia as well as overseas. This would involve a significant extension of its remit beyond dealing solely with import and export. These submissions referred to the domestic restrictions imposed by the New Zealand *Protected Objects Act 1975*.

However, Professor Lyndel Prott, Professor Patrick O’Keefe and Dr Philip Jones contended that any such regulation of the domestic movement of significant objects under the PMCH legislation would be tangential to its primary purpose of restricting the illicit export and cultural loss of nationally significant objects. WAM also commented that tighter restrictions similar to those under the Western Australian *Aboriginal Heritage Act 1972* may push the movement and collection of Indigenous material further underground.

Some submissions did ask for significantly tighter restrictions on Indigenous heritage objects, including one suggestion to elevate all Indigenous heritage objects more than 30 years old and currently listed as Class B objects to Class A status, without any possibility of temporary export.

Revisions and clarifications to several items of Part 1 of the Control List were also suggested in order to strengthen its protection of Indigenous objects. Both Dr Jones and Professor Vivien Johnson stated that a key

priority should be the removal of the criterion under Item 1.2(b) that an Indigenous object must not have been “created specifically for sale” in order to qualify for consideration under Part 1 of the Control List. Both Dr Jones and Professor Johnson agreed that substantial research discounts the idea that the majority of Indigenous objects were only made for one purpose – either sale or internal use in a “closed society”. One expert consulted as part of the review said that he believed that over 50% of Indigenous objects in collections internationally were created with the intent of being available for both internal and European consumption.

Additionally, this criterion assumes that the cultural significance of an Indigenous heritage object is diminished if it has been “made for sale”. Professor Johnson regarded this view as an “antiquated, ethnographic” assumption and pointed out that this artificial divide has been “long since transcended” by the booming market for Indigenous art of both cultural and aesthetic significance. This criterion does not apply to other object categories in the Control List so there is a lack of consistency in its application as part of the determination of an object’s ‘significance’.

DNREAS and Dr Jones also believed that the wording of Item 1.3, which relates to Indigenous Class A objects, should be clarified in several instances. DNREAS wished the current listing of “bark and log coffins used as traditional burial objects” to be expanded to cover other traditional grave goods. Whilst Dr Jones was uncertain of the cultural justification for protecting coffins lacking associated human remains, he nonetheless also believed the legislation should specify more clearly whether the coffins prohibited from export must be made of a composite of “bark *and* log” (as the current wording of paragraph (b) may be interpreted) or can be “bark *or* log”.

Dr Jones also recommended that the reference to “secret and sacred” ritual objects in paragraph (a) of Item 1.3 should be changed to the now widely used “secret sacred”, as certain objects may be sacred but not secret. It is worth noting that this terminology of “secret sacred” is also currently used by the Australian Government’s Return of Indigenous Cultural Property (RICP) Program. Another expert consulted as part of the review process argued for the use of sacred only, perhaps qualified by noting that it is kept restricted. He felt that the term secret set up a dichotomy between an Aboriginal and Torres Strait society which held many things as secret and a non-Indigenous society which does not, highlighting a notion of difference.

DNREAS further recommended that the current listing of dendroglyphs under item 1.3 should be expanded to cover any item associated with a registered Australian Indigenous Sacred Site, which are specified under the Northern Territory’s *Aboriginal Sacred Sites Act 2004*. Finally,

DNREAS also requested that the Part 1 Control List title of “Objects of Australian Aboriginal and Torres Strait Islander Heritage” should be followed by an open or non-exclusive description of specific examples of Indigenous objects.

Some submissions did oppose the idea of special protection for Indigenous heritage objects. One submission asserted that Indigenous heritage objects, including secret sacred objects, exist on a continuum of significance and should be considered on their individual merits and relative significance, rather than offered a separate category of special protection. Another submission stressed that the significance criteria for Indigenous objects should be aligned with the significance criteria for non-Indigenous objects, including non-Indigenous objects of spiritual or religious significance. This submission further added that if any Indigenous object is adequately represented in public collections, then there is no compelling reason to prohibit its export.

WAM, however, believed that the Control List’s provision in item 1.2 that objects must be “adequately represented in Aboriginal or Torres Strait Islander community collections or public collections in Australia” in order to allow their export is not strong enough. WAM recommended that an object’s rarity, condition and significance to both Indigenous artisans at the time of its creation and contemporary Indigenous people form part of the consideration process.

Finally, the majority of submissions supported the principle of consultation with Indigenous people during the significance assessment of Indigenous heritage objects and artworks. Recognition of the primary role of Indigenous people in the custodianship of their heritage was encouraged by several submissions, including the Victorian Aboriginal Heritage Council. The Victorian Government and Museum Victoria also acknowledged the many practical difficulties of identifying secret sacred objects, including the realities of undertaking consultation with community members and communities who may have different views.

The Victorian Government and Museum Victoria offered the Registered Aboriginal Party (RAP) permissions system under the Victorian *Aboriginal Heritage Act 2006* as a consultation model, and the Victorian Government proposed that only Indigenous expert examiners and Indigenous NCHC members should assess export permit applications for Indigenous objects. MA and Converge Heritage + Community also noted the *Ask First* principles published by the former Australian Heritage Commission as valuable guidelines. Few suggestions were proffered as to how the existing significance assessment process under the PMCH legislation could incorporate more targeted and effective Indigenous consultation.

**Recommendation 16:** *Investigate the most appropriate way to protect Indigenous heritage material under the PMCH legislation. Issues to examine further include which Indigenous objects should be restricted from export or subject to export permits, how Indigenous objects and works of art should be defined and categorised under the Control List, how Indigenous consultation on the assessment of Indigenous objects may be effectively utilised, and how protection of Indigenous objects under the PMCH legislation will relate to, and interact with, other Commonwealth, state and territory legislative regimes, including the outcomes of the review of the Aboriginal and Torres Strait Islander Heritage Protection Act 1984.*

***Should this also include artwork that is identified as having secret sacred significance for Aboriginal and Torres Strait Islander community members?***

The proposition to extend the PMCH legislation's special protection for Indigenous heritage objects to Indigenous artworks identified as depicting objects or rituals of secret sacred significance was contentious. The most unified theme evident in the submissions received was the idea that if Indigenous artworks of secret sacred significance are to be afforded special protection under the PMCH legislation, it should be as a defined list of specific artworks rather than a generalist class of artworks.

The focus of this debate invariably remains the well known early Papunya Tula boards, and particularly those painted between 1971 and 1972. Numerous submissions have advocated for the special protection of a defined subset of these early Papunya Tula boards for several reasons.

Certain early Papunya Tula boards are known to depict objects or rituals of secret sacred significance which are traditionally subject to cultural restrictions on access and display. Several contemporary communities or community members have also indicated a wish to continue to restrict the display of certain Papunya boards. Considerable debate and research has been conducted, both by anthropologists and relevant Indigenous communities, on the issue of whether all of the Papunya artists producing these boards fully understood the market economy and intended those works that were sold to private individuals to be available for general circulation and display. It has also been debated whether the same cultural restrictions that would apply to a secret sacred object or ritual would also apply to an artistic depiction of that object or ritual.

Several submissions and experts consulted believed that community consultation and historical evidence favour the idea that at least some of

the Papunya artists painting from 1971-1972, the Pintupi artists, did not have the same understanding of the market economy and how to safely present secret sacred elements in a cross-cultural marketplace as other Papunya artists due to their geographical isolation. As a result, Professor Vivien Johnson, John Kean and Kate Khan believe that a proportion of Papunya boards produced during this period were not intended for sale or general circulation.

Kean also acknowledged the difficulty of choosing which types of evidence to favour more heavily when debating the intentions of the Papunya Tula artists, noting that some researchers regard the wishes and opinions of their contemporary descendents most highly, whilst others seek to privilege the original artists' intentions. Kean also commented in consultation that whilst trade in religious items is common in many societies both historically and in the contemporary period, he believes research reflects this was not intended as the principal reason why Pintupi artists took to painting so enthusiastically from 1971-1972.

Several experts and submissions believe that it may be appropriate to extend Class A status to certain early Papunya boards and other highly significant Indigenous artworks due to their exceptional national significance in aesthetic and historical terms.

Both Professor Johnson and Kean agreed that it is necessary to protect Papunya boards of secret sacred significance created between 1971 and 1972. They advocated adding a new Class A category to Part 1 of the Control List for Indigenous artworks of secret sacred significance.

Professor Johnson and Kean also believe it would be possible to further define this category under the legislation by creating a list of restricted or protected Papunya boards using focused community consultation, Professor Johnson's database and other sources. Additionally, the *Significance 2.0* guidelines provide for the assessment of objects, including artworks, according to social or spiritual significance, which would accommodate objects like the Papunya Tula boards.

Both Kean and Professor Johnson agreed that whilst consultation with Pintupi artists and other Indigenous communities has indicated that an artwork depicting secret sacred objects is not considered to be a secret sacred object itself, communities remain concerned about, and wish to restrict, the display of the secret sacred subject matter within these artworks. It was also generally agreed by Kean, Professor Johnson and Dr Philip Jones that Papunya boards created after 1972 were generally not suitable for Class A protection under Part 1 of the Control List on secret sacred significance terms, as by this time all Papunya artists had attained full understanding of the market economy context and agreed

appropriate strategies for presenting secret sacred material within artworks to outsiders.

Kean also asserted that the protection of this specific subset of early Papunya boards on secret sacred significance terms would provide certainty to both governments and the art market, eliminating lengthy consultation processes over individual boards. Both Kean and Professor Johnson also suggested that those Papunya Tula boards offered protection from export could be made available to the relevant Indigenous communities through a purpose-built facility in order to provide an “amazing resource” and legacy for Indigenous people. This proposal acknowledges that there would not usually be an incentive for Australian collecting institutions to purchase and preserve secret sacred Papunya boards denied export, as they are restricted from display.

Other organisations supporting the protection of Indigenous art of secret sacred significance under Part 1 of the Control List included ATSIAB, DNREAS, the State Library of Queensland, the Victorian Government (which also noted that no thresholds should be used to assess secret sacred artworks) and, with the qualification that protection should not constitute a blanket ban but should be extended to selected works only, the NSW Government and CAAMD.

However, several submissions from anthropological experts and art dealers opposed the extension of blanket protection to Indigenous artworks determined to be of secret sacred significance under the PMCH legislation.

One submission pointed out that whilst contemporary community members may have identified certain Papunya Tula boards as being of secret sacred significance, this does not necessarily mean the artworks would satisfy national significance criteria (particularly as several Australian collections of Papunya Tula boards exist). This submission also asserted that Papunya boards and other items of Indigenous secret sacred significance should be assessed for national significance on par with other religious items under the PMCH legislation. Finally, this submitter also doubted that the Papunya artists were naïve about the destination of the works they offered or sold for external consumption, and thus questioned the validity of contemporary calls to restrict their display and sale.

Several commercial art dealers also opposed the special protection of Indigenous artworks identified as having secret sacred significance on the grounds that this may negatively affect the international Indigenous art market. Commercial art dealers also took the view that Indigenous artists were well versed in strategies to conceal or disguise secret sacred

content in artworks. On the other hand, Kean and Professor Johnson contended that the number of secret sacred Papunya boards which should be protected from export under the PMCH legislation would amount to a maximum of approximately 150 works in private collections, many of which are already located overseas beyond the purview of the PMCH legislation. This represents a very small proportion of the Indigenous art market. Professor Johnson also stated that the type and style of Papunya boards currently generating the most interest from international collectors are different from the early, potentially secret sacred Papunya boards.

Ultimately, the submissions from Dr Jones and at least one art dealer were in agreement that if a case of exceptional secret sacred significance can be made for certain well-documented artworks, such as certain early Papunya boards, then a selective Class A listing may be acceptable. However, they do not believe there is a persuasive case to automatically protect a generalised class of Indigenous artworks of secret sacred significance. Dr Jones additionally noted that the consequences for the regulation of photographs and films of sacred objects or ceremony should be considered if special protection is granted to Indigenous artworks of secret sacred significance.

The submissions and consultation conducted during the review highlighted that the best means of further consulting with Indigenous communities to identify Indigenous artworks of secret sacred significance is difficult to ascertain. A few submissions acknowledged the difficulty of repeatedly consulting Indigenous communities on a factor – significance – which is subject to change in community perceptions over time.

At least one expert consulted believed that Indigenous communities should not be consulted wholesale on heritage objects or artworks beyond confirming provenance details, lest contemporary debates about an object's significance be continually reopened in the absence of its traditional owner or creator. Another expert noted that in the case of Papunya Tula boards, further consultation should be restricted to discussing those Papunya boards which remain ambiguous, as it would be insulting to consult communities on items they have already defined as either safe or dangerous in previous consultations. It is obvious that mechanisms for consulting communities and feeding this into significance assessment procedures under the PMCH legislation require further consideration and we note that there are currently a number of models for Indigenous community consultation in place.

Overall, it is clear that offering special protection to Indigenous artworks identified as having secret sacred significance under the PMCH legislation is an extremely complex issue, complicated by the historical



burden of many layers of consultation, and varied consultation outcomes, with the Indigenous artists creating such works and related Indigenous communities. As submissions on the issue were from a relatively narrow range of stakeholders and the views put forward so diverse, we are unable to recommend any changes to the PMCH legislation in the short term. However, the issues raised are important and should be considered further in consultation with a broader range of stakeholders.

**Recommendation 17:** *Given the widely divergent views contained in the submissions it is recommended that at this time the current arrangements be maintained.*

**Recommendation 18:** *Undertake targeted consultation with relevant stakeholders and representative bodies to determine whether Indigenous artworks of secret sacred significance which should be granted Class A protection under the PMCH Control List.*

***Does the Control List allow an appropriate assessment to be made of Indigenous artworks regarded as having exceptional spiritual, cultural and historical significance?***

Currently, Part 5 of the Control List does not specify significance criteria for objects of fine or decorative art beyond set age and monetary thresholds. The *Significance 2.0* guidelines, however, do specify assessment criteria for the social and aesthetic and social and spiritual significance of objects which could be adopted.

A number of submissions stipulated that greatly strengthened provisions (beyond the establishment of more comprehensive significance criteria) should be introduced to assess the significance of Indigenous art, such as a requirement to assess *all* Indigenous artworks on a case by case basis. However, no suggestions were offered as to how to efficiently administer the greatly increased workload and processing time involved in such an assessment model.

Overall, experts from state collecting institutions suggested in consultation that they feel the Control List generally protects highly significant Papunya works and that the NCHC's Papunya Tula Reference Group has been a valuable forum for discussing divergent opinions and resolving complex issues. However, they remain uncertain whether all of the most significant Indigenous artworks are being systematically captured whilst they lack special protection under the PMCH legislation. One expert also recommended that the Papunya Tula Reference Group could be expanded to assist its experts to balance their workload.

One submission also recommended that the criterion under Part 1 of the Control List that an object must be protected if “it is not adequately represented in Aboriginal or Torres Strait Islander community collections, or public collections in Australia” should also be a criterion under Part 5 of the Control List for objects of fine or decorative art. However, the submission also recommended leaving secret sacred Indigenous artworks out of assessments of “adequate representation” as they can not be displayed by the collecting institutions holding them. Finally, ATSIAB cautioned that the PMCH legislation should aim to strike a balance between protecting Indigenous artworks of exceptional significance and facilitating access to the Indigenous art market.

The submissions to the review have emphasised that the significance criteria and thresholds currently used to assess Indigenous heritage objects and artworks under the PMCH legislation are problematic, may not adequately protect Indigenous objects and artworks of either exceptional spiritual significance and/or aesthetic and historical significance, and require revision.

A major theme has also been the consideration that Indigenous objects and artworks may require alternative significance assessment criteria which account for culturally specific, as well as more localised or regionalised, assessments of exceptional significance. The special assessment and protection of Indigenous objects has been generally supported in the context of the attempts of Indigenous cultures to recover from a history of sustained cultural devastation and the opposition of many contemporary Indigenous people to the trade in cultural property of spiritual significance.

In light of these dilemmas and the intersections between the significance assessment of Indigenous objects and artworks of secret sacred significance, the department believes it would be most useful to consult further and consider establishing a framework to assess all Indigenous objects and artworks as a separate category under the PMCH legislation. This concept was also supported by several submissions.

***Recommendation 19:*** Investigate the introduction of significance criteria for Indigenous objects and works of art which take into account spiritual significance and cultural significance, as well as the age and monetary thresholds specified under the PMCH Regulations.

## 6.5 A national register?

### **Overview**

The department noted in the review discussion paper that Switzerland, New Zealand and France do not use a Control List system to restrict the export of their significant cultural objects. Instead, they have established national (and sometimes also regional) registers of significant objects. Professor Lyndel Prott further advised that Japan and Germany also use national lists. Additionally, under the French system both publicly and privately owned objects may be registered, and an object's owner and location must be recorded and kept up to date.

The review discussion paper asked stakeholders if the Australian Government's National Heritage List (NHL) system, which protects places of outstanding heritage significance to Australia, could be a suitable model for developing an Australian national register of cultural and heritage objects.

Overall, most submissions to the review expressed only cautious or qualified support for a national register, and believed that it should only be an informal guide. Most submissions recognised that a national listing of significant objects could be used, along with other tools, by expert examiners, export permit applicants, collecting institutions and the public to assist with determining whether an object is an APO. Several submissions, however, expressed outright opposition to the idea of a national register.

In addition, most submissions strongly supported the establishment of a French-style register of the owners and locations of APOs which have been denied export permits. Substantial support was also expressed for the Australian Government to provide funding to private individuals and public institutions to assist with the conservation and preservation of these eligible objects. At least one submission discussing this option suggested that such financial assistance should be subject to adequate safeguards and controls, and appropriate trustee arrangements in order to account for the demise of individuals or bodies owning APOs denied export permits. A register of APO owners could be regularly audited to ensure that nationally significant objects remain intact and within Australia, while funding for conservation would help to offset preservation costs and the loss of overseas revenue for owners. The implementation of such a register is discussed further in the chapter on streamlining the export permit application process. We note that under the *Historic Shipwrecks Act 1976*, currently under review, the transfer, possession and custody of material such as relics, including coins, from historic shipwrecks is regulated.

## ***Should a national list of heritage objects of outstanding national significance be established?***

Some submissions supported the establishment of a national register based on NHL criteria without qualification. One submission emphasised that the alignment of the significance assessment criteria used under the PMCH legislation with NHL criteria would particularly enhance fossil protection, as fossil discoveries often provide the basis for granting sites national heritage listing. While this may be true, as is often the case due to the diversity of objects regulated under the PMCH legislation, few other submissions expressed the belief that the NHL criteria would adequately cover the majority of the cultural objects covered by the Control List.

Walter Bloom commented that a national register may assist with documenting privately held items of outstanding significance to avoid their “disappearance” from the public record. Similarly, other submissions argued that a national register may help to notify owners of the significance of their objects and inform them of their obligations under the PMCH legislation, although it must be noted that no obligation currently exists under the PMCH legislation for owners to preserve APOs within Australia. It was also proposed that a national register could aid in tracking and deterring any theft of the items listed on it.

Other submissions noted that a national register could help expert examiners to establish comparative benchmarks of significance, and provide valuable insights into Australians’ “national preoccupations” and evolving perceptions of significance. ATSIAB noted that Indigenous communities could list objects which they consider to be significant, although this suggestion assumes that the national register would be open to public nominations. Finally, it was also stated that previously unknown or discovered works could be added to the national register if they arise, or if their known significance appreciates to the value of “national significance”.

However, many more submissions contended that a national register would be resource intensive and burdensome to create and administer, as it would not become sufficiently comprehensive for a long time and would require active management to remain effective. Many submissions also believed that a national register would be unlikely to provide greater clarity than the current Control List and would be a redundant waste of resources, as export controls similar to those already in place would remain necessary to prevent the loss of the objects registered.

Professor Lyndel Prott further argued that objects denied export permits constitute a sufficient de facto list of Australia’s most significant objects,

and noted that the idea of a national register has previously been rejected by all state and territory governments as administratively unworkable. Museum Victoria also advised that the Victorian Government is currently facing challenges in resourcing the administration of its own movable cultural heritage legislation, lending credence to the threat of undue administrative burden.

Other submissions expressed concern over the possibility that a national register may marginalise and reduce the protection of significant objects which are not listed on it. ATSIAB asserted that it would be important to ensure that significant objects which are not listed are not subject to superficial examination or reduced consultation when being considered for export. The NSW Government also attested that the rushed or retrospective listing of previously unidentified objects can be legally and procedurally complex and “unsatisfactory”.

Several submissions also pointed out that certain objects currently on the Control List would not be suitable for specific listing on a public national register. It was acknowledged that objects such as Indigenous human remains and philatelic objects, for example, are significant and sensitive but are not likely to be considered of “outstanding national significance” by the broader community. The appropriateness of publicly listing Indigenous human remains and secret sacred objects was also questioned by many. There was general consensus that listings of gender specific and secret sacred objects would require restricted access, generating further administrative complexity. The State Library of Queensland also encouraged careful consideration of the privacy implications of a national register.

Several submissions also opposed the use of the NHL as a model for protecting movable cultural heritage. The Victorian Government and Museum Victoria asserted that the significance criteria for static heritage sites are not suitable for application to movable cultural heritage.

The Western Australian Museum (WAM) posited that a national register could only be feasible if it was allocated appropriate funding and national agreement was sought on the assessment process. The NSW Government further requested that the potential impacts of family law provisions governing the dispersal of estates be considered, as these may affect the ownership and protection of registered objects. The Victorian Government also asked for an appraisal of the eligibility of dispersed collections for national registration, and questioned how a national register could recognise an object’s impact on the significance of an entire collection.

Finally, there were mixed responses to the question of which objects should be included on a national register. Most submissions supported

the inclusion of APOs denied export permits, with some also suggesting that these objects should concurrently become Class A objects. Dr Philip Jones suggested that objects purchased using the NCH Account should also be included on a national register, as these objects would have been purchased on the basis of a strong case for national significance.

Several submissions also believed that objects from public collections could be included on a national register, although there was no decisive consensus as to whether this would include all such objects or only exceptionally significant objects. This highlights a key issue – what type of significance criteria should be used for a national register of movable cultural heritage? No submissions specified this, although they may have commented on the use of significance criteria under the PMCH legislation generally.

The Victorian Aboriginal Heritage Council believed that a national register should extend to objects held in private collections and by Indigenous contemporary custodians, while the ACGA also asserted that objects on temporary export permits should be registered. Dr Jones further proposed that prominent or frequently exhibited and publicised objects could be included, and that it would be useful to call for public nominations. It is likely, however, that public nominations would increase the initial burden of administering a national register, as the significance of nominated objects would need to be assessed and confirmed.

Additional issues relating to a national register that the department was urged to consider included ensuring that it would sufficiently complement existing state heritage registers. The NSW Government also stated that should a national register supersede the Class A category of the Control List, it should be determined by a detailed thematic study of all current and potential Class A objects, rather than by public nomination, and should focus on objects most at risk of illegal export. The Victorian Government also requested a thematic study, but supported supplementing this with public nominations of both publicly and privately owned objects.

***Recommendation 20:*** *Compile a publicly available list of examples of nationally significant objects, including objects which have been denied export permits and objects which have been purchased using the NCH Account, to assist export permit applicants and expert examiners to comparatively assess national significance. Legal issues with publishing this information will also need to be investigated.*

***Recommendation 21:*** *All objects placed on a publicly available list of examples of nationally significant objects be accompanied by a statement of significance.*

**Recommendation 22:** Update the *Guidelines for Expert Examiners* to require experts to use the list of nationally significant objects as a guide in undertaking their assessments.

**Recommendation 23:** Liaise with relevant state and territory departments to determine whether the criteria used in other jurisdictions state and territory registers of national significance align with national significance criteria. Where alignment is evident, establish procedures for referring Australian protected objects denied export permits to state or territory registers, and for states and territories to refer objects of potential national significance to the department for inclusion on its list of nationally significant objects.

***Should a register be kept of the owner and location of those Australian protected objects which have been denied export permits? Should funding be provided to assist private individuals or public institutions with the conservation of these objects?***

Those submissions discussing the issue of providing Australian Government funding to institutions and private collectors to help them conserve nationally significant objects prohibited from export unanimously supported this idea. Anecdotally, the department has also received feedback that institutions and private collectors submitting export applications may not always have the resources to adequately preserve an object should it be found to be nationally significant and is denied export.

The department does not currently have funding to conduct any such conservation payments. The type and amount of payment that would be most effective is also a matter that would require further consultation and clarification. For example, it is unclear whether a set payment would be best, or a sliding scale of payments based on elements such as the estimated monetary value or condition of an object. It is also important to consider the resources that would be required to administer the allocation of conservation funding, and to assess any applications required.

In order to achieve this goal, the department would need to create and seek additional funding for a conservation payment program, or explore financing options such as drawing from increased funding (potentially including pecuniary penalties for offences) or donations to the NCH Account. This issue is further considered in the Chapter on the Account.

Finally, it is worth mentioning that such funding would focus on the domestic protection of APOs, which is currently not the major aim of the PMCH legislation. Effectively, the PMCH legislation as it currently

operates only recognises an APO at the border between Australia and other nations.

Another concern centred on the inclination of private collectors to preserve nationally significant objects prohibited from export when no incentives are currently offered and no offences or punishments for destroying or damaging such an object are currently contained in the PMCH legislation. This is particularly relevant given private collectors may lose a significant source of income should an object be denied export for sale overseas.

Several submissions advocated for all owners of objects determined to be of national significance and prohibited from export to be recorded, and for the object's location also to be recorded and kept up to date to ensure it remains in Australia. This register could be monitored using regular audit checks. Such a register would be somewhat akin to New Zealand's register of Maori cultural heritage under the *Protected Objects Act 1975*; although an Australian register under the PMCH legislation would presumably apply to all APOs prohibited from export. The New Zealand legislation allows only registered collectors, licensed dealers and public museums to buy Maori cultural heritage.

***Recommendation 24:*** *The PMCH legislation should require owners of all Australian protected objects denied export permits to register their contact details and the location of their object with the department, to keep these details up to date, and to assist with any audit checks. This register would be administered and used by the department and Australian Customs and Border Protection Service officers and would not be publicly available. The department should be appropriately resourced to maintain this register.*

***Recommendation 25:*** *Undertake further consultation with relevant stakeholders to determine whether assisting owners of objects prohibited from export with their preservation and conservation is an appropriate objective for the PMCH legislation.*

***Recommendation 26:*** *Investigate defining and introducing the destruction or damage of an Australian protected object prohibited from export by its owner as an offence under the PMCH legislation, with an associated pecuniary penalty. Under a civil regime, pecuniary penalties could be awarded by a court on a case by case basis depending on the severity of the damage caused.*



## **6.6 Streamlining the export permit application process**

### ***Permits, general permits, and certificates of exemption***

To export a movable cultural heritage object, applicants must apply for a permit in writing. The application process involves three steps:

- the application is referred to one or more experts examiners for assessment;
- these assessments are reviewed by the National Cultural Heritage Committee, which recommends to the Minister whether or not an export permit should be granted;
- the Minister makes the final decision as to whether an export permit will be granted.

The Minister may impose conditions on a permit, such as a time limit for the temporary export of an Australian protected object.

Until recently, letters of clearance have been issued for objects determined not to be Australian protected objects which, therefore, do not require an export permit. These letters were developed to be provided to Customs when the object is exported to assist with the object's passage out of Australia.

### ***Certificates of exemption***

Certificates of exemption may also be issued for Australian protected objects, including Class A objects, which are being temporarily imported to Australia. This mechanism allows Australian protected objects to be imported for an exhibition, or for sale at an auction, and be re-exported, encouraging overseas owners of these objects to send them back to Australia for exhibition or sale. This certificate provides security, under the PMCH and ATSHIP Acts, that the object can be re-exported post exhibition or sale. However, certificates of exemption do not provide blanket protection against potential claims under other legislation, such as state and territory laws.

***Should applicants for export permits under the PMCH Act be required to provide more rigorous documentation, including undertaking some of the research currently undertaken by the expert examiners? Would this assist in streamlining the assessment process?***

Although current application forms for temporary and permanent export request information on the object to be exported, many of the applications submitted do not include a significance assessment or detailed provenance information. Insufficient information can cause delays within the application process as additional information needs to be requested from the applicant and/or sourced by the expert examiner, to enable the provision of sound advice to the National Cultural Heritage Committee and the Minister. Delays also occur in cases where the expert examiner has recommended against an export permit. In these circumstances, the applicant is invited to respond to the examiner's findings and an increasing number of applicants are providing substantial amounts of new information on the provenance of the object at this time. The expert examiner or examiners are then required to reconsider the application, and in many cases undertake a new assessment. This can lead to lengthy delays which could have been prevented if the applicant had been required to undertake more thorough documentation at the time the original application was lodged.

The United Kingdom, Canada and New Zealand all place a greater obligation on the applicant for an export permit to provide documentary evidence of provenance and significance. In New Zealand for example, if sufficient information is not provided then the application will not be processed, thus providing an incentive for the applicant to provide good quality information upfront.

Contributors to the review overwhelmingly expressed support for the need to strengthen the requirements for applicants to provide more rigorous documentation when submitting export permit applications under the PMCH Act. This included recognising the need for the provision of significantly more documentation relating to the objects, such as good quality images to assess features of the objects, details of acquisition and the provenance of the objects. For Indigenous objects, it was also suggested this could include the need to provide details of provenance and details of Indigenous consultation.

Currently there is no legislative basis to request additional information from an applicant. Contributors expressed general support for applications not being processed until there is sufficient information provided by the applicant. Suggestions included that a basic standard of documentary evidence and provenance should be set and met by

applicants, before an assessment could proceed. This could assist in obtaining information on the significance of objects from applicants who are hesitant to provide basic information which may lead to a permit refusal.

There was recognition that the application process needs to be more clearly understood by applicants in order to facilitate the provision of more relevant and rigorous documentation and information. An applicant who is not familiar with the process is more likely to need support and guidance in undertaking good quality provenance and significance research to complete an application. On the other hand a business, company or institution may reasonably be expected to offer more information and have access to more resources to assist them in putting together good documentation. Suggestions to address these issues include improvements to the application form to provide clear instructions of requirements and to improve the understanding of the application process, providing best practice examples and case studies of what an application and supporting documentation should look like, introducing a form of declaration that all relevant information has been supplied and introducing a penalty for failing to provide relevant information in an application.

Although some concerns were raised that information provided by applicants would not be independent, submissions generally noted that the provision of more rigorous documentation by the applicant would not replace the research undertaken by expert examiners. A mechanism would need to be in place to ensure the validity of the information provided by the applicant. Strengthening requirements during the application process may, however, place more emphasis on the role of expert examiners in verifying the research and documentation provided by the applicant.

There was general agreement that introducing these requirements would assist in streamlining the assessment process, by reducing the amount of time an expert examiner needs to take to consider an application.

***Recommendation 27:*** *Require applicants for export permits under the PMCH Act to provide more rigorous documentation, including undertaking provenance and significance research for objects they are exporting. A guide which includes examples and a list of suggested resources to research provenance could also be made available to assist applicants to provide an appropriate level of relevant information.*

***Recommendation 28:*** *Consider amending the legislation to strengthen the requirement for the applicant to provide adequate information when submitting an export permit application.*

## ***Should a fee be charged for the processing of permit applications?***

Currently, there is no fee charged for submitting a temporary or permanent export permit application or an application for a certificate of exemption, under the PMCH Act. Many Australian Government permit schemes charge fees. This includes a number of permit schemes currently administered by the department, such as the wildlife permits scheme under the *Environment Protection and Biodiversity Conservation Act 1999* and the import and export of hazardous waste under the *Hazardous Waste (Regulation of Exports and Imports) Act 1989*.

The discussion paper for the review requested feedback on the introduction of a fee for processing permit applications. On the whole, the introduction of fees was strongly supported. However, many submissions caveat this support with the need to improve the permit application process, especially in regard to the length of time taken for processing applications, before a fee system could be introduced. There was also recognition that charging a fee was reasonable, so long as it was an amount that would not deter applicants from applying.

A relatively small number of submissions objected to the introduction of fees. One submission raised the risk of introducing fees as a disincentive for people to lodge an application and comply with the Act. The *Council of Australian Art Museum Directors* expressed concern that applicants feel inconvenienced by the process, without adding a fee structure. The *Australian Commercial Galleries Association* expressed their objection to the introduction of fees on the basis that it would be another impost on an already volatile art market and that decisions relating to Australian heritage should be the concern of the Australian Government, from both a policy and financial perspective.

The introduction of fees is consistent with other permitting systems administered by the Australian Government, state and local governments. There are administrative and research costs associated with processing permit applications, and although expert examiners undertaking assessments are currently operating on a voluntary basis (an issue that is discussed at Section 5.7 of this report), several submissions have flagged the idea that fees could be collected to pay expert examiners which could also contribute to improving the timeframes for processing applications.

Developing an appropriate fee structure would require further investigation, including further analysis of the effectiveness of similar systems already in operation. The Victorian Government's submission highlighted the permit process in place for the *Aboriginal Heritage Act 2006* (Victoria) as a model. This Act provides for the protection of

Victorian Aboriginal cultural heritage, including movable cultural heritage. Permits are required to remove an Aboriginal object from Victoria. Currently a fee of \$147.55 is charged for this application with funds then being used to pay expert examiners. This submission also recommended including a capacity to waive fees where appropriate and setting a sliding scale according to the value of the objects. They also suggest an additional fee be charged to applicants who do not provide sufficient details and do not adequately respond to requests for additional information. The additional fees can then be used to cover the costs of expert examiners to undertake the additional research or make a physical inspection of the object to gather the information required.

A detailed cost benefit analysis would be required to investigate the cost of establishing a user pays system taking account of the number of permits issued and the resources required to establish and administer such a system.

**Recommendation 29:** *Investigate introducing an application fee for permits under the PMCH Act. This should include undertaking a detailed cost benefit analysis to establish whether introducing a user pays system for permit applications is financially viable. The development of an online permit application system to support efficient processing should also be investigated.*

**Recommendation 30:** *If application fees are introduced, the development of a payment scale is recommended to cover the different categories of permits (for example temporary and permanent permits and certificates of exemption) and applicants (such as individuals versus companies).*

**Recommendation 31:** *The commencement of a fee system would need to coincide with the implementation of set timeframes for processing applications.*

### ***Should the department be given a greater decision making role in regard to objects that are not Australian protected objects?***

To reduce delays and improve efficiency in processing applications, the review raised the idea of departmental officers playing a greater role in the decision-making process. Specifically, the question was asked whether departmental officers should make decisions regarding applications where an object is clearly not significant to Australia, or is adequately represented in public collections.

Contributors to the review expressed divergent views on a devolving more of the decision-making process to the department. A number of industry organisations, collecting institution representative bodies and some state governments supported the idea of giving greater decision-making powers to departmental officers. This view was expressed in the case of objects that are not APOs, as a way to streamline the process and reduce timeframes.

Whilst recognising that such a change may reduce delays and improve efficiency, the submission from the NSW Government expressed some concern about a reduction of appropriate protection of the process by increasing the role of the department. Other submissions expressed concern on the basis that the department does not have the tools or knowledge to make informed decisions of the significance of an object.

Currently, where an object is clearly not an APO, for example where it does not meet the monetary or age threshold of the PMCH Control List, or where an expert examiner confirms the object does not meet the criteria of the Control List, the applicant is advised in writing by the department that the object is not subject to regulation under the PMCH Act and no export permit is required. Applicants clearly benefit from knowing upfront that the object they wish to export is not an APO and, therefore, not subject to regulation under the PMCH Act.

Similarly, if the object is assessed as an APO by an expert examiner and the type of object is adequately represented in public collections, there could be cost and time efficiencies gained by referring these decisions to a departmental delegate, rather than proceeding with engaging the NCHC and the Minister in the decision-making process.

***Recommendation 32: Consider amendments to the PMCH Act to streamline the decision-making process for permit applications where an expert examiner advises that an object is an Australian protected object and adequately represented in Australian collections.***

A small number of concerns were raised in submissions about the increased risk of applicants providing incorrect or insufficient information in an attempt to avoid consideration by the NCHC and the Minister. However, letters issued by the department confirming the object does not meet the criteria are only issued following the receipt of advice from an expert examiner.

A streamlined process is currently in place for the export of fossils and meteorites. Applicants are encouraged to contact an expert examiner directly to check whether the object meets the criteria and requires a permit. If the expert examiner finds the object does not meet the criteria they may issue a 'letter of clearance', which acts as a letter of comfort for

the exporter and confirms that the object does not require a permit. An evaluation of this process could be undertaken to determine its effectiveness.

**Recommendation 33:** *Evaluate the effectiveness of the current process for expert examiners issuing letters of clearance for the export of fossils and meteorites.*

***Should export permits be denied when there is no interest from public collecting institution in acquiring an object, and no immediate prospect of its proper conservation and preservation in Australia?***

Submissions to the review were divided in their response to the question of whether an export permit should be denied when public collecting institutions do not express an interest in acquiring a significant Australian cultural heritage object.

Those arguing in favour of denying a permit despite the lack of interest from a public collecting institution did so on the basis that institutions are not always aware that significant objects are on the market, they may have difficulty in obtaining funds to purchase such an object or not have immediate storage capacity. There was recognition that this may change over time, meaning an object may subsequently find a place in a public collection and if the object has already been exported then the opportunity to make it publicly accessible in Australia will have been lost.

It was suggested that the term 'interest from a public collecting institution' would need to be carefully defined. As where the lack of interest was related only to a lack of funds, then this issue could be raised with the department and could be grounds for denying an export permit. This would then allow time for the purchase of the object to be negotiated with the assistance of the NCHA or another funding source. It was also suggested that the department could play a more pro-active role in asking institutions if they are interested in purchasing significant objects including consulting with peak heritage conservation bodies such as the Council of Tramway Museums of Australia.

Some submissions, although arguing against the refusal of a permit where there is no interest from public collecting institutions in acquiring the object, did so on the basis that private collectors may equally be able to purchase and preserve significant objects.

Those arguing in favour of granting a permit regardless of interest from public collecting institutions provided a wide range of reasons to support comments. These reasons included that objects should continue to be

assessed on the basis of significance, and not on public institution interest in the object, that a lack of interest suggests that the object has failed the test of significance and that this should be a criterion in favour of granting an export permit and that it is important that Australian culture is represented in overseas collections.

There was also support expressed in submissions for the availability of funds to publicly acquire an object of significance in such circumstances, with obligations for display or accessibility. This is an objective currently being met through the National Cultural Heritage Account.

***Recommendation 34:*** *Objects continue to be assessed on the criteria set out in the National Cultural Heritage Control List. A lack of interest from a public collecting institution should not influence a decision on whether to grant or refuse a permit.*

### ***Temporary export permits***

#### ***Should Australia adopt a similar approach to Canada and automatically grant temporary export permits for up to five years?***

Currently, applications for temporary export permits go through the same process as those for permanent export, that is, assessment by an expert examiner and report to the NCHC which makes a recommendation to the Minister.

Canada, which has a similar scheme to that in Australia, automatically grants temporary export permits for periods of up to five years. The holder of the permit is required to notify the ministry of the return of the object.

The automatic temporary export permit approach was supported in a number of submissions as a way of streamlining the application process and facilitating the exposure of significant Australian cultural objects to international audiences. The temporary exhibit of Aboriginal art works overseas, for instance, can benefit the artists, their communities and the entire Indigenous contemporary art industry. Other submissions noted the risks involved in allowing the automatic temporary export of protected objects, since if the object is not returned its recovery from overseas could be difficult. Once an object is overseas, it is also possible that an object may fall under overseas cultural heritage legislation and be prevented from returning.



Some protected objects, for instance philatelic exhibits and vintage cars exported for shows or touring overseas, are exported and returned to Australia on a regular basis. International sporting trophies can also be Australian protected objects, although they may be exported by current title holders or for display overseas. Under the current PMCH legislation, a new temporary export permit must be obtained on each occasion. The granting of a multiple use temporary export permit, issued for a limited timeframe, would streamline the process for such objects and improve efficiency for both government and exporters.

Automatically granting temporary export permits for a maximum period of five years was considered too long in some submissions because of the difficulty of monitoring compliance over this timeframe and the possibility that an object might not be returned. However, the Geological Survey of Western Australia argued that a period of even two years is far too short for adequate research projects to be carried out on fossil material. The validity period of a temporary export permit is therefore best determined on a case by case basis, with a period of up to five years possible as in the Canadian system. The PMCH legislation could be amended to allow temporary export permits for Class B objects to be granted for a period of up to five years, depending on the circumstances, subject to the applicant providing evidence that the object will be returned safely and within a set timeframe. The return of the objects should be monitored and there should be substantial penalties for non-compliance.

**Recommendation 35:** *Multiple use temporary export permits, for approved purposes and within a set timeframe, should be allowed for certain types of objects which regularly travel, including philatelic exhibits, cars, aircraft and international sporting trophies.*

**Recommendation 36:** *Consider amendments to the PMCH legislation to allow the issuing of permits for the temporary export of Class B Australian protected objects for a period of up to five years, on a case by case basis. The return of the objects should be reported by the exporter and compliance monitored. There should be substantial penalties for non-compliance.*

***Should the exemption from the Temporary Export Permit process be extended to include other institutions and organisations that have responsibility and ownership for Australian protected objects?***

Currently, principal collecting institutions may apply for a general permit which allows the export on loan of Australian protected objects for the purpose of research, public exhibition or a similar purpose. This permit

only applies to Class B objects that are accessioned into the institution's collection.

There were a limited number of responses to the question of whether the general permit process should be extended to other institutions and organisations that have responsibility and ownership for Australian protected objects. The NSW Government expressed support for this approach and suggested that criteria would need to be established for non-institutional applicants. Mode of transport, capabilities of the receiving organisation and purpose of export would also need to be considered, as once the objects leave the country they would be covered by laws of the receiving country and potentially not recoverable. Other submissions suggested the process could be supported by establishing a register for institutions and organisations to be listed on, before they were eligible to apply for a general permit, and that the objects should be placed on a National register before a general permit is granted.

As with the issuing of temporary permits, some concern was raised about the risk of objects not being returned to Australia when exported under a general permit, and the need to introduce penalties for non-compliance. It was recognised that institutions have the added incentive of upholding their reputation which would give them more reason to comply with requirements.

**Recommendation 37:** *The granting of general permits to allow principal collecting institutions which have responsibility and ownership for Class B Australian protected objects to loan them overseas for research, public exhibition, or a similar purpose, should be extended to include other institutions and organisations.*

**Recommendation 38:** *Develop criteria for extending general permits to non-institutional applicants.*

### ***Should Class A objects be granted temporary export permits where the Minister is satisfied that a valid reason exists?***

The PMCH Act currently prohibits the export of Class A objects, unless they have been imported from overseas under a certificate of exemption which allows their subsequent export. In response to this question most submissions felt that in certain circumstances, such as for important overseas exhibitions and research, the granting of temporary export permits should be possible. However, they also believed this should only be allowed after careful consideration by the Minister or delegate on the advice of the NCHC and under strict conditions. In the case of Class A objects of Aboriginal and Torres Strait Islander heritage, this would

include the need to consult with, and obtain consent from, the relevant Indigenous custodians. For objects that are requesting temporary export, this would include a requirement for the applicant to provide guarantees with supporting evidence that the object will not be adversely affected by travel and will be safely returned. Additionally, the Victorian Government felt that applicants must provide evidence of researching foreign laws to ensure the object's immunity from seizure under foreign legislation.

Dr Val Attenbrow highlighted the difficulties caused for researchers wishing to conduct overseas radiocarbon dating of fragments of Indigenous human remains (currently Class A objects), in circumstances where Australian radiocarbon laboratories do not have equivalent experience. Dr Attenbrow recommended that the PMCH Act be amended to allow the export of a small bone or fragment of Indigenous human remains for dating purposes (a process that might involve destruction of the fragment), but only where appropriate and contemporary Indigenous consent has been obtained. This approach has also been supported by the NCHC, which believes that the current PMCH legislation lacks flexibility in not allowing the export of Australian Indigenous human remains for scientific analysis, when supported by the relevant local Indigenous community and when the research cannot be carried out in Australia with the same accuracy. In this circumstance, a permanent export permit would be required.

**Recommendation 39:** Amend the PMCH legislation to allow the Minister, in consultation with the NCHC, to consider granting a permanent or temporary export permit for Class A objects, where satisfied that a valid reason exists and specific conditions have been met.

## 6.7 Expert examiners and the National Cultural Heritage Committee

### Overview

The National Cultural Heritage Committee is appointed by the Minister for the Environment, Heritage and the Arts under the PMCH Act. The Committee has the power to advise the Minister in respect to the operation of the PMCH Act, the National Cultural Heritage Control List, and the National Cultural Heritage Account.

The PMCH Act requires that the Committee comprise:

- four persons each representing a different collecting institution
- a member of the Australian Vice-Chancellors' Committee

- a nominee of the Minister for Aboriginal and Torres Straits Islander Affairs (being an Aboriginal or Torres Strait Islander person)
- four persons having experience relevant to the cultural heritage of Australia.

Expert examiners perform a key role in the operation of the PMCH Act, determining whether objects that are the subject of export permit applications are Australian protected objects and making a recommendation to the National Cultural Heritage Committee about whether an export permit should be granted. Currently the matters that they need to consider (depending on the object category) can include whether the object is 'of significance to Australia' and whether similar objects in public collections are 'of equivalent quality'. Many expert examiners are from public collecting institutions and universities but private individuals also provide significant input. They provide their expertise on a voluntary, unpaid basis.

Expert examiners advise the department and the NCHC on whether an object:

- is an Australian protected object by assessing it against the criteria in the Control List;
- has significance to Australia as defined in the Regulations (where that criterion applies); and
- is of such importance to Australia that its loss through export would constitute a significant diminution of Australia's cultural heritage.

The current register of expert examiners has developed over a number of years, on both an 'as needs' basis and from the interest of particular curators. It has been suggested that to ensure independence and currency of advice that expert examiners be appointed for a period of five years, during which time they would be required to attend a workshop organised by the department on assessment issues and processes.

There is no reference to payment for expert examiners in the PMCH Act. When the PMCH Act and Regulations were drafted, it was envisaged that the majority of expert examiners would be from collecting institutions and universities. It was thought that the support for the institutions and universities through the issuing of permits and funding from the National Cultural Heritage Account would be appropriate quid pro quo for the time allocated to providing expert examiner reports.

However, the question of payment to expert examiners has been raised on a number of occasions, particularly in regard to the work undertaken by private examiners not connected with a university or collecting institution.

### ***Should the register of expert examiners be reviewed every five years?***

The majority of submissions supported review of the register of expert examiners on a regular basis. Most considered a five yearly timeframe appropriate. One submission recommended three yearly review of the register.

Some submissions recommended not only regular review but also registration for a set period of time, such as five years, with the possibility of re-appointment for a further period after each five yearly review.

The Aboriginal and Torres Strait Islander Arts Board of the Australia Council for the Arts (ATSIAB) recommended: that the membership of the expert examiner register should be publicly available; that before establishing the five year tenure, the examiners on the current list should be reviewed so that their credentials are measured against identified criteria of expertise; that expert examiners assessing Indigenous objects should have, in addition to relevant expertise in material culture, experience that demonstrates cultural understanding of Aboriginal and Torres Strait Islander people.

The NSW Government submission suggested introducing a system of accreditation which could include evidence of an individual's qualifications and professional experience in their field of expertise.

The submission from the Geological Survey of Western Australia suggested registering a particular position within an organisation as carrying expert examiner responsibility, for example, Chief Palaeontologist or Chief Geoscientist. This would introduce a degree of automatic succession planning, especially as there is a diminishing number of experts in some categories of objects.

***Recommendation 40: Institute five year tenure for registered expert examiners and a five yearly review of the register of expert examiners.***

### ***Should onsite and online training be provided for expert examiners to support their work under the PMCH Act?***

Whilst submissions acknowledged that registered examiners already have expertise in their particular fields, there was strong support for training of expert examiners. Training should focus on induction on the PMCH Act and the role of registered expert examiners.

There was also recognition that a high standard of expert examiner assessments is fundamental to the sound operation of the PMCH Act. Extensive research is often required to produce an assessment of an object to a standard that enables a sound recommendation by the NCHC. Training would ensure that examiners have a good understanding of the Control List criteria and the assessment process. This would contribute to the consistency and the quality of reports. Providing training may also assist in recruiting individuals with appropriate skills and experience.

The Australian War Memorial recommended onsite training sponsored by government. Kylie Winkworth suggested that the department provide a structured training program, either onsite or online, providing training materials such as exemplar expert examiner reports for a range of objects. In addition, she suggested that assistance could be provided for expert examiners to attend training workshops, perhaps on an annual basis, particularly those expert examiners working in areas receiving the greatest number of applications. One submission proposed expert examiners receive training through a professional education provider.

The ATSIAB submission recommended that training for expert examiners should include cross-cultural awareness, Indigenous cultural heritage rights and Indigenous cultural and intellectual property issues.

***Recommendation 41:*** *Develop and implement a training program for registered expert examiners to ensure their understanding of the operation of the PMCH legislation, and to support the provision of a high standard of advice to the National Cultural Heritage Committee.*

***Should expert examiners, or the institutions to which they belong, be paid for their assessments?***

***Should any payments be restricted to expert examiners working in the private sector?***

Overall, submissions recognised that the work undertaken by expert examiners is pivotal to effective operation of the PMCH Act. Submissions acknowledged that expert examiner assessments:

- are often required in a short timeframe;
- can be very time consuming to prepare;
- require research that may mean an examiner withdrawing from other responsibilities, inevitably impacting on other areas of productivity and commitments;
- require expertise that may be held by just one or two experts, creating a burden if there are many applications in a particular area;

- are subject to rising expectations of the knowledge, analysis and judgment they convey.

Submissions were generally supportive of payment for the work undertaken by expert examiners. Most, but not all, submissions supported payment of private expert examiners. However, there were differences in opinion about payment for work by expert examiners within public institutions.

Robert Jones, an expert examiner, expressed the view that individuals registered as expert examiners in order to protect Australia's cultural heritage. Financial remuneration was not a motivating factor. Further, as government institutions, such as state museums, are the main beneficiaries of the PMCH Act and carry most of the responsibility for the role of expert examiners, these institutions, as originally envisaged, should not receive payment for this service.

One submission expressed the view that payment of expert examiners would result in a high standard of reports, more timely submission of reports and greater accountability of expert examiners. Robert Jones, however, did not believe that payment to institutional expert examiners or their institutions would result in quicker processing.

Kylie Winkworth maintained that, in principle, collecting organisations should support their staff to act as expert examiners without charge. Access to funding for acquisitions through the National Cultural Heritage Account is an incentive and provides a sizable benefit to institutions. However, there may be situations where one examiner from one institution is doing a large number of assessments, placing a burden on the examiner and the institution. In these cases there should be flexibility to consider payment of an honorarium to the institution.

The NSW Government submission did not support direct payment to expert examiners from public institutions at this stage and proposed that it may be possible for available funds to be used to assist public institutions to fund positions that support expert examiners.

Professor Prott considered that all expert examiners should be paid for their work. The Government should not be relying on the goodwill of institutions and private individuals to ensure operation of the PMCH Act. If the Government is interested in controlling the export of Australian heritage then it should be prepared to pay for efficient and effective implementation. Professor Prott did not consider that payment would necessarily produce a better system but it would be fair. It would be a matter for examiners belonging to institutions to make their own arrangements with those bodies.

Other submissions supported the view that it is unreasonable to expect expert examiners or institutions to give freely of their time and expertise in an environment in which they are often being charged by other government organisations for similar services, and in which they may be giving up the opportunity to undertake paid consultancies by devoting time to PMCH assessments.

Some submissions considered there to be greater reason to pay private expert examiners than to pay public institutions. One approach suggested was to offer an honorarium to support training and professional development or research materials.

Submissions favouring the payment of private expert examiners pointed out that individuals often incur expenses preparing assessments. These expenses include travel, phone calls and research resources. One submission estimated the time spent preparing an assessment was generally ten hours, and may be up to thirty hours. For many private expert examiners this is time that could potentially be spent on income producing activities and that receiving some payment for this time would be welcome.

***Recommendation 42:*** Investigate options for payment for the work undertaken and expenses incurred by expert examiner. This would also form part of the consideration of the introduction of an application fee (Recommendation 29).

### ***Are there measures that could be implemented to assist expert examiners in undertaking their role?***

Submissions that identified measures that could be implemented to assist expert examiners were consistent in commenting on the need for more support for the assessment process.

One key measure identified was the need for feedback from the department, to expert examiners, on the outcome of matters referred by the NCHC on which they have provided advice. In addition, receiving information on previous assessments and the outcomes of applications for similar objects would contribute to the quality and consistency of expert examiner reports. When available, the references for research previously undertaken by expert examiners should be provided, enabling validation and obviating the need to search for primary materials.

An interactive website was suggested as one means of facilitating dialogue between expert examiners and the department which would contribute to the standard and timeliness of reports. The website could



include a reference tool for expert examiners, providing guidance on the responsibilities of the role and on the assessment process.

The Victorian Government submission recommended commissioning typological studies of movable cultural heritage, particularly in the areas receiving the highest volumes of permit applications. The outcomes of such studies could be distributed, or published, giving expert examiners access to background contextual information, sample assessments of significance, comparative assessments across groups or categories of objects and a typological analysis of themes likely to relate to significance for particular categories of objects.

Another valuable resource would be inventories of the collections of public collecting institutions. This would greatly assist expert examiners determining the importance to Australia's cultural heritage of an object under application for export. One submission commented that access to relevant collection's databases and free access to information held by institutions would enable assessments to be undertaken more effectively.

One submission considered that applications should be submitted an agreed time in advance of the proposed export date to allow time for expert examiner assessment and consideration by the NCHC.

As is occasionally required, some submissions recommended that funding should be available to cover travel by expert examiners to undertake research or to inspect an object.

***Recommendation 43:*** *Expert examiners to be routinely provided with feedback by the department on the outcome of their recommendations on matters referred by the National Cultural Heritage Committee.*

***Recommendation 44:*** *Investigate other measures to assist expert examiners to perform their role under the PMCH legislation.*

### ***National Cultural Heritage Committee (NCHC)***

Submissions that commented on the NCHC suggested changes to its composition and function. Indigenous representation on the NCHC was the principal area attracting recommendations for change.

The submission received from Aboriginal Affairs Victoria (AAV) proposed expanding Indigenous representation on the NCHC. This view was supported by other submissions. AAV proposed that, applications for the export of objects of Indigenous movable cultural heritage should be considered by the Indigenous member(s) of the NCHC who would have the option of involving other members of the NCHC.

AAV also proposed the adoption of a process similar to that under the *Aboriginal Heritage Act 2006* (Victoria). Under this system, permit applications for the removal of Indigenous movable cultural heritage from Victoria are referred to a Registered Aboriginal Party whose approval is required for the granting of a permit. AAV suggested that Aboriginal and Torres Strait Islander people have a similar role under the PMCH Act whereby objects of Indigenous movable cultural heritage should be assessed by Indigenous expert examiners, facilitated through a register of Indigenous expert examiners.

The AAV submission also recommended removal of the Minister's power to grant a permit if the NCHC recommends that a permit should not be granted in respect of Indigenous cultural heritage.

Western Sydney Regional Organisation of Councils Ltd recommended an institution of an Indigenous reference committee to deal with gender specific cultural material.

Museums Australia suggested expansion of the function of the NCHC to take on similar responsibilities to the Australian Heritage Council in terms of establishing national significance thresholds, and advising on the identification, protection and conservation of Australia's collections.

The submission received from Cultural Heritage Practitioners Tasmania (CHPT) supported, in general terms, the current composition of the Committee as appropriate to the function and purpose of the PMCH Act. However, the submission questioned the inclusion of one member of the Australian Vice-Chancellors Committee [Universities Australia]. CHPT suggested instead that consideration be given to selecting a representative with relevant and appropriate academic credentials from an organisation such as the Academy of Science to represent scientific objects and University collections. CHPT considered that occasional appointment of a university representative could effectively be achieved by appointing someone from a significant university collection under paragraph 17(1)(a). CHPT also recommended changing the name of the NCHC to more clearly reflect the scope of the committee as movable cultural heritage.

**Recommendation 45:** Investigate and consult with relevant stakeholders on the composition and functions of the National Cultural Heritage Committee.

## 6.8 The National Cultural Heritage Account

### **Overview**

Regulations 8 to 13 of the *Protection of Movable Cultural Heritage Regulations 1987* (the PMCH Regulations) make provision for administration of the National Cultural Heritage Fund. The Fund was never operational and was superseded by the NCH Account, established as a Special Account for the purposes of the *Financial Management and Accountability Act 1997* (the FMA Act) by amendment to the PMCH Act in 1999. The Account was first funded in the 1999-2000 financial year.

The PMCH Regulations were not revised when the Account was established. As a result, references to the 'National Cultural Heritage Fund' in the PMCH Regulations have an uncertain legal effect and are arguably not applicable to the operation of the Account.

**Recommendation 46:** *Amend the PMCH Regulations to correctly reflect the National Cultural Heritage Account and its operations, consistent with the FMA Act.*

Each financial year, the Australian Government allocates \$500,000 to the NCH Account. As it currently operates, funds from the NCH Account are made available to successful applicants to help them purchase Australian protected objects for display and safe-keeping.

The NCH Account is designed to encourage Australian cultural organisations to buy nationally significant objects that they could otherwise not afford, with the intention that they are to be preserved and made accessible to the public. The NCH Account is also intended to assist institutions to acquire APOs that have been refused export permits and assisting owners of objects denied an export permit reach a fair price on the local market. Although the Fund's purpose in helping owners was made clear in the Second Reading speech for the Movable Cultural Heritage Bill in November 1985, this objective is not currently explicit in the legislation in relation to the Account:

### ***Purpose of the Account***

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.

Funding assistance from the Account is provided on a case by case basis at the discretion of, and as determined by, the Minister, generally after considering the advice of the National Cultural Heritage Committee. The

PMCH Act provides that one of the Committee's functions is to advise the Minister in relation to the operation of the Account, either of its own motion or on request by the Minister. Assistance from the Account is not limited to objects refused export permits. Since the Account's first financial year of operation in 2000-01, ten of the 33 objects purchased through the Account had been denied an export permit

Under the current National Cultural Heritage Account Guidelines, the Committee will give preference or priority to the following Australian protected objects:

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

In providing advice to the Minister on the use of the Account, the Committee's recommendation may include advice on:

- The eligibility for funding assistance from the Account with respect to:
  - the object; and
  - the suitability of the applicant institution.
- The establishment of a fair Australian market value for the object.

In particular cases, for example where an object of great significance is to be auctioned at short notice, the Minister may direct funding assistance for the acquisition of significant objects without consulting the Committee.

Most submissions discussing the NCH Account expressed the view that the current level of annual funding has limited its capacity to guard against the loss or sale of Australia's cultural heritage overseas. When the NCH Account was first established, it was envisaged that the Australian Government, state and territory governments and private individuals would contribute funds. In practice, only the Australian Government has provided funding, which has remained limited to \$500,000 per annum.

Greater awareness about the Account in the collections sector is resulting in increasing concurrent and competing demands on the Account. Prices are also rising in the art market for the type of highly significant objects

targeted by the Account. Based on these trends, the entire funding available under the Account could be committed in the first few months of the financial year, leaving it unable to assist a public collecting institution purchase an object as important as the Charlotte medal<sup>6</sup> if it came up for sale later in the financial year.

The review discussion paper posed a number of questions which outlined potential mechanisms to improve the capacity and operation of the NCH Account. These options included increased Australian Government funding, seeking tax deductibility status to encourage monetary donations to the NCH Account, and creating greater linkages with the Australian Government's Cultural Gifts Program (CGP).

Some submissions suggested support for the NCH Account functioning as a form of compensation for applicants denied export permits, with one arguing strongly for compensation on the basis that the denial of an export permit can financially disadvantage, for example, an overseas buyer who can't find a public collecting institution in Australia interested acquiring the object through the NCH Account or an Australian owner who could realise a greater sale price overseas. However, at least one submission disagreed with the concept of compensation as applicants can still sell their object domestically and all owners of cultural property have been given a reasonable amount of time to become aware of restrictions under the PMCH Act, given its 1987 inception. Concern was also raised that, under compensation measures, export permit applicants may submit applications likely to be rejected in an attempt to secure government funding and/or an advantageous domestic sale. This does not seem to be an issue at the present time since there is no requirement for government to purchase objects denied export permits under the PMCH Act.

***Should Australian Government funding to the NCH Account be increased to enhance its capacity to fulfil its purpose? If so, what amount would be appropriate?***

The majority of submissions discussing funding levels for the NCH Account supported an increase to its allocation. In both public submissions and consultations undertaken by the department, \$500,000 was considered to be too low to assist in purchasing nationally significant cultural objects of high monetary value, particularly given current market prices and the quantity of significant cultural heritage material available

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<sup>6</sup> The National Cultural Heritage Account assisted the Australian National Maritime Museum's purchase of the Charlotte medal at auction in July 2008. It is believed that the medal was probably struck and engraved on board one of the First Fleet ships, the *Charlotte*, on arrival in Botany Bay in January 1788.

on the market. This opinion predominated despite media reports noting a downturn over the last twelve months in the Australian art auction market, especially in comparison to the high prices achieved in 2007. More recently, reports have indicated that there has been improvement in certain categories of the market.

The National Gallery of Australia commented in relation to the art market that the half million in funding was of limited use given the economic climate. It also noted that galleries have not been the chief recipients of NCH Account funding assistance. Many of the objects they acquire or would have an interest in acquiring are at the upper end of the market. According to museum and heritage consultant Kylie Winkworth, “in the last few years many significant items have slipped from public institutions due to high auction prices and limited or no funds in the Account”.

Several submissions commented that the limited acquisition budgets of many public collecting institutions hamper their ability to procure or contribute funds to acquire a highly significant cultural object, even with NCH Account support. Responses also suggested that the scarcity of funds available from the NCH Account has restricted its ability to assist with the purchase of objects that are of cultural heritage significance but that tend not to be prioritised in institutional acquisition practices or philanthropic giving, such as objects of natural science.

The most frequently proposed annual funding allocation to the NCH Account was \$5 million. Other submissions also recommended \$1 million, \$1.5 million, \$2 million, \$2.5 – 5 million and an unlimited amount (presumably to be assessed each year on a case by case basis). One submission alternatively proposed that an appropriate level of funding could be calculated based on the amount of funding sought per year since the NCH Account's inception. In the department's experience, however, the amount of assistance requested in any year is as much affected by knowledge of the capped funds available as it is by the collection sector's needs. As a result, this approach is unlikely to provide a reliable guide for necessary funding levels.

Some submissions in favour of increased funding to the NCH Account also suggested that provision could be made for the NCH Account to be interest bearing, for “automatic ‘top ups’” to be allocated following any grants to institutions, for annual increases to be allocated according to an agreed amount or the Consumer Price Index, and for funding to respond to shifts in market prices. Another submission suggested that at least \$500,000 should be contributed each year to a proposed base fund of \$5 million in order to build a “future fund” for the acquisition of nationally significant objects.

Several contributors supported allowing the accumulation of unspent funds across financial years. As the NCH 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 NCH 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 NCH Account's ability to respond to the market with more flexibility.

Providing adequate funding to the NCH Account is unquestionably in keeping with the intent of both the PMCH legislation and the 1970 UNESCO Convention to which it gives effect. Professors Lyndel Prott and Patrick O'Keefe commented that the NCH Account has always been considered crucial to the operation of the PMCH legislation, as it provides a mechanism for addressing issues raised by the refusal of an export permit for an object. By enabling the sale of these nationally significant objects to collecting institutions, the department notes that the NCH Account also contributes to their protection by discouraging illegal export and facilitating their conservation.

As indicated in the submission from the New South Wales Young Lawyers International Law Committee, as a party to the 1970 UNESCO Convention Australia should provide an adequate budget, as far as it is able, for the national services protecting cultural heritage and, if necessary, establish a fund for this purpose<sup>7</sup>.

An increase in funds for the NCH Account would need to be accompanied by revised operational guidelines to support applicants and decision-makers, and to enhance accountability and transparency. This revision process could also take into account some submissions' suggestions for improving NCH Account policy and procedures.

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<sup>7</sup> Article 14 of the 1970 UNESCO Convention states that 'in order to prevent illicit export and to meet the obligations arising from the implementation of this Convention, each State Party to the Convention should, as far as it is able, provide the national services responsible for the protection of its cultural heritage with an adequate budget and, if necessary, should set up a fund for this purpose.'

## **Recent sales of Australian cultural heritage material**

This table lists some examples of recent sales of Australian cultural heritage material and is intended only as an illustration of current market prices. Items listed are not necessarily Australian protected objects.

<b>Item</b>	<b>Date Sold</b>	<b>Price <sup>8</sup></b>
New South Wales Sketchbook: Sea Voyage, Sydney, Illawarra, Newcastle, Morpeth, c.1817 – 1840 (Edward Close, 1790-1866)	May 09	\$900,000
<i>Mad Hatter's Tea Party</i> , c. 1956 (Charles Blackman, b.1928)	May 09	\$720,000
<i>The bar</i> , 1954 (John Brack, 1920 – 1999)	Mar 09	\$3.2 million
<i>Goanna Corroboree at Mirkantji</i> , 1971 (Kaapa Mbitjana Tjampitjinpa, c. 1926 – 1989)	Oct 08	\$276,000
<i>Water and Bush Tucker Story</i> , 1972 (Johnny Warangkula Tjupurrula, c. 1932 – 2001)	Oct 08	\$228,000
<i>Rocky McCormack</i> , 1962 – 1963, (Russell Drysdale, 1912 – 1981)	Aug 08	\$1.89 million
Charlotte Medal, 1788 (Thomas Barrett)	July 08	\$873,750 (Purchased with \$200,000 in NCH Account funding)
Jackie Howe (1861 – 1920) shearing medal and gold fob watch with original photographs	May 08	\$360,000
Ten shilling note, serial no. M 000 001, 1913	Mar 08	\$1.909 million
Victoria Cross, Private William Jackson	2008	\$655,000

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<sup>8</sup> For the sale of *The bar* and Private William Jackson's Victoria Cross see Corrie Perkin, 'National Gallery of Victoria buys John Brack's *The bar*', *The Australian*, 19 March 2009, <http://www.theaustralian.news.com.au/story/0,,25210727-16947,00.html>, viewed 9 July 2009, and John Wasiliev, 'The Best Investments of 2008', *Australian Financial Review*, 13 December 2008, 37 ff.. Information on the Charlotte Medal has been provided by the department (price includes hammer price and buyer's premium). The remaining prices have been sourced from auction house websites and include hammer price and buyer's premium (for the ten shilling note see also Kerry Rodgers, 'Australia's No. 1 Bank Note Fetches \$1.77 Million', *Numismaster.com*, 11 March 2008, <http://secure.numismaster.com/ta/numis/Article.jsp?ad=article&ArticleId=3977>, viewed 9 July 2009).



## ***Broadening the functions of the NCH Account***

Several submissions encouraged the Australian Government to consider broadening the purpose of the NCH Account in order to support the costs of transport, conservation, interpretation and providing public access for both publicly and privately owned cultural heritage material. Appropriate preservation, storage and display practices are essential to the protection of Australia's nationally significant cultural heritage for future generations. Museums & Galleries NSW noted that the significant costs associated with these procedures can affect an institution's decision to acquire an object.

Australia ICOMOS suggested the NCH Account also support the retention of objects still situated within their place of significance. It proposed that funding for activities such as conservation and thematic studies could act as a preventative measure against initial relocation. Another suggestion was that the NCH Account could be used in the future to prevent the export from Australia of international art, including items from the Asia Pacific. However, apart from specific cases where a connection with Australia's history has evolved, retaining material of significance to other nations falls outside the scope of the PMCH Act. It could also undermine Australia's attempts to protect, acquire and bring about the restitution of cultural heritage material of significance to Australia.

A number of submissions commented on the limitations of the PMCH Act to prevent the on-sale of significant heritage items previously exported from Australia. These submissions encouraged the use of the NCH Account to help protect and/or acquire objects held in other countries. The department notes that NCH Account funding can be used to purchase nationally significant objects coming up for sale overseas and could also potentially sponsor the documentation of important objects held overseas and not on the market.

The Victorian Government proposed the adoption of standards, such as the Museums Australia (Victoria) Museum Accreditation Program, to determine the capacity of organisations to receive NCH Account support and to potentially enable small collecting organisations to become beneficiaries. The department notes that this could help ensure the care of objects acquired with NCH Account assistance. As suggested in another submission, this could also be achieved by making conservation management plans a requirement of NCH Account funding support.

Should Australian Government funding for the NCH Account be increased to \$5 million per annum, the NCH Account could afford to support conservation work for some items. Assistance could, for instance, be targeted towards institutions acquiring objects denied export permits

although they are unable to care for the objects or to provide public access, as suggested by Dr Philip Jones.

There are examples of current Australian Government funding for similar activities. The Historic Shipwrecks program provides funding to state and territory agencies who manage, protect, identify and raise awareness of historic shipwrecks on behalf of the Commonwealth, including for researching and preserving shipwrecks, making shipwreck information more accessible and training inspectors<sup>9</sup>.

Given current market prices, implementing a more consistent approach to the conservation of APOs, or broadening the NCH Account's functions to incorporate further measures to prevent export would require resources additional to the \$5 million most frequently proposed.

The department therefore recommends that funding for the conservation of APOs should be considered and managed separately to the NCH Account, except where funding may be directly linked to an organisation's obligations as a recipient of NCH Account assistance. Broader conservation support is discussed in the chapter on streamlining the export application process, and would be better tied to the recommendations made under this chapter.

### ***Promoting the Account***

While many submissions supported the work of the NCH Account, the NSW Government commented that it could be better promoted. At its meeting of 4 December 2008, the NCHC similarly recommended that the department undertake outreach activities to publicise the NCH Account in the context of facilitating more applications for assistance from Indigenous organisations and communities.

A number of submissions also expressed interest in seeing small, regional and rural organisations benefit further from the NCH Account. Increased promotion of the NCH Account amongst such organisations would assist with this aim, as would the facilitation of collaborative arrangements between larger and smaller organisations, where an established institution could provide support for the care and exhibition of an object to enable its partner to benefit from NCH Account funding. Another submission also advocated the return of objects acquired with NCH Account assistance, or forfeited under the PMCH Act, to their place of significance. The department supports targeted promotion of the NCH

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<sup>9</sup> <http://www.environment.gov.au/heritage/shipwrecks/program/index.html>

Account to these particular groups, but would require additional resources to undertake this work.

**Recommendation 47:** Consider increasing Australian Government funding to the National Cultural Heritage Account to at least \$5 million per annum. This amount should be reviewed against market prices every five years, and should be considered in conjunction with other issues examined in this review, such as the monetary thresholds and method of calculating market value under the Control List.

**Recommendation 48:** Allow all unspent National Cultural Heritage Account funds to carry over into future financial years.

**Recommendation 49:** Investigate, in consultation with relevant stakeholders, whether the provision of emergency or ex-gratia funding should be a function of the National Cultural Heritage Account, or provided through another mechanism.

**Recommendation 50:** Revise and update the guidelines for the National Cultural Heritage Account to support decision-makers and individual applicants, such as smaller communities or organisations, and to enhance accountability and transparency.

**Recommendation 51:** Better promote the National Cultural Heritage Account, particularly amongst Indigenous, rural and regional organisations and communities.

### **Should the option of providing tax deductibility status for donations to the Account be explored with the Australian Taxation Office?**

Most submissions addressing the tax deductibility status of the NCH Account supported consulting with the Australian Taxation Office (ATO) to consider options for tax deductible monetary donations to the NCH Account. A number of contributors believed that in addition to contributing to the funding available, tax incentives could help to raise the profile of the NCH Account and its objectives across the community. One submission proposed that tax incentives could be made available to owners of significant heritage items who are willing to sell their objects within Australia at a reduced market price. ATSIAB suggested that donations to Aboriginal and Torres Strait Islander cultural keeping places could also be considered for tax deductibility.

However, concerns were also raised that tax deductible donations to the NCH Account could lead to increased competition for philanthropic funds amongst cultural institutions. Many cultural institutions also already offer

tax deductible donation options under the deductible gift recipient scheme. The Council of Australian Art Museum Directors (CAAMD) stated its preference for donations to be given directly to institutions rather than the NCH Account.

However, the NSW Government weighed its concerns regarding competition for donated funds against the potential advantage that smaller institutions without established foundations could tap into philanthropic funds via the NCH Account. Ms Winkworth proposed that government consider providing tax deductible status only to donations for acquisitions by institutions without a foundation or other form of deductible status. Her suggestion poses a potential solution but would require further consideration.

Submissions also queried levels of interest in donating to a generic account as opposed to donating to an institution for a particular item, as well as interest in contributing to a fund that many believe is government's responsibility. One submission suggested these concerns could be addressed by offering greater tax incentives where a public collecting institution was interested in acquiring an object intended for export.

Nevertheless, the important work performed by the Account in securing care for, and public access to nationally significant objects could help encourage individuals seeking to support Australia's cultural heritage more broadly to commit donations and bequests. The positive response to the review and call for submissions, and the support expressed for the Act and its purpose suggests a strong level of interest in the protection of Australia's movable cultural heritage.

The exploration of tax deductibility options would need to take into account the Government's current philanthropic reforms and reviews of the tax system and not for profit sector. The submission made by the New South Wales Young Lawyers International Law Committee suggested that the financial obligations imposed by the 1970 UNESCO Convention would also need to be considered in relation to any tax deductibility options proposed.

### ***Other avenues for increasing Account funds***

Options suggested for increasing Account funds included arrangements for matching Commonwealth funding with contributions from state and territory governments and other institutions. However, at least one submission contended that the Account would need to address the protection of cultural property at a state and territory level for these governments to contribute.

**Recommendation 52:** *Consult with the Australian Taxation Office and other relevant stakeholders to explore options for tax deductible donations to the National Cultural Heritage Account.*

### ***Should Australia consider a greater linkage between the Protection of Movable Cultural Heritage and the Cultural Gifts Program?***

The Cultural Gifts Program provides tax incentives to encourage gifts of culturally significant items from private collections to public art galleries, museums, libraries and archives.

The general rule is that the average of the GST inclusive market values specified in valuations from approved valuers for the gift is fully tax deductible, with some exceptions. Gifts are also exempt from capital gains tax.

Linkages between the PMCH legislation and the Cultural Gifts Program could include a scheme like that operating in Canada where taxation incentives are linked with a grant program for the purpose of purchasing objects denied an export permit. Institutions or public authorities may apply for certification of cultural property for income tax purposes, involving a determination of whether the object is of 'outstanding significance and national importance' and if it is, a determination of 'fair market value'. The tax benefit goes to the individual who donates or sells the object to a designated institution.

This means that as an alternative to relying solely on an application for funding under the Canadian equivalent to the Account, philanthropists are purchasing the objects that will ultimately be donated to Canadian collecting institutions.

Of those submissions that considered linkages between the PMCH legislation and the Cultural Gifts Program, a significant majority were in favour. Submissions saw potential for encouraging the donation of significant objects to public institutions, and noted that the process of classifying objects as nationally significant, as occurs under the Canadian scheme, could help institutions find philanthropists to support the acquisition of objects. For one contributor, links between the two programs raised the potential for public collecting institutions to negotiate the acquisition of Aboriginal and Torres Strait Islander objects intended for export (but not yet sold) so that they could be retained in Australia. Another supported tax incentives based on Canada's system in so far as items are gifted to public collecting institutions and that, where an artist donates his or her work, experts determined whether the gift is accepted.

Other submissions proposed that the two schemes remain relatively separate, but that the acquisition of objects refused export permits by collecting institutions could be facilitated through the Cultural Gifts Program, tax incentives or a system that matched the sale price.

Opposition to further connections between the two programs stressed the importance of institutions reaching independent decisions regarding the items they acquire for their collections. One contributor observed that while the Account enables acquisitions actively sought by organisations, this is unlikely to be the case for many objects donated under the Cultural Gifts scheme. However, this same submission pointed to advantages to be gained from consolidating and improving approaches to the assessment of significance and to provenance standards between the PMCH legislation and the Cultural Gifts Program.

In relation to the Cultural Gifts Program, it should be noted that although items may not be directly sought by institutions, recipient organisations must formally accept a gift, determine that it conforms with its collection policy and ensure that it will be of ongoing value. These requirements provide some safeguards against institutions becoming repositories for unwanted donations.

Submissions also sought improved valuation guidelines and raised concerns regarding unscrupulous valuation practices and attempts to augment tax advantages. As a measure to prevent such practices, the Australasian Philatelic Traders' Association proposed that objects be sold by public auction rather than gifted and that the net proceeds be donated to the Account. These issues could be considered in the context of examining the potential for building links between the two schemes.

**Recommendation 53:** *Undertake further work to identify potential links between the Cultural Gifts Program and the PMCH legislation, particularly possibilities for facilitating the acquisition of objects by collecting institutions for which export permits have been refused.*

## 6.9 Compliance and enforcement provisions

### Overview

An essential element of any legislation containing a regulatory component is that the regulation is effective and efficient - effective in addressing an identified problem, and efficient in maximising the benefits to the economy and taking account of the costs involved.

In practice, the enforcement provisions of the PMCH legislation have proved cumbersome and resource intensive to apply. While the

department has undertaken a number of successful seizures and repatriations of illegally imported objects, most recently from Argentina, China and Spain, offences have been very difficult to prove. Since the last review of the PMCH Act in 1991, the Australian Government's approach to regulation has also shifted to a lighter touch model with an emphasis on encouraging compliance and alternative dispute resolution mechanisms such as mediation or arbitration, rather than criminal or civil enforcement.

The department's approach to compliance and enforcement, in keeping with the Australian Government's policy of promoting self regulation where possible, relies on encouraging the community to abide by the legislation it administers through measures such as communication and education activities, timely provision of information and advice, persuasion, cooperative assistance and collaboration.

Beyond the regular clients of the PMCH export assessment process, such as the major auction houses, larger collecting institutions and active interest groups, there is a low level of public awareness about the PMCH legislation. This view was reflected in a number of submissions to the review.

### ***Compliance Mechanisms***

A more effective compliance regime for the PMCH legislation will require general and targeted public awareness, education and communication campaigns, and outreach and training for the department's partner agencies, which include the Australian Federal Police (AFP) and the Australian Customs and Border Protection Service. Given the breadth of the object categories in the Control List, a rolling education program targeting specific categories would be the most cost effective approach. This would also be consistent with Articles 5 and 10 of the 1970 UNESCO Convention, which requires State Parties to publicise their rules on export of cultural property and to use educational measures to spread knowledge of the Convention.<sup>10</sup>

The Cultural Property Section does not currently have the resources to develop a communications strategy and related education material and undertake education and awareness training for our broader group of key stakeholders and the general community.

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<sup>10</sup> O'Keefe, Patrick J. 'Commentary on the 1970 UNESCO Convention', Institute of Art and Law, p. 104.

Submissions discussing the illegal trade in fossils, rocks and meteorites, including submissions from the Victorian Government and Museum Victoria, also recommended spot checks at major international rock, mineral and fossil fairs. Anecdotally the department understands that significant numbers of APOs are traded at these fairs without having gone through the export permission process. We note however, that inspectors appointed under the PMCH Act have no jurisdiction to exercise their powers outside Australia. In certain circumstances a Mutual Assistance Request could be made seeking the assistance of a foreign country and under which foreign officials could exercise coercive powers.

While the PMCH legislation regulates the export of fossil specimens removed from the ground, significant concerns were raised in consultations with expert examiners about gaps and inconsistency between Commonwealth, State and Territory legislation protecting fossil sites. A stronger and more uniform national legislative framework for protecting fossils in situ was urged as a way to reduce the theft and subsequent illegal export of fossil specimens, which are difficult to detect at the border. Similar concerns apply with meteorites. Such an approach would require consultation and co-operation between the federal, state and territory governments. We note that this is also an issue under consideration by the review of the EPBC Act, which protects places with nationally significant geoheritage values on the National Heritage List.

Submissions also supported the creation of a registry of exporters dealing in particular 'at risk' object categories, for example, heritage machinery, so consignments could be subject to regular spot checks. Submissions dealing with heritage machinery noted that it is easy to illegally export these objects by cutting them up and exporting the pieces as spare parts or scrap metal, for re-assembly at the destination. The introduction of monitoring warrants into the PMCH legislation could also be used to monitor the compliance of dealers in this way through auditing and spot checks.

DEWHA has recently introduced strategic audits into its compliance and enforcement activities under the EPBC Act, focusing on themes such as industry sectors, geographical areas, threatened species or protected areas. The department has also instituted a program of alerts with the Australian Customs and Border Protection Service to monitor compliance with the PMCH Act and has established new procedures to initiate information reports to the AFP on breaches of the legislation. However, it does not currently have the resources to implement an effective monitoring and audit program on export permits, letters of clearance and certificates of exemption issued under the PMCH Act or to conduct spot checks.



The compliance elements of the PMCH legislation could also be enhanced by the introduction of additional administrative measures or alternative dispute resolution. A mediation framework or provision would provide an alternative to lengthy, adversarial and costly court processes. Making enforceable undertakings (or binding, voluntary, negotiated agreements) available as part of the enforcement toolbox would provide an alternative to prosecution and greater flexibility and have a genuine deterrent effect. The introduction of Penalty Infringement Notices (PINs) may also be appropriate for strict liability offences.

**Recommendation 54:** *Develop a communications strategy including targeted public awareness and education campaigns to address the Australian community's lack of knowledge about the PMCH legislation.*

**Recommendation 55:** *Develop targeted training packages to assist key stakeholders such as expert examiners and Australian Customs and Border Protection Service officers.*

**Recommendation 56:** *Undertake further consultation with relevant stakeholders on how protection of fossils or meteorite objects under the PMCH legislation should relate to, and interact with, other Commonwealth, state and territory legislative regimes, taking account of outcomes of the review of the EPBC Act.*

### **Should the PMCH Act include similar enforcement mechanisms to those in the EPBC Act?**

In 2008-09, the department responded to 45 enquiries from the Australian Customs and Border Protection Service, the AFP and the general community regarding compliance incidents in relation to the PMCH legislation. DEWHA undertakes preliminary assessment of incident reports, and if it is determined that an action is potentially in breach of the Act, the matter is referred for investigation.

Where compliance approaches fail, an effective and workable enforcement regime is required under the PMCH legislation. Part V of the PMCH Act deals with the enforcement of the legislation and contains search and seizure provisions. The enforcement mechanisms under the PMCH Act are much more limited than those in Part 17 of the EPBC Act. The PMCH legislation currently focuses on criminal enforcement mechanisms and offences, which must be proved beyond reasonable doubt. This is a high standard of proof – in the case of exporting or attempting to export a protected object that a person knew or was reckless as to whether the object was a protected object - which makes the securing of convictions very difficult.

By comparison, the EPBC Act contains a tiered suite of criminal, civil and administrative penalty provisions to allow for a range of sanctions commensurate with the relative seriousness of different contraventions of the Act. Civil penalty provisions generally require a lower standard of proof, being proof on the balance of probabilities. They only carry a financial penalty, not imprisonment and do not result in a criminal conviction.

It would be effective and appropriate to have a suite of mechanisms available in the PMCH legislation, comprising administrative sanctions such as cancelling an export permit, and for more complex cases the ability to choose between civil provisions or strict liability criminal provisions where there are fault elements which need to be proved. The PMCH legislation could also incorporate a provision allowing a court to order a pecuniary penalty to be paid to the Commonwealth which would take into account the severity of the contravention and the profit involved on a case by case basis. This would assist in defraying the cost of civil investigations.

We note that the independent review of the *Environment Protection and Biodiversity Conservation Act 1999*: interim report notes that “When responding to compliance matters, the department has a suite of options available. The primary focus is to ensure the best outcome for the environment and, as such, administrative options are often found to be the best approach. In deciding to pursue civil or criminal penalties in the courts, the department must consider the range of factors set out in the (DEWHA) Compliance and Enforcement Policy, including the cost of the proposed response option compared to the benefits of that option and the standard of evidence collected.”<sup>11</sup>

The powers of inspectors under the PMCH Act could also be clarified and strengthened. Currently, the appointing officer (delegate) appoints inspectors with a suite of powers, which do not currently align with departmental policy. An alternative approach currently in use across the department is for the appointing officer (delegate) to confer Inspector powers selectively. For example, rather than an inspector having the power to seize and arrest, the delegate may want the ability to make a policy decision to limit the inspector’s power to seizure based on an assessment of the particular case. The introduction of an offence for the

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<sup>11</sup> Independent review of the *Environment Protection and Biodiversity Conservation Act 1999*: interim report p.333. The DEWHA Compliance and Enforcement Policy referenced was adopted in January 2006. A new draft policy is currently being developed.

obstruction of inspectors in the course of their duties would also assist them to effectively carry out their role.

There was considerable support in submissions to the review for the enforcement provisions of the PMCH Act to align with those in the EPBC Act. The Australia Council supported introducing a provision similar to the EPBC Act's injunctive remedy allowing "interested persons" to restrain an Indigenous object from export so that Indigenous groups directly affected could apply to the Federal Court for injunctive relief.

The EPBC Act is currently undergoing an independent review. Therefore, any proposed changes to the compliance and enforcement provisions of the PMCH Act will need to factor in any relevant recommended revisions to those in the EPBC Act.

***Recommendation 57:*** *Align the PMCH Act compliance and enforcement provisions with the Environment Protection and Biodiversity Conservation Act 1999. Through the introduction of a variety of sanctions and remedies, including criminal penalties, civil remedies and administrative actions, the PMCH Act would provide greater flexibility and efficiency in enforcing the protection of significant objects.*

***Recommendation 58:*** *Strengthen inspector provisions in the PMCH Act to require persons to comply with any direction given by an authorised inspector, and make it an offence for a person to obstruct an inspector in the course of their duties.*

The PMCH Act would also be strengthened by enhanced seizure provisions, particularly permissions to search and seize electronic equipment, which are in place under the EPBC Act. The powers of seizure and retention under the PMCH Act could be tightened by making items seizable and liable to forfeiture based on reasonable grounds of suspicion, and by extending the current limit of 60 days for holding evidence that has been seized. Based on experience with a number of investigations, the current limit of 60 days does not allow enough time to collect and analyse evidence and institute court proceedings.

Consideration could also be given to placing the onus of proof that an object is not protected, and that it is the object assessed by the department for an export permit, on the owner or possessor of the object. This would introduce the concept of strict liability and remove intent as an element of the offence.

The introduction of hold or retention notices which would allow a suspected Australian or foreign protected object to be held for a period of 72 hours would also allow further enquiries to be made into the status of the object. The current legislation only allows an inspector to seize and

retain an object that has already been determined to be a 'protected object'. In practice, the level of expert assessment required to establish definitively that an object is protected has meant that there is little opportunity to act quickly at the border when an offence is suspected, and thus significant objects may be lost.

***Recommendation 59:*** *Strengthen seizure and forfeiture powers under the PMCH legislation to make both forfeited objects and evidentiary material seizable based on reasonable grounds of suspicion, and consider extending the current 60 day retention period.*

Past consideration of the seizure provisions in the PMCH Act have also identified the current wording of the legislation defining what constitutes 'export' (subsection 9(4)) as problematic. Objects are not automatically forfeited until they are exported. At present this is defined as occurring only when the vessel, aircraft etc commences departure. This can be too late for effective administration of the PMCH Act.

***Recommendation 60:*** *In consultation with the Australian Customs and Border Protection Service, consider amending the PMCH Act so that export is deemed to have occurred at the time an object is in the control of the Australian Customs and Border Protection Service or an Export Declaration Number is issued.*

The department administers the *Historic Shipwrecks Act 1976* in conjunction with delegates from each of the states, the Northern Territory and Norfolk Island. The Historic Shipwrecks Act protects historic wrecks and associated relics which are more than 75 years old and in Commonwealth waters.

The Historic Shipwrecks Act aims to ensure that historic shipwrecks are protected for their heritage values and maintained for recreational, scientific and educational purposes. It also seeks to control actions which may result in damage, interference, removal or destruction of an historic shipwreck or associated relic. Under the Historic Shipwrecks Act divers may access wreck sites for recreational purposes, but a permit must be obtained in order to remove relics from a wreck site or to disturb the physical fabric of a wreck.

The transfer, possession and custody of material such as relics, including coins, from historic shipwrecks is also regulated. The Historic Shipwrecks Act is also currently under review, and this review will provide a useful opportunity to consider the potential for alignment of the compliance and enforcement elements of the PMCH Act and Historic Shipwrecks Act.

There has been ongoing interest in measures to improve our capacity to detect illicitly imported and exported material at the border. Currently the PMCH Act includes provisions that allow Australia to respond to an official request by a foreign government to return movable cultural heritage objects that have been illegally exported from their country of origin. Requests can only be made for material which entered Australia after 1 July 1987, the operative date of the Act. Where the requesting country is a Party to the UNESCO Convention the date of the illegal export of the objects must be after its implementation into its domestic law. Countries that are not Party need to have relevant cultural heritage protection legislation in place at the time the object(s) were illegally exported.

Such requests are dealt with at an inter-governmental level and there are inevitably time lags with this process. Professor Lyndel Prott recommended that the Minister should have the power to authorise the immediate seizure of an object reasonably believed to have been illegally exported from a foreign state, noting that it is not always possible for developing countries to investigate activities and process documents quickly.

Some submissions have suggested that if a foreign government agency lists an object on an accepted international database for stolen artworks or objects, and/or issues an alert about a stolen artwork or objects through any law enforcement or regulatory agency, this should be considered a request for an object's seizure and return.

***Recommendation 61: Investigate broadening the provisions in the PMCH legislation covering unlawful imports to include objects listed on Interpol's database of stolen cultural property and the Art Loss Register.***

The Australian Customs and Border Protection Service is an important partner in enforcing the legislation and would be assisted in its role by clear, easy to understand legislation. Because the broad range of categories contained in the PMCH Control List do not fall within the Australian Harmonized Export Commodity Classification (AHECC), the eight digit code used to classify goods for export, the level of subjectivity currently instilled in the significance test and the expert knowledge required to assess whether an object is an APO, make it difficult for officers to readily identify objects that might fall within the scope of the PMCH Act. Expert examiners who may be required to assess whether a held object is an APO also may not be available. This complexity significantly impacts on timeliness and the Australian Customs and Border Protection Service's own operational procedures. This issue is also addressed in the report's consideration of the Control List and significance assessment.

**Recommendation 62:** *Consult with the Australian Bureau of Statistics and the Australian Customs and Border Protection Service to explore the feasibility of integrating cultural property export declarations with the Australian Harmonised Export Commodity Classification codes used by the Australian Customs and Border Protection Service.*

A number of submissions were concerned about the lack of any mechanism within the PMCH legislation for tracking those APOs which have been denied export permits, as well as objects leaving the country on temporary export permits. Mark Morrissey and Warren Doubleday both suggested that a register should be kept of the owner and location of APOs denied export permits, to be updated each time the object changes hands. This would be consistent with section 10 of the Historic Shipwrecks Act.

There were also calls for stronger engagement with the Australian Customs and Border Protection Service. The department has been exploring ways to work more co-operatively with Australian Customs and Border Protection Service officers, including on the administration of temporary and permanent export permits and certificates of exemption, to assist with tracking them through Australian Customs and Border Protection Service systems and improving the level of compliance of both exporters and importers.

Submissions from the ACGA and NAVA additionally felt that the Australian Government could do more to address a broader spectrum of art crime, and recommended the establishment of an Australian Art Loss Register with links to Interpol and the AFP. The Art Loss Register Ltd is the world's largest database of stolen art and antiques and is dedicated to their recovery. It includes a due diligence service to sellers of art and its shareholders include Christie's, Bonhams, members of the insurance industry and art trade associations.

Museum Victoria suggested that the department produce a newsletter for the major Australian collecting institutions advising of thefts and giving contact details.

***Should Section 48 of the PMCH Act be similar to that of the EPBC Act? This would mean that a judicial review, but not merits review, of a Ministerial decision, would still be available under the Administrative Decisions (Judicial Review) Act 1977, Section 39B of the Judiciary Act 1903 and section 75 of the Constitution.***

Section 48 of the PMCH Act provides for certain decisions of the Minister to be reviewable by the Administrative Appeals Tribunal (AAT).

By contrast, sections 206A, 221A, 243A, 263A and 303GJ of the EPBC Act, which were amended in 2006, declare that AAT review is not available for decisions about permit matters made personally by the Minister. AAT review is, however, available where decisions about permit matters are made by a delegate of the Minister.

Professor Lyndel Prott and the Federation of Australian Historical Societies all opposed removing merit based review from the PMCH Act. Professor Prott felt that it encouraged compliance with the legislation. Dr Philip Jones supported its removal.

We note that review mechanisms are being considered as part of the current review of the EPBC Act and that submissions to that review have criticised the 2006 amendments removing the right to merits review for certain decisions made by the Minister under the Act. The issue of expanding merits review and whether the most appropriate body to deal with merits reviews of decisions made under the EPBC Act is the AAT or a new specialist body will be subject to further consideration before the review is finalised. Compared to the PMCH Act, the range of decisions made under the EPBC Act is far greater and the process for making them, including the stages involved, including provision for public comment in the decision-making process, more complex. It is therefore not an area where there is a strong case for harmonisation between the PMCH and EPBC Acts.

***Recommendation 63: Retain the current provision for merit based review by the Administrative Appeals Tribunal for certain decisions of the Minister, available under Section 48 of the PMCH Act.***

## 6.10 International obligations and collaboration

### ***Should Australia consider ratifying the International Institute for the Unification of Private Law (UNIDROIT) Convention on Stolen or Illegally Exported Cultural Objects 1995 (the UNIDROIT Convention)?***

The PMCH Act allows the Australian Government, at the request of a foreign state, to seize illegally exported objects that have been imported into Australia in accordance with our obligations as a Party to the 1970 UNESCO Convention. This mechanism has worked successfully in a series of seizures and repatriations of objects illegally exported from their country of origin.<sup>12</sup>

However, there is currently no provision in the PMCH Act for private action to be mounted through the courts to seek the return of stolen or illegally exported cultural objects. Consequently, individuals, organisations and foreign governments must rely upon diplomatic action to make these requests.

There have been concerns that differences between common law and civil law legal systems, particularly in the extent to which they protect the rights of a good faith purchaser versus those of the person who has been dispossessed of an object, have been exploited to legitimise illicit trade in cultural objects. Civil law systems accord much wider protection to a good faith purchaser of stolen property.

The 1970 UNESCO Convention contains provisions for compensation to be paid by the country of origin for an object innocently imported by a foreign purchaser or person who has obtained valid title to the object. The supplementary UNIDROIT Convention was also developed to facilitate private action through uniform provisions.

The 1970 UNESCO Convention covers a broad range of issues aimed at protecting cultural objects, including obliging all parties to take appropriate steps to recover and return stolen or illicitly exported objects, primarily through diplomatic channels. By contrast, the UNIDROIT

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<sup>12</sup> Since 2004 the Australian Government has returned illegally exported Chinese fossils seized in Australia to the People's Republic of China on three occasions. The most recent handover took place on 15 February 2008 (see <http://www.environment.gov.au/minister/garrett/2008/pubs/mr20080115.pdf>). Other recent handovers include 130 kilograms of dinosaur and plant fossils returned to the Argentine Republic in August 2007, 16 Dyak skulls returned to Malaysia in May 2007, an Asmat human skull from Papua returned to Indonesia in December 2006, and seven ancient Egyptian funerary objects returned to Egypt in July 2005.



Convention<sup>13</sup> is a private law instrument which deals exclusively with the restitution and recovery of stolen and illicitly exported cultural objects. It provides more detailed measures, including tests concerning an object's heritage context and importance, which must be satisfied before an object may be seized and returned.

Most importantly, the UNIDROIT Convention enables State Parties *and* individuals to make private legal claims regarding stolen objects. It establishes uniform minimum legal rules, including time limits for claims for restitution, and provides for compensation for innocent third parties who have purchased an object in good faith and have exercised due diligence in doing so<sup>14</sup>. The UNIDROIT Convention is not retroactive and applies only to objects stolen or illegally exported after it enters into force in both the originating and destination countries. It allows for "fair and reasonable" compensation to be assessed by the courts.

The UNIDROIT Convention is intended to complement the 1970 UNESCO Convention and it was developed at the recommendation of UNESCO. Although Australia played an extensive part in the process of negotiating the UNIDROIT Convention, it has not ratified the Convention. The principles reflected in the UNIDROIT Convention appear to offer valuable additional measures to combat illicit trade in cultural heritage objects and enhance international cooperation for their protection. Where objects are illegally exported but not stolen, it is appropriate that only foreign states may take action through the courts.<sup>15</sup> In the case of stolen objects, the right to take court action could also extend to individuals and organisations.

Supporters of the UNIDROIT Convention argue that allowing for claims of compensation by innocent purchasers who can show that they exercised due diligence in acquiring an object would assist in deterring illicit trade. Adopting this measure would make it advantageous for buyers to deal with reputable dealers who have adopted a Code of Ethics consistent with the UNIDROIT Convention. The principle of due diligence also accords with the practices adopted by museums; the International

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<sup>13</sup> See <<http://www.unidroit.org/english/implement/i-95.pdf>>

<sup>14</sup> Article 7 of the 1970 UNESCO Convention requires the country requesting the return of an illegally exported object to pay just compensation to an innocent purchaser or person with valid title. However, there are no detailed provisions as there are in the UNIDROIT Convention. Under Article 6(1) of the UNIDROIT Convention, where an object was illegally exported and action is being brought by a foreign state, compensation is payable by the foreign state. In the case of stolen objects, compensation may be payable by either the claimant or a person who transferred the object to the innocent purchaser (according to the law of the country where the action is heard) (Articles 4(1)-(5)).

<sup>15</sup> Under Article 5(3) of the UNIDROIT Convention, the State must show that the object is of 'significant cultural importance' or meets other specific criteria.

Council of Museums (ICOM) Code of Ethics mandates that museums will not acquire, identify or otherwise authenticate any object that is suspected to have been illegally acquired, transferred, imported or exported.

The MA *Code of Ethics for Art, History and Science Museums 1999* (the Code<sup>16</sup>) is also intended to assist its members in making decisions about the ethical issues they may encounter. The Code specifies conditions under which acquisitions should not be considered, such as if legal title cannot be obtained or if the object has been exported illegally. The Code also refers to MA's support for international efforts to address the illicit trade in cultural material and relevant Commonwealth and state and territory legislation.

Many individual Australian collecting institutions have developed their own policies to guide staff on provenance issues. These policies are generally informed by international and national frameworks, combined with the institutions' own experiences. Guidance on provenance issues may be included in collection development policies, acquisition policies, and due diligence guidelines.

The Heads of Collecting Institutions (HOCl), a forum of the Chief Executives of Australia's national collecting institutions, developed *Collecting Cultural Material: Principles for Best Practice* (the Principles), which was published in June 2009. The Principles are intended to be a voluntary resource for the broader cultural sector to work within established legal and ethical frameworks. They also represent the agreed standard that HOCl members will apply to the purchase, gifting and bequest of objects, and are consistent with their individual acquisition and disposal policies.

There have been calls over a number of years for innocent good faith purchasers of illegally exported objects should have a right to fair and reasonable compensation, provided they can show that they exercised due diligence in acquiring the objects. This would be consistent with Article 7(b)(ii) of the 1970 Convention, which states: (ii) at the request of the State Party of origin, to take appropriate steps to recover and return any such cultural property imported after the entry into force of this Convention in both States concerned, provided, however, that the requesting State shall pay just compensation to an innocent purchaser or to a person who has valid title to that property.

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<sup>16</sup> <http://www.museumsaustralia.org.au/dbdoc/maethics.pdf>

To date this has not been a feature of Australia's implementation of the Convention and there are no formal measures in place to seek compensation from requesting countries. As Professor Patrick O'Keefe notes in his *Commentary on the 1970 UNESCO Convention*<sup>17</sup>, this aspect of the Convention has proved problematic. It is not readily applicable to many national legal systems, particularly in Common Law systems where the good faith purchaser has no special protections.

Any provision for compensation would also need to ensure that 'good faith' involved having undertaken proper due diligence and provenance checks. As Professor O'Keefe outlines "firmer rules on good faith have been adopted in Article 4(4) of the UNIDROIT Convention:

In determining whether the possessor exercised due diligence, regard shall have to be had to all the circumstances of the acquisition, including the character of the parties, the price paid, whether the possessor consulted any reasonably accessible register of stolen cultural objects, and any other relevant information and documentation which it could reasonable have obtained, and whether the possessor consulted accessible agencies or took any other step that a reasonable person would have taken in the circumstances."<sup>18</sup>

A number of submissions supported Australia ratifying or considering the ratification of the UNIDROIT Convention. Professor Lyndel Prott and Professor Patrick O'Keefe commented that the UNIDROIT Convention was more consistent with common, rather than civil, law systems and should deter illegal export by placing the risk of uncompensated loss of an object on the acquirer who has failed to exercise due diligence. They also noted that it extends time limitations for claims, which would considerably aid museums who often do not discover thefts for several years. Indigenous communities and developing countries can also experience constraints in gathering evidence, which can make them unable to initiate action quickly.

Walter Holt took a different view, believing that Australia should not ratify the UNIDROIT Convention because it should not be expected to bear a burden that another country chooses, by whatever means,

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<sup>17</sup> Op cit.

<sup>18</sup> Ibid p.66.

not to bear itself. He argued that failures and shortcomings in the laws of foreign nations should not be the cause for bad laws to be imposed on good, law-abiding people in other countries such as Australia.

Professor Lyndel Prott and Professor Patrick O'Keefe have also recommended that Australia consider withdrawing its reservation to Article 10 of the 1970 UNESCO Convention. At the time of acceptance of the Convention, Australia was unable to comply with Article 10's obligations to require dealers to maintain a register of transactions because two states were in the process of reviewing their legislation relating to second hand dealers.

**Recommendation 64:** *In addition to the current PMCH Act provisions which allow state to state action for the seizure and return of illegally exported objects, consider ratification of the UNIDROIT Convention to provide the right of private action by individuals, bodies or states (foreign countries).*

**Recommendation 65:** *Undertake a process of consultation on whether Australia should withdraw its reservation to Article 10 of the 1970 UNESCO Convention.*

***Are there other measures which could be introduced to enhance Australia's ability to counter illicit trade, including international collaboration?***

### ***Collaboration on Compliance and Enforcement***

A consideration which emerged during the review and was supported in Professor Lyndel Prott's submission was that the Australian Government should seek to enhance its ability to respond quickly in seizing objects suspected to have been illegally exported from a foreign country. Currently, the originating country's request and their confirmation of an object's significance are required to seize a foreign object. This process can be prolonged, particularly in poorly resourced developing countries. Professor Prott characterised Australia's reciprocity in responding substantively to the illegal export of foreign protected objects as crucial to enhancing its position for its own potential international negotiations for the return of illegally exported APOs.

While Professor Prott and Professor O'Keefe recommended amending the PMCH legislation to allow the Minister to order the seizure of foreign objects, the department has also considered whether section 41 of the PMCH legislation could be amended to remove the requirement that seizure may only occur at "the request of the original state party".

However, further consultation with the Australian Government Solicitor (AGS), the Office of International Law (OIL) and DFAT would be required to determine if Australia could amend these provisions without breaching the Constitution or obligations under the 1970 UNESCO Convention.

The department has a successful and positively recognised record of collaborating with other nations to seize and return illegally exported foreign protected objects such as Chinese fossils, and currently has a Memorandum of Understanding (MoU) in place with the Cultural Heritage Administration of the Republic of Korea. The department is also currently discussing the potential for a similar MoU with the Chinese Government.

The department's ability to influence policy making and strategic approaches in relevant international fora is constrained by the limited resources it has to support these activities. Most of our international partnerships in this area have resulted from approaches from potential or existing bilateral partners. Unlike our active engagement in shaping the international debate on the natural and built heritage, there is no departmental cultural property representation at meetings of UNESCO, INTERPOL or other fora shaping the forward agenda in the field of movable cultural heritage and action to combat illicit trade. We currently hold no positions on committees or working groups developing and negotiating and policy.

There would be benefit in exploring options for cultural cooperation, international information sharing and capacity building with DFAT and AusAID to enable Australia to learn from others and to share expertise with developing countries in the Asia Pacific region in particular. The opportunity to share information and best practice models with counterpart administrations, including compliance and enforcement mechanisms, would be enhance the operation of the PMCH legislation. This cooperation with Asia Pacific nations would strengthen Australia's standing as an influential contributor to the region and its development, and support the Australian Government's commitment to regional engagement, including the cultivation of cultural ties.<sup>19</sup>

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<sup>19</sup> Australian Labor Party, *National Platform and Constitution 2007*, 227, 245, 232-35.

Increased international engagement would also assist the department and associated law enforcement agencies such as the AFP and Australian Customs and Border Protection Service to more rapidly identify and respond to the importation of illegally exported objects.

**Recommendation 66:** *Liaise with relevant Commonwealth agencies to explore opportunities to support enhanced international collaboration with other nations, with the objective of improving compliance and enforcement mechanisms and outcomes under the PMCH legislation.*

**Recommendation 67:** *Liaise with relevant Commonwealth agencies, and monitor the outcomes of the review of the Environment Protection and Biodiversity Conservation Act 1999, to consider whether the PMCH legislation can be amended to enhance the Australian Government's capacity to seize illegally exported foreign objects.*

## **Loans and Seizure**

An issue that was not canvassed in the review discussion paper, but which has emerged during the course of the review, was that Australia does not have legislation which grants cultural heritage material on loan from overseas institutions and individuals immunity from seizure in response to third party claims. The department received a submission from the British Museum drawing attention to laws in the United Kingdom, the United States of America, France, Germany, Belgium, Switzerland and Austria which protect any object of cultural significance loaned from abroad from any seizure by law enforcement authorities that may be ordered in civil or criminal proceedings.

The British Museum's submission emphasised that the immunity from seizure laws in force in other nations do not grant "immunity from suit and they may be drafted in terms which safeguard the interests of genuine claimants under international treaties, such as the UNESCO Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Cultural Property". Under the UK system, detailed and rigorous due diligence procedures relating to provenance must be undertaken before immunity from seizure can be granted.

The department understands from museum sector feedback and the submission from the History Trust of South Australia that Australian collecting institutions are experiencing increasing reluctance by overseas museums and galleries to lend objects for exhibition in Australia, due to concerns about their potential seizure by third party claimants. This includes objects that are likely to be APOs and which could trigger attempts to have them remain permanently in Australia and foreign culturally significant objects that may be claimed to have been illegally

acquired from their original owners, illegally exported from their country of origin or claimed as part of an unrelated legal dispute with the current owner, the lending institution or the country in which the lending institution is located.

Australia currently has some legislative measures offering protection from seizure that apply in specific and limited circumstances. For instance, certificates of exemption issued under the PMCH legislation allow Australian protected objects now located overseas and imported into Australia for temporary exhibition or research to be legally exported again without undergoing export permit assessment. Certificates of exemption also provide protection from claims under the ATSHIP Act, but do not prevent potential claims under other legislation, such as state and territory laws.

The PMCH Act provides some assurance for international objects on loan for exhibition purposes in Australia. Subsection 14(1) of the Act provides that where objects forming part of the movable cultural heritage of a foreign country are exported from that country in contravention of a law of that country relating to cultural property and are imported into Australia, the objects are liable to forfeiture to the Commonwealth of Australia. Subsection 14(2) provides for an offence where such objects are exported illegally. However, subsection 14(3) of the PMCH Act provides that subsections 14(1) and (2) do not apply in relation to the importation of protected objects of a foreign country under a loan agreement for up to 2 years for an exhibition of the objects by a principal collecting institution.

In specific circumstances, materials loaned from overseas institutions which come under the relevant foreign government's legal jurisdiction may also be covered by certain immunities from the jurisdiction of Australian courts under the *Foreign States Immunities Act 1985*, or limited diplomatic and consular immunities under the *Diplomatic Privileges and Immunities Act 1967*.

Providing immunity from seizure under Commonwealth legislation could have implications for state and territory laws and would require consultation with state and territory governments. Any provisions for immunity from seizure would also need to be balanced with measures to ensure that we continue to meet our obligations under the 1970 UNESCO Convention.

While amendments to the ATSHIP Act have tightened immunity from seizure provisions by reinforcing the dominant jurisdiction of certificates of exemption under the PMCH legislation, the department is advised that the complexity of varying provisions under state and territory legislation means that watertight immunity from seizure is not guaranteed under

current laws. It is as yet unclear how the provision of immunity from seizure would be best supported and further consultation with the Attorney-General's Department and DFAT is required on this matter.

It should also be noted that at least one submission commented that the provision of certificates of exemption for Indigenous objects held in overseas collections is problematic, given what it saw as the often unsavoury motivations and methodologies which drove their collection prior to the introduction of Indigenous heritage protection laws in Australia. Currently, the Australian Government only seeks the restitution of Indigenous human remains from overseas collections. This submission recommended that the criteria for certificates of exemption for Indigenous objects be revised and restricted, and that thresholds for the export of wooden objects under the *Export Control Act 1982* and Australian Customs and Border Protection Service guidelines should also be tightened.

**Recommendation 68:** *Undertake targeted consultation with stakeholders on the need for legislative amendments to safeguard cultural property on loan from overseas institutions from seizure by law enforcement authorities.*

### ***Other International Agreements***

Some submissions to the review drew attention to the close relationship between intangible and tangible cultural heritage, and the particular relevance of protecting Indigenous intangible cultural heritage, which has been historically threatened by interventions disrupting the transmission of cultural knowledge systems, rituals and practices between generations.

Several external submissions to the review requested that the Australian Government prioritise the protection of intangible cultural heritage under its broader arts and culture policy framework, as this heritage bestows meaning on the tangible cultural objects and sites currently protected under Commonwealth, state and territory legislation.

Internal consultation within the department also highlighted that should Australia ratify the 2003 UNESCO *Convention for the Safeguarding of the Intangible Cultural Heritage* (the ICH Convention), criteria for listing diverse aspects of Australia's intangible cultural heritage would be developed. If an aspect of Australia's intangible cultural heritage became listed under the ICH convention, this would undoubtedly inform the significance assessment of cultural objects under the PMCH legislation. It is possible under such a framework that expert examiners may need to consider an object for intangible cultural heritage listing in order to assist



in protecting both the intangible and physical aspects of its heritage or significance.

The Australian Government is currently considering ratification of the ICH Convention. The department does not propose to incorporate intangible cultural heritage considerations into the PMCH legislation prior to confirmation of either ratification or non-ratification of the ICH Convention.

The NSW Government and Professor Lyndel Prott highlighted in their submissions that any ratification of the 2001 UNESCO *Convention on the Protection of the Underwater Cultural Heritage* would also have implications for the PMCH legislation and its relationship with the *Historic Shipwrecks Act 1976* (the Historic Shipwrecks Act). Professor Prott recommended that the Australian Government become a party to this Convention. The Australian Government is currently considering ratification of the Underwater Cultural Heritage Convention.

Finally, both Professor Prott and the National Gallery of Victoria submitted the recommendation that Australia should become a party to the 1954 and 1999 Protocols to the 1954 Hague *Convention for the Protection of Cultural Property in the Event of Armed Conflict*. Professor Prott declared that Australia's increased commitment to international agreements governing cultural property would enhance its position as a world leader in international cultural heritage law and protection.

The 1954 Hague Protocol deals with the return of cultural property removed from an occupied territory during armed conflict. The department understands that Australia did not become a party to this Protocol pending advice on Constitutional implications from AGD, which must be revisited. The 1999 Protocol deals with penalties for those who do not comply with the protection of cultural property during conflict or occupation. As this Protocol would place specific obligations on Australian military personnel, substantial consultation with the Department of Defence would be required prior to any further progress towards adopting this Protocol.

**Recommendation 69:** *Monitor, report and consult on implications for the PMCH legislation should the Australian Government ratify the 2003 UNESCO Convention for the Safeguarding of the Intangible Cultural Heritage or the 2001 UNESCO Convention on the Protection of the Underwater Cultural Heritage.*

**Recommendation 70:** *Undertake targeted consultation with stakeholders on the potential impacts of becoming a party to the 1954 and 1999 Protocols to the 1954 Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict.*

## 6.11 Impacts on broader arts and culture policy

### **Overview**

Various submissions to the review discussed the relationship between the PMCH legislation and other Australian Government and state and territory policy objectives, legislative instruments and heritage assessment frameworks. Most of these submissions identified opportunities for the PMCH legislation to complement and draw added value from other Australian Government programs, legislative reviews and policy discussions. While several submissions warned against tightened restrictions which could impede the legitimate trade in cultural property, none accused the current PMCH legislation of fundamentally undermining or neglecting the cultural sector or other arts, culture or heritage programs, policies, legislation or international agreements.

### ***Is the PMCH legislation having an unintended impact on any of Australia's other arts and culture policy objectives?***

The ACGA, NSW Government and Victorian Government called on the Australian Government to recognise in its review of the PMCH legislation that the protection of Australia's movable cultural heritage must be balanced with the need to facilitate the increased export of cultural objects, particularly visual arts and craft, to showcase Australian culture overseas. The promotion of Australian artistic achievement overseas was considered vital for building international understanding of Australian identity and culture and avoiding cultural isolation. Obviously, the international promotion and sale of Australian art also delivers crucial economic benefits to artists and their communities.

The NSW Government emphasised the finding of the 2007 Senate Inquiry into the Indigenous visual arts sector, *Indigenous Art – Securing the Future*, that efforts should be undertaken to increase the international promotion of Indigenous visual arts and craft. The NSW Government also noted that the resale royalty benefits available to Indigenous artists under the Australian Government's resale royalty scheme would be limited by any new restrictions on the export of Indigenous visual artworks to nations which participate in reciprocal royalty schemes.

The ACGA appealed in its submission for the Australian Government to devote equitable resources and attention to enhancing the export of Australian art, which was recognised as a key issue at the 2020 Summit in April 2008, as to enforcing the PMCH legislation. The ACGA also noted that it is currently investigating mechanisms to further assist Australian art

exports with the Department of Foreign Affairs and Trade (DFAT) and Austrade.

It should be noted that there has been no evidence to date, nor any submissions made to the 2007 Senate Inquiry into the Indigenous visual arts and craft sector, to indicate that the PMCH legislation has had an adverse effect on the export of Australian art, the international art market, or the Indigenous art market. Since the inception of the PMCH Act in 1987, 63 objects have been refused export. Of these, 26 have been Indigenous objects, and 18 of these have been Papunya Tula paintings, which are well known to be historically, aesthetically and spiritually significant. The export restrictions on these objects have affected a very minor portion of the market for Papunya Tula works, let alone the entire Indigenous or international art market.

Dr Philip Jones posited, as did many other submissions discussing potential links between the PMCH legislation and the Cultural Gifts Program, that there could be greater partnership, cross-promotion and (presumably) potential transfers of APOs refused export permits between the PMCH assessment process, the Cultural Gifts Program and touring exhibitions through Visions Australia.

ATSIAB also advocated greater recognition of Indigenous cultural and intellectual property ownership by expert examiners. Whilst the submission referred to the protocols and best practice guidelines of UNESCO and the World Intellectual Property Organisation (WIPO), a specific model for how to engage in enhanced consultation on Indigenous intellectual property under the PMCH legislation was not articulated.

ATSIAB also stressed the importance of cultural heritage and its role in “philosophically underpinning the cultural integrity of arts practice” as a key integrative consideration for the PMCH legislation and the Australian Government’s broader arts and culture policy framework. It urged the review to have regard to the Australia Council’s protocols for dealing with Indigenous visual arts and heritage, and to consider the implications of the discussions of the 2020 Summit and National Indigenous Arts Reference Group regarding the potential establishment of a National Indigenous Cultural authority, although this is presumably a longer term consideration.

The major criticism levelled against the PMCH legislation in the context of broader policy considerations was the question of how effectively it aligns with the complex assortment of Commonwealth, state and territory legislation governing the protection of both Indigenous and non-Indigenous cultural and heritage objects and their associated sites. Numerous submissions to the review affirmed that state and territory laws

protecting, for example, Indigenous heritage do not offer complete coverage, and objects may easily be moved between states by unscrupulous collectors seeking less restrictive heritage protection regimes, as highlighted by the NSW Government's case study on Aboriginal breastplates.

The NSW Government argued that the PMCH review should consider improved alignment between the PMCH legislation and the legislation governing national and world heritage places containing movable heritage collections a priority, as many significant objects are associated with these places. This proposal also touches on the issues discussed in chapter three in relation to the role of an object's context, including its association with a place or collection of objects, to its significance. The NSW Government also recommended that the PMCH legislation institute age thresholds and other operational measures that are better aligned with the Historic Shipwrecks Act. The alignment of Commonwealth legislation dealing with related issues is also on the agenda for the ongoing reviews of the EPBC Act and Historic Shipwrecks Act. The department will need to consider opportunities for improved legislative alignment in tandem with the outcomes of these reviews.

Dr Philip Jones made several suggestions in his submission regarding the wording of Item 1.3 of the Control List which, if adopted, may affect the definition and perceived significance of several Class A Indigenous objects, including secret sacred objects and bark and log coffins. The department considers it important to ensure that any altered treatment, wording or definition of these objects under the PMCH legislation is made in consultation with RICP Program officers, the RICP Management Committee and its Heritage Division to ensure policy consistency across the Australian Government's Arts, Culture and Heritage portfolios. For example, the RICP Program currently uses the terminology "secret sacred objects," and recommends the repatriation of associated burial goods, which may include bark and log coffins, alongside Indigenous ancestral remains in its national policy and principles.

***Recommendation 71:*** Monitor the impact of the PMCH legislation on the contemporary Indigenous art market to assess whether it is having any negative impact.

***Recommendation 72:*** Continue to monitor concerns that the legitimate trade in cultural property, including visual arts and craft, is supported in line with the Australian Government's broader policy objectives, and is not excessively restricted under any amendments to the PMCH legislation.

**Recommendation 73:** Undertake further consultation with relevant stakeholders on the need for the PMCH legislation to align with complementary operational principles in relevant Commonwealth, state and territory heritage legislation.

**Recommendation 74:** Ensure that the treatment and definition of secret sacred objects and burial goods under the PMCH legislation and other Commonwealth legislation, policies and programs are consistent by liaising with the RICP Program Management Committee and the Heritage Division of the department.

# Appendix A: Discussion Paper



**Australian Government**

**Department of the Environment, Water, Heritage and the Arts**

## **Review of the *Protection of Movable Cultural Heritage Act* 1986 and Regulations**

### **Discussion Paper**

**January 2009**

## Introduction to the Review

The *Protection of Movable Cultural Heritage Act 1986* (PMCH Act) commenced operation on 1 July 1987 to give effect to the 1970 UNESCO *Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property*. The PMCH Act protects Australia's heritage of movable cultural objects and supports the protection by foreign countries of their heritage of movable cultural objects.

The *Protection of Movable Cultural Heritage Regulations 1987* (PMCH Regulations) set out the National Cultural Heritage Control List and also deal with the operation of the National Cultural Heritage Account (which the PMCH Regulations refer to as 'the Fund').

The PMCH legislation has been reviewed twice, first in 1991 followed by a review of the Regulations and Control List in 1995.

The review of the PMCH legislation will consider the operation of the legislation and the extent to which it is achieving its purpose.

The PMCH Act defines Australia's movable cultural heritage objects as 'objects of importance to Australia, or to a particular part of Australia, for ethnological, archaeological, historical, literary, artistic, scientific or technological reasons', and falling within listed categories. An Australian protected object is a Class A or Class B object on the National Cultural Heritage Control List, which is set out in Schedule 1 to the PMCH Regulations. Objects specified in the Control List include:

- Indigenous art and artifacts
- Works of fine or decorative art
- Scientific and archaeological artifacts
- Fossils, meteorites and minerals
- Agricultural and industrial heritage
- Books, stamps and medals
- Historic materials.

Under the PMCH Act an object that meets the criterion of being an Australian protected object under the National Cultural Heritage Control List requires a permit if the object is to be exported.

The protection of foreign countries' movable cultural heritage is dealt with by sections 14 and 41 of the PMCH Act which enable Australia to respond to an official request by a foreign government to return objects of their cultural heritage that have been illegally exported from their country of origin.

The PMCH Act also includes provisions for the establishment of the National Cultural Heritage Committee (NCHC) and the National Cultural Heritage Account (NCHA). The NCHC is appointed by the Minister for the Environment,

Heritage and the Arts and advises the Minister in respect to the operation of the PMCH Act, the National Cultural Heritage Control List, and the NCHA.

Under the Act the NCHA helps Australian cultural organisations acquire Australian protected objects, as defined in the PMCH Act. Its purpose is to encourage organisations to buy nationally significant objects that they could not otherwise afford, with the intention that they be preserved and made accessible to the public.

**Objectives of the Review:**

The review of the PMCH legislation will examine:

1. the operation of the PMCH legislation generally;
2. the extent to which the objectives of the PMCH legislation have been achieved;
3. the appropriateness of the current arrangements and categories under the National Cultural Heritage Control List for achieving the effective operation of the PMCH Act;
4. the operation of the National Cultural Heritage Account; and
5. the effectiveness of the current permit system for protecting both Australia's and foreign countries' movable cultural heritage.

The review will be guided by Australian government policy objectives:

1. to protect and conserve Australia's most significant movable cultural heritage and to promote Australian arts and culture;
2. to work in partnership with the states and territories within an effective federal arrangement;
3. to facilitate delivery of Australia's international obligations;
4. the Australian Government's deregulation agenda to reduce and simplify the regulatory burden on people, businesses and organisations; and
5. to ensure activities under the PMCH Act represent the most appropriate, efficient and effective ways of achieving the Government's outcomes and objectives in accordance with the Expenditure Review Principles.

The review will seek input from state and territory governments, members of the community and industry.

The review will commence as soon as possible and be completed by 31 May 2009.



## **Introduction to the Discussion Paper:**

The purpose of this Discussion Paper is to encourage input from individuals, businesses and organisations into the review of the PMCH Act and the PMCH Regulations. It provides:

- an explanation of the key provisions of the PMCH Act and the PMCH Regulations;
- a summary of how the provisions have been implemented since the PMCH Act and Regulations came into force in 1987; and
- a selection of key questions regarding the operation of the PMCH Act and Regulations to help stimulate discussion as part of the review.

Submissions on the PMCH Act and Regulations are invited. The closing date for submissions is 6 March 2009.

Submissions should respond to the key issues to be reviewed. To assist, key questions are interspersed throughout this discussion paper. The key questions are posed primarily as 'thought starters' and are not intended to limit comments or submissions on the PMCH Act and Regulations.

Comments regarding other aspects of the PMCH Act and Regulations and their operation, and the extent to which the objects of the PMCH Act and Regulations have been achieved, are welcome.

Submissions can be directed to:

Secretariat to the Review of the PMCH Act  
Cultural Property Section  
Department of the Environment, Water, Heritage and the Arts  
GPO Box 787  
CANBERRA ACT 2601, or  
[PMCHReview@environment.gov.au](mailto:PMCHReview@environment.gov.au)

Submissions will be published on the review website unless marked confidential, at

[www.arts.gov.au/public\\_consultation](http://www.arts.gov.au/public_consultation)

Submissions may also be reproduced in public documents such as the Report on the Review of the PMCH Act.

For submissions from individual community members, the publication of contact details will be limited to name, suburb and state unless marked confidential.

Questions about the review can be directed to the Secretariat:

[PMCHReview@environment.gov.au](mailto:PMCHReview@environment.gov.au)

Phone: 1800 115 771

## Other reference materials:

While this discussion paper provides information on key provisions in the Act, further information is available on the Department of the Environment, Water, Heritage and the Arts (DEWHA) website:

[http://www.arts.gov.au/movable\\_heritage](http://www.arts.gov.au/movable_heritage)

## Part 1: Questions raised in this Discussion Paper:

### 1. National Cultural Heritage Control List

Does the current Control List capture Australia's most significant cultural objects?

- Are the Class A objects listed in the Control List still our 'most significant'?
- Is the list of Class B objects too broad or too narrow? There have been calls for Part 4 Objects of Applied Science or Technology to be broadened to include space and satellite, alternative energy – solar, nuclear, computing, and medical innovations.

Do all categories on the Control List need to remain separately listed? For example, could philatelic objects become a sub-category of Part 9, objects of historical significance?

Does the Control List allow an appropriate assessment to be made of Indigenous artworks regarded as having exceptional spiritual, cultural and historical significance?

### 2. Thresholds and the PMCH Regulations

Are the age thresholds still appropriate? Given the pace of technological change do the age thresholds specified make it likely that significant objects will be lost to Australia?

Should a new category be introduced to allow the Minister to determine objects of national significance that are under age or monetary thresholds?

At what level should the monetary thresholds for the object categories be set?

How often should the thresholds be reviewed and on what basis?

Is 'current Australian market value' an appropriate benchmark?

### 3. Significance and the PMCH Regulations to Australia

Should the definition of 'significance' in the PMCH Regulations be amended? The criteria developed by the former Heritage Collections Council (now being reviewed by the Collections Council of Australia) are well understood throughout

the collections sector – should they be adopted to assess which Australian protected objects should be denied export permits?

Are there other models that should be considered?

#### **4. Indigenous objects**

Should there be special protection for objects relating to Aboriginal and Torres Strait Islander heritage? Should this also include artwork that is identified as having secret and sacred significance for Aboriginal and Torres Strait Islander community members?

#### **5. A National Register?**

Should a National List of Heritage Objects of outstanding national significance be established?

#### **6. Export Permit Applications**

Should applicants for export permits under the PMCH Act be required to provide more rigorous documentation, including undertaking some of the research currently undertaken by the expert examiners? Would this assist in streamlining the assessment process?

Should a fee be charged for the processing of permit applications?

Should the department be given a greater decision-making role in regard to objects that are not Australian protected objects?

Should export permits be denied when there is no interest from a public collecting institution in acquiring an object, and no immediate prospect of its proper conservation and preservation in Australia?

Should a register be kept of the owner and location of those Australian protected objects which have been denied export permits? Should funding be provided to assist private individuals or public institutions with the conservation of these objects?

#### **7. Temporary Export Permit Applications**

Should Australia adopt a similar approach to Canada and automatically grant temporary export permits for up to five years?

Should the exemption from the Temporary Export Permit process be extended to include other institutions and organisations that have responsibility and ownership for Australian protected objects?

Should Class A objects be granted temporary export permits where the Minister is satisfied that a valid reason exists?

## 8. Expert Examiners

Should the register of expert examiners be reviewed every five years?

Should onsite and online training be provided for expert examiners to support their work under the PMCH Act?

Should expert examiners, or the institutions to which they belong, be paid for their assessments?

Should any payments be restricted to expert examiners working in the private sector?

Are there measures that could be implemented to assist expert examiners in undertaking their role?

## 9. National Cultural Heritage Account

Should Australian Government funding to the Account be increased to enhance its capacity to fulfil its purpose and if so what amount would be appropriate?

Should the option of providing tax deductibility status for donations to the Account be explored with the Australian Taxation Office?

Should Australia consider a greater linkage between the Protection of Movable Cultural Heritage and the Cultural Gifts Program?

[http://www.arts.gov.au/tax\\_incentives/cultural\\_gifts\\_program](http://www.arts.gov.au/tax_incentives/cultural_gifts_program)

## 10. Enforcement provisions

Should the PMCH Act include similar enforcement mechanisms to those in the EPBC Act?

Should s.48 of the PMCH Act be similar to that of the EPBC Act? This would mean that a judicial review, but not merits review, of a Ministerial decision, would still be available under the *Administrative Decisions (Judicial Review) Act 1977*, section 39B of the *Judiciary Act 1903* and section 75 of the *Constitution*.

## 11. Broader arts and culture policy framework

Is the PMCH legislation having an unintended impact on any of Australia's other arts and culture policy objectives?

## 12. International Conventions

Should Australia consider ratifying the UNIDROIT Convention on the Return of Stolen or Illegally Exported Cultural Objects?

Are there other measures which could be introduced to enhance Australia's ability to counter illicit trade, including international collaboration?

## Part 2: Current operation of the Act:

The PMCH Act implements a system of export permits for certain heritage objects defined as 'Australian protected objects.' It is not intended to restrict normal and legitimate trade in cultural property, and does not affect an individual's right to own and sell within Australia.

More detailed information is available at:

[http://www.arts.gov.au/movable\\_heritage/movable\\_cultural\\_heritage\\_laws](http://www.arts.gov.au/movable_heritage/movable_cultural_heritage_laws)

### Exporting cultural heritage objects from Australia

The PMCH Act establishes as the movable cultural heritage of Australia the National Cultural Heritage Control List, which consists of categories of objects specified in the PMCH Regulations.

Australia's Control List has been described as having 'the most extensive implementation of the 1970 UNESCO Convention yet undertaken.'<sup>20</sup>

The criteria (which define the categories) include historical association, cultural significance to Australia, representation in an Australian public collection, age and financial thresholds. The Control List includes Class A objects of such significance to Australia that they may not be exported:

These are:

- Victoria Cross medals awarded to Australian service personnel as listed in item 7.3 of Schedule 1 to the Regulations;
- Each piece of the suit of metal armour worn by Ned Kelly at the siege of Glenrowan in Victoria in 1880 specified in item 9.2A; and
- Aboriginal and Torres Strait Islander objects which cannot be exported (see item 1.3). These are:
  - Sacred and secret ritual objects
  - Bark and log coffins used as traditional burial objects
  - Human remains
  - Rock art
  - Dendroglyphs (carved trees).

Class B objects, which require a permit to be exported, fall within the following nine categories:

1. Objects of Aboriginal and Torres Strait Islander heritage;
2. Archaeological objects;

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<sup>20</sup> Patrick J O'Keefe, 'Developments in cultural heritage law: what is Australia's role?' [1996] Australian International Law Journal, p.100.

3. Natural science objects;
4. Objects of applied science or technology;
5. Objects of fine or decorative art;
6. Objects of documentary heritage;
7. Numismatic objects (coins and medals);
8. Philatelic objects (stamps); and
9. Objects of historical significance.

Class B objects also need to meet certain additional criteria, such as age, monetary value and significance to Australia.

### **Operation of the PMCH Act**

A summary of permit applications and outcomes over the last four years is as follows:

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

This includes applications for permanent and temporary export and letters of clearance and objects not requiring an export permit.

### **Options for Control List**

The majority of applications for export permits fall within certain categories such as Indigenous art, fossils, agricultural or other vehicles and military objects or weapons. Objects in other categories – documentary, numismatic, archaeological and Indigenous heritage – have been the subject of few or no applications. In the fine and decorative art category, almost all applications have been made by auction houses and relate to Indigenous art. Applications for objects of historical significance, a broad category that includes objects at least 30 years old that are not represented in at least two public collections, have almost exclusively concerned military and sport-related objects. Similarly, in applied science or technology, most applications relate to agricultural machinery and road or rail transport.

However, there is a high likelihood that objects potentially falling within all these categories and sub-categories are leaving the country illegally either through deliberate breach of the PMCH legislation or because exporters are unaware of the requirements of the legislation.

Does the current Control List capture Australia's most significant cultural objects?

- Are the Class A objects listed in the Control List still our 'most significant'?
- Is the list of Class B objects too broad or too narrow? There have been calls for Part 4 Objects of Applied Science or Technology to be broadened to include space and satellite, alternative energy – solar, nuclear, computing, and medical innovations.

Do all categories on the Control List need to remain separately listed? For example, could philatelic objects become a sub-category of Part 9, objects of historical significance?

Does the Control List allow an appropriate assessment to be made of Indigenous artworks regarded as having exceptional spiritual, cultural and historical significance?

Should the definition of 'adequate representation' be extended to include private collections; particularly for some categories of objects that are not extensively represented in public collections such as philatelic objects?

## Thresholds and the PMCH Regulations

### Age thresholds

Certain age thresholds apply to particular parts of the Control List. A 30 year threshold applies to Class B Aboriginal and Torres Strait Islander heritage objects (Part 1), non-indigenous fine or decorative art objects (Part 5), applied science objects (Part 4), objects of documentary heritage (Part 6) and objects of historical significance (Part 9). A lower limit of 20 years applies to Indigenous art objects under Part 5. Archaeological objects (Part 2) must have remained at least 50 years in the place from which they were removed. There are no age thresholds for Parts 3 (natural science), 7 (numismatic) and 8 (philatelic). Some of the age thresholds were up to 75 years in earlier versions of the Control List, but the thresholds were decreased in 1998.

By contrast, Canada, the UK and New Zealand have an age threshold of at least 50 years for all cultural heritage objects. The threshold is higher for some types of objects (for example, in the UK the threshold is 100 years in the case of books, archaeological objects, elements of dismembered artistic, historical or religious monuments, 75 years for means of transport, and 200 years for printed maps).

Are the age thresholds still appropriate? Given the pace of technological change do the age thresholds specified make it likely that significant objects will be lost to Australia?

Should a new category be introduced to allow the Minister to determine objects of national significance that are under age or monetary thresholds?

There are also various monetary thresholds for particular types of objects in Parts 3 (natural science), 5 (fine and decorative arts) and 7 (numismatic objects). For example, gold nuggets, diamonds and sapphires must have a current Australian market value of at least \$250,000; musical instruments, prints, posters, photographs and tapestries a value of at least \$10,000; sculptures and furniture at least \$30,000; and jewellery, clocks, watches, watercolours, pastels and sketches at least \$40,000.

The 1995 review of the Control List identified the following issues with monetary and age thresholds:

- The removal in 1993 of the monetary value limit for fossils (previously set at \$1000) resulted in a dramatic increase in applications for export approval with no increase in permits refused. That is, no more items were identified as warranting protection despite the net being significantly widened.
- It is not easy to set market values given the volatility of the market and difficulty in relating value to some assumed level of significance.
- While consultations identified concerns about the appropriateness of some levels and inconsistencies in some monetary values, the general conclusion was that having a threshold was nonetheless useful.

The age and monetary thresholds have not been revised since 1998.

Given inflation and other developments, including a significant appreciation in the value of objects of Aboriginal and Torres Strait Islander fine and decorative art, do the monetary thresholds in the PMCH Regulations need to be adjusted?

At what level should the monetary thresholds for the object categories be set?

How often should the thresholds be reviewed and on what basis?

Is 'current Australian market value' an appropriate benchmark?

## Significance

The term 'significance to Australia' is one of the criteria in six of the nine parts of the Control List and is broadly defined. Under subregulation 2(1) of the PMCH Regulations the term 'significance to Australia', for an object, is defined to mean the object is of Australian origin, has substantial Australian content, or has been used in Australia, and: (a) is associated with a person, activity, event, place or business enterprise, notable in history; or (b) has received a national or international award or has a significant association with an international event; or (c) represents significant technological or social progress for its time; or (d) is an object of scientific or archaeological interest.



The criterion 'Australia-related' is used in Part 5 (objects of fine or decorative art), while Part 9 (objects of historical significance) refers to an object's association with a person, activity, event, place or business enterprise 'notable in Australian history.' Seven parts of the Control List have as a criterion that the object is not 'adequately represented' in Australian public collections.

This lack of clarity and consequent uncertainty has been identified as an issue affecting the effective operation of the PMCH Act and its administration. Because the assessment criteria are so open to interpretation it causes problems and delays for applicants, expert examiners, members of the National Cultural Heritage Committee and for Customs officers in determining whether object/s are Australian protected objects and if so whether their export would significantly diminish the cultural heritage of Australia.

### **Significance assessment**

The criteria and methodology for significance assessment developed by the former Heritage Collections Council are used widely in local, state and national collecting institutions across Australia. These criteria are set out in

*Significance: a guide to assessing the significance of cultural heritage objects and collections* and available at:

[http://www.collectionsaustralia.net/sector\\_info\\_item/5](http://www.collectionsaustralia.net/sector_info_item/5)

It has been suggested that these criteria be used for the significance of objects under the PMCH Act. The HCC approach comprises four primary criteria: historic, aesthetic, scientific, research or technical; and social or spiritual. Five comparative criteria evaluate the degree of significance, acting as modifiers of the main criteria: provenance; representativeness; rarity; condition, completeness or intactness and integrity; and interpretive potential.

*Significance* is currently being updated by the Collections Council of Australia and a second edition is in preparation.

Should the definition of 'significance to Australia' in the PMCH Regulations be amended? The criteria developed by the Heritage Collections Council (now being reviewed by the Collections Council of Australia) are well understood throughout the collections sector – should they be adopted to assess which Australian protected objects should be denied export permits?

Are there other models that should be considered?

### **Indigenous objects**

New Zealand's movable cultural heritage legislation, the *Protected Objects Act 1975*, contains special measures for Indigenous objects (nga taonga tuturu). These objects are those which (i) are more than 50 years old, (ii) relate to Maori culture, history or society, and (iii) are, or appear to have been, manufactured or

modified in New Zealand by Maori, or brought to or used in New Zealand by Maori.

All finds of taonga tuturu must be reported to the ministry or the nearest public museum within 28 days, and the chief executive must call for claims of ownership to be lodged. Any such object found in New Zealand is prima facie deemed to be Crown property. Any interested party can claim ownership through the Maori Land Court, which has the power amongst other things to prohibit offering for sale or parting with possession of any object which has been a gift.

The *Protected Objects Act* also provides for registration of collectors of taonga tuturu. Privately owned taonga tuturu can only be sold to registered collectors (ordinarily resident in New Zealand), licensed dealers and public museums. These provisions do not apply to other protected objects.

Should there be special protection for objects relating to Aboriginal and Torres Strait Islander heritage? Should this also include artwork that is identified as having secret and sacred significance for Aboriginal and Torres Strait Islander community members?

### **Comparison of the operations of the UK and Australian schemes from 2006 to 2008**

In the UK between 1 May 2006 and 30 April 2007, the UK Department of Culture Media and Sport received 11,607 applications for individual export licences. Of those applications, twenty-eight items were referred to the Reviewing Committee on the Export of Works of Art and Objects of Cultural Interest by Expert Advisers and twenty-two of these were subsequently found to meet one or more of the UK's test for assessing the importance of an object, the 'Waverly criteria'. These criteria are:

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

Twenty items had their export licences deferred, of these, twelve were acquired by UK institutions or individuals. Four were granted an export licence.

In Australia during the 2007-08 financial year 163 applications were finalised covering 4,961 objects (including 116 for letters of clearance). Permits were issued to permanently export 22 Australian protected objects. Five permits were issued to allow the temporary export of five Australian protected objects.

The 116 letters of clearance were issued to cover 4,882 objects that were assessed by expert examiners as not being Australian protected objects and therefore not requiring an export permit under the Act. One object was refused an export permit and six applications were withdrawn.

Thirteen certificates of exemption covering 25 objects were issued. The certificates allow Australian protected objects that are currently overseas to be imported into Australia and subsequently re-exported.

In terms of restricting or preventing the flow overseas of Australia's cultural heritage, very few permanent export permits have been refused under the PMCH Act. Between 1994/95 and 2007/08, the annual number has been between none and eight.

In both Canada and the United Kingdom, the permanent export of a protected object will only be prevented if the object can be purchased domestically at a fair market price. If it cannot, an export permit will usually be granted. The process almost always includes a deferral period with public institutions being given the opportunity to raise the funding to purchase objects (utilising government funding and donations through cultural gift schemes). Both the Canadian and UK systems require the applicant to provide extensive documentation relating to the history, provenance and condition of the object which facilitates processing as well as working to ensure it was not acquired illicitly. Further information on the Canadian and UK systems is available at:

[http://www.pch.gc.ca/progs/mcp-bcm/mcp\\_e.cfm](http://www.pch.gc.ca/progs/mcp-bcm/mcp_e.cfm)

[http://www.culture.gov.uk/what\\_we\\_do/cultural\\_property/3293.aspx](http://www.culture.gov.uk/what_we_do/cultural_property/3293.aspx)

## **An alternative to the Control List: a national register**

### **Options for national listing**

An alternative model to the Control List is to establish a national register of significant cultural objects, the export of which would be prohibited (in effect a register of Class A objects). This model has been adopted by Switzerland and New Zealand. Switzerland regulates the export of Swiss objects of 'significant importance' on its federal and canton (regional) registers. France also has an export control system linked to classification of specific objects – both publicly and privately owned property may be classified and the government maintains a record of the object's location and the owner's name.

A Register of National Heritage Objects could be developed based on the Australian government National Heritage List, which recognises and protects places of outstanding heritage significance to Australia. Anyone can nominate a place for inclusion on the National Heritage List. The Australian Heritage Council assesses the nominations and make recommendations to the Minister for the Environment, Heritage and the Arts. The final decision is made by the Minister. All the nominations assessed against the nine National Heritage criteria, and a 'significance threshold' is also applied. To reach the threshold for the National

Heritage List, a place must have 'outstanding' heritage value to the nation; this means it must be important to the Australian community as a whole.

Places on the National Heritage List are in all states and territories. Listed places are protected by Australian government laws and special agreements with state and territory governments and Indigenous and private owners. Places on the list are protected under the EPBC Act which requires that approval be obtained before any action takes place that could have a significant impact on the national heritage listed values of a place.

### **National Register**

Should a register of movable cultural heritage objects of outstanding national significance be established? The list could comprise:

Objects for which the Minister has refused a permanent export permit

Objects added by the Minister on the recommendation of the National Cultural Heritage Committee

The National Cultural Heritage Committee should call for public nominations of objects to be included in the Register.

The Minister may determine what types of objects could be given priority in a nomination period.

Objects on the national register must not be permanently exported, except where the Minister is satisfied that exceptional circumstances warrant the grant of an export permit.

Should all Class A objects be on a National Register

The Australian Government also maintains the Commonwealth Heritage List, which includes places of significant heritage values on land or water owned or managed by the Commonwealth. The assessment and nomination for Commonwealth Heritage List places mirrors that of the National Heritage List.

Should a register be kept of the owner and location of those Australian protected objects which have been denied export permits? Should funding be provided to assist private individuals or public institutions with the conservation of these objects?

### **Permits, general permits, and certificates of exemption**

To export a movable cultural heritage object, you must apply for a permit in writing. The application process involves three steps:

- the application is referred to one or more experts examiners for assessment;

- these assessments are reviewed by the National Cultural Heritage Committee, which recommends to the Minister whether or not an export permit should be granted;
- the Minister makes the final decision as to whether an export permit will be granted.

### **Permanent and temporary permits**

The Minister may impose conditions on a permit, such as a time limit for the temporary export of an Australian protected object.

Letters of clearance are issued for objects determined not to be Australian protected objects and, therefore, do not require an export permit. These letters can be provided to Customs when the object is exported to assist with the object's passage out of Australia.

### **Certificates of exemption**

Certificates of exemption allow Australian protected objects, including Class A objects, which are currently overseas to be imported into Australia and subsequently re-exported. Overseas owners of Australian protected objects are encouraged to repatriate them to Australia for exhibition or sale. A certificate of exemption provides security that Australian protected objects can be re-exported on completion of the exhibition, or if a sale to a resident of Australia is unsuccessful.

### **Streamlining the application process**

Although the current application forms for temporary and permanent export request information on the object to be exported, many of the forms currently submitted do not include a significance assessment or detailed information provenance. This can delay the application process when additional information is requested, or when it is not provided then often the expert examiner tries to source the information.

The UK and Canada and New Zealand all place a greater obligation on the applicant for an export permit to provide documentary evidence of provenance, significance assessment. In New Zealand at least if sufficient information is not provided then the application will not be processed.

To reduce delays and improve efficiency in processing applications, the department could be given a clearer role in the application process, to allow departmental officers to issue permits or letters of clearance where an object is clearly not of significance to Australia, or is adequately represented in public collection. Currently there is no charge for the processing of temporary or permanent export permanent applications. Following the user pays principle, should a fee be introduced for permit applications?

Should applicants for export permits under the PMCH Act be required to provide more rigorous documentation, including undertaking some of the research currently undertaken by the expert examiners? Would this assist in streamlining the assessment process?

Should a fee be charged for the processing of permit applications?

Should the department be given a greater decision-making role in regard to objects that are not Australian protected objects?

Should export permits be denied when there is no interest from public collecting institution in acquiring an object, and no immediate prospect of its proper conservation and preservation in Australia?

### **Temporary export permits**

Currently, applications for temporary export permits go through the same process as those for permanent export, that is, assessment by an expert examiner and report to the NCHC which makes a recommendation to the Minister. Only principal collecting institutions are exempt from this process through the grant of general permits, and only in relation to export on loan for the purpose of research, public exhibition or a similar purpose.

Canada, which has a similar scheme to that in Australia, automatically grants temporary export permits for periods of up to five years. The holder of the permit is required to notify the ministry of the return of the object.

Should Australia adopt a similar approach to Canada and automatically grant temporary export permits for periods of up to five years?

Should the exemption from the temporary export permit process be extended to include other institutions and organisations that have responsibility and ownership for Australian protected objects?

Should Class A objects be granted temporary export permits where the Minister is satisfied that a valid reason exists?

### **Expert examiners**

Expert examiners perform a key role in the operation of the PMCH Act, determining whether objects that are the subject of export permit applications are Australian protected objects and making a recommendation about whether an export permit should be granted. Although many expert examiners are from collecting institutions and universities, private individuals provide significant input on such objects as vintage and veteran cars. At present the register of expert examiners has been developed over a number of years and on both an 'as needs' basis and from interest of particular curators.

It has been suggested that to ensure independence and currency of advice that expert examiners be appointed for a period of five years, during which time they

would be required to attend a workshop organised by the department on assessment issues and processes. Valuers under the Commonwealth government Cultural Gifts program are required to re-apply every five years to be listed as valuers under this program.

Should the register of expert examiners be reviewed every five years?

Should online and onsite training be provided for expert examiners to support their work under the PMCH Act?

### **Payment for expert examiners**

There is no reference to payment for expert examiners in the PMCH Act. When the Act was drafted, it was envisaged that the majority of expert examiners would be sourced from collecting institutions and universities. As many of these institutions would be applying for both export permits and funding from the National Cultural Heritage Account, it was not regarded as necessary to include payment for the examiners in the Act. It was thought that the support for the institutions and universities through the issuing of permits and funding support from the National Cultural Heritage Account would be appropriate *quid pro quo* for the time allocated to providing expert examiner reports.

The issue of payment to expert examiners has been raised by expert examiners on a number of occasions, particularly in regard to the work undertaken by private examiners not connected with a university or collecting institution.

It has been suggested by some expert examiners that there would be a greater pool of people available to assist with examinations if there was a reimbursement for the work undertaken.

Should expert examiners, or the institutions to which they belong, be paid for their assessments?

Should any payments be restricted to expert examiners working in the private sector?

Are there measures that could be implemented to assist expert examiners in undertaking their role?

### **The National Cultural Heritage Account**

Part IV of the PMCH Act establishes the National Cultural Heritage Account and enables money in the Account to be spent for the purpose of facilitating the acquisition of Australian protected objects for display or safe-keeping. When it was established in 1999 it was assumed that both Federal and State governments and private individuals would contribute to the Account. It was envisaged that the Account would have the dual purpose of assisting Australian collecting institutions to acquire objects refused export permits, and to compensate applicants denied export permits for the lost opportunity of a sale in the international market.

In practice, only the Australian government has provided funding for the Account. Funding for the Account has not increased beyond the original \$500,000 per annum so it has only a limited ability to assist to retain culturally significant objects in Australia – particularly collections.

The Australian scheme had envisaged that the National Cultural Heritage Account would be used to ensure that the owner receives a fair market price but the funding cap of \$500,000 has limited its capacity to do so.

Should Australian Government funding to the National Cultural Heritage Account be increased to enhance its capacity to fulfil its purpose and if so what amount would be appropriate?

Should the option of providing tax deductibility status for donations to the Account be explored with the Australian Taxation Office?

Canada has a system in place linking taxation incentives with a grant program for the purpose of purchasing objects denied an export permit. Institutions or public authorities may apply for certification of cultural property for income tax purposes, involving a determination of whether the object is of 'outstanding significance and national importance' and if it is, a determination of 'fair market value'. The tax benefit goes to the individual who donates or sells the object to a designated institution.

This means that as an alternative to relying solely on an application for funding under the Canadian equivalent to the National Cultural Heritage Account, philanthropists are purchasing the objects that will ultimately be donated to Canadian collecting institutions.

Should Australia consider a greater linkage between the Protection of Movable Cultural Heritage and the Cultural Gifts Program?

[http://www.arts.gov.au/tax\\_incentives/cultural\\_gifts\\_program](http://www.arts.gov.au/tax_incentives/cultural_gifts_program)

## **Enforcement**

While general and targeted public awareness, education and communication campaigns are an important factor in the efficient administration of the PMCH Act, amendments to the Control List would assist in addressing some of the current problems relating to enforcement of the legislation.

Part V of the PMCH Act deals with the enforcement of the legislation and contains search and seizure provisions. The enforcement mechanisms under the PMCH Act are much more limited than those in Part 17 of the *Environment Protection and Biodiversity Conservation Act 1999* (EPBC Act). The focus of the PMCH is on criminal offences, which must be proved beyond reasonable doubt, a high standard of proof which makes the securing of convictions very difficult, and criminal enforcement mechanisms.



## Comparison with the EPBC Act:

- provides for certain provisions to be civil penalty provisions, which generally require a lower standard of proof, being proof on the balance of probabilities, and allows the Federal Court to order a person to pay the Commonwealth a pecuniary penalty on the application of the Minister in relation to a contravention of a civil penalty provision;
- provides for the Minister or another interested person to apply to the Federal Court for an injunction to restrain certain action, or require certain action to be taken, in relation to a contravention of the Act;
- allows the Federal Court to make a remediation order to repair or mitigate damage in certain circumstances;
- gives inspectors powers to act without search warrants in certain circumstances;
- provides for infringement notices as an alternative to prosecution in certain circumstances;
- allows enforceable undertakings to be given to the Minister in certain circumstances<sup>21</sup>;
- gives the Minister information gathering powers in certain circumstances;
- allows the Minister to publicise contraventions.

Should the PMCH Act include similar enforcement mechanisms to those in the EPBC Act?

### AAT review

Section 48 of the PMCH Act provides for certain decisions of the Minister to be reviewable by the Administrative Appeals Tribunal (AAT).

By contrast, sections 206A, 221A, 243A, 263A and 303GJ of the EPBC Act, which were amended in 2006, provide that AAT review is not available for decisions about permits etc. made by the Minister personally. AAT review is, however, available where decisions about permits etc. are made by a delegate of the Minister.

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<sup>21</sup> Enforceable undertakings are available for breaches of civil penalty provisions.

Should s.48 of the PMCH Act be similar to the EPBC Act? This would mean a judicial review, but not a merits review, of a Ministerial decision would still be available under the *Administrative Decisions (Judicial Review) Act 1977*, section 39B of the *Judiciary Act 1903* and section 75 of the *Constitution*.

### **Private action to recover stolen objects**

The PMCH Act allows the Australian Government, on request by a foreign state, to seize illegally exported objects that have been imported into Australia, in accordance with obligations under the 1970 UNESCO Convention. That mechanism has worked successfully in a series of seizures and repatriation of objects illegally exported from their country of origin.<sup>22</sup>

However, there is no provision for private action through the courts for return of stolen or illegally exported cultural objects.

There have been concerns that differences between common law and civil law legal systems, particularly in the extent to which they protect the rights of a good faith purchaser as against those of the person who has been dispossessed of the object, have been exploited to legitimise illicit trade in cultural objects. A supplementary convention, the UNIDROIT<sup>23</sup> Convention on the Return of Stolen or Illegally Exported Cultural Objects 1995, was developed to facilitate private action through uniform provisions. Details are available at:

<http://www.unidroit.org/english/conventions/1995culturalproperty/1995culturalproperty-e.htm>

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<sup>22</sup> Since 2004 the Australian Government has on three occasions handed back to the People's Republic of China illegally exported Chinese fossils that have been seized in Australia, the most recent handover taking place on 15 February 2008 (see <http://www.environment.gov.au/minister/garrett/2008/pubs/mr20080115.pdf>). Other recent handovers include a 1482 Ptolemy world map returned to Spain in February 2008, 130 kilograms of dinosaur and plant fossils returned to the Argentine Republic in August 2007, 16 Dyak Skulls returned to Malaysia in May 2007, an Asmat human skull from Papua returned to Indonesia in December 2006 and seven ancient Egyptian funerary objects returned to Egypt in July 2005.

<sup>23</sup> UNIDROIT is the International Institute for the Unification of Private Law.

## The UNIDROIT Convention

The UNIDROIT Convention is not retroactive, applying only to objects stolen or illegally exported after entry into force of the Convention for both countries. There are time limits on claims for restitution and provision for compensation for innocent purchasers who can prove that they exercised due diligence in acquiring the object.<sup>24</sup> Where the object was illegally exported and action is being brought by a foreign state, compensation is payable by the foreign state. In the case of stolen objects, compensation may be payable by either the claimant or a person who transferred the object to the innocent purchaser (according to the law of the country where the action is heard). 'Fair and reasonable' compensation is assessed by the courts.

Australia has not ratified the UNIDROIT Convention <http://www.unidroit.org/english/implement/i-95.pdf>. Nonetheless, the principles reflected in the UNIDROIT Convention appear to be valuable additional measures to combat illicit trade in cultural heritage objects and enhance international cooperation for their protection. Where objects are illegally exported but not stolen, it is appropriate that only foreign states may take action through the courts.<sup>25</sup> In the case of stolen objects, the right to take court action could also extend to individuals and organisations.

Allowing for claims of compensation by innocent purchasers who can show that they exercised due diligence in acquiring the objects would assist in deterring illicit trade. Adopting this measure would make it advantageous for buyers to deal with reputable dealers who have adopted a Code of Ethics consistent with the UNIDROIT Convention. The principle of due diligence also accords with the practice adopted by museums: the International Council of Museums (ICOM) Code of Ethics provides that museums will not acquire, identify or otherwise authenticate any object that is suspected to have been illegally acquired, transferred, imported or exported.

Should Australia consider ratifying the UNIDROIT Convention on the Return of Stolen or Illegally Exported Cultural Objects?

Are there other measures which could be introduced to enhance Australia's ability to counter illicit trade?

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<sup>24</sup> Art 7 of the 1970 UNESCO Convention also requires the country requesting return of an illegally imported object to pay just compensation to an innocent purchaser or person with valid title. However, there are no detailed provisions as there are in the UNIDROIT Convention. Under Art 6(1) of that Convention, where the object was illegally exported and action is being brought by a foreign state, compensation is payable by the foreign state. In the case of stolen objects, compensation may be payable by either the claimant or a person who transferred the object to the innocent purchaser (according to the law of the country where the action is heard) (Art 4(1)-(5)).

<sup>25</sup> Under Art 5(3) of the UNIDROIT Convention, the State must show that the object is of 'significant cultural importance' or meets other specific criteria.

## Appendix B – List of submission

<b>List of Submissions Received</b>	
<b>#</b>	<b>Submitter name/organisation</b>
1	Bob Walker
2	Dr Val Attenbrow
3	Confidential
4	Confidential
5	Lyndel Prott
6	Australian War Memorial
7	Ralph Bottrill
8	Warby Engine Club
9	National & State Libraries Aust.
10	Maryborough City Whistle Stop
11	Department of Environment, Parks, Heritage & the Arts
12	Stephen & Frances Davies
13	Western Australian Museum
14	History Trust of South Australia
15	Dr MacLaren North
16	Heyfield & District Vintage Machinery Group
17	Robert Jones
18	Confidential
19	Arthur Beau Palmer
20	The Australian Philatelic Federation
21	John Keane
22	Richard Breckon

23	Confidential
24	Council of Tramway Museums of Australasia
25	Henty & District Antique Farm Machinery Club
26	Border Steam & Oil Engine Club
27	Confidential
28	Trevor Smith
29	Neil Athorn
30	Tasmanian Archive & Heritage Office
31	Cultural Heritage Practitioners Tasmania
32	Dr Marett Leiboff
33	William Knapp
34	Mark Morrissey
35	Ian McShane
36	Vivien Johnson
37	National Film and Sound Archive
38	Geological Survey of Western Australia
39	Confidential
40	Stephen Bailey
41	Aitken, Hutchison & Coleman
42	Neil Meyers
43	Port Arthur Historic Site Management Authority
44	Australian Steam Heritage Education Society (ASHES)
45	John Browning
46	On behalf of ASHES
47	Professor Walter Bloom
48	Confidential

49	On behalf of ASHES
50	Department of Natural Resources, Environment, Arts & Sport
51	Royal Historical Society of QLD
52	Confidential
53	Poppy Wenham
54	South Australian Museum
55	Museum Victoria
56	Challenge Assessments
57	Confidential
58	Museums & Galleries NSW
59	Confidential
60	Federation of Australian Historical Societies
61	Council of Australasian Archives & Records Authorities
62	Richard Newell
63	Converge Heritage + Community
64	Marilyn C Truscott
65	Gus Munro
66	State Library of Queensland
67	Australia ICOMOS
68	Australian Antique & Art Dealers Association
69	Melbourne Cricket Club Museums Department
70	National Gallery of Victoria
71	Collections Council of Australia
72	NSW Young Lawyers Intl. Law Committee
73	David Rossington
74	Andrew Gibb

75	Walter Holt
76	Geodiscoveries
77	Julian Holland
78	UNESCO Memory of the World
79	Australian Commercial Galleries Association
80	Council of Australasian Museum Directors
81	Old Parliament House
82	National Museum of Australia
83	Engineers Australia
84	ArtsACT
85	Heritage Council Victoria
86	Confidential
87	Phil Creaser
88	Henk Godthelp
89	Council of Australian Art Museum Directors
90	Colin Schroeter
91	Department of Education, Training and the Arts
92	Robin Gibb
93	Bathurst Observatory
94	Western Sydney Regional Organisation of Councils
95	Dr Philip Jones
96	National Association for the Visual Arts
97	Kylie Winkworth
98	Australasian Philatelic Traders' Association
99	Australia Council for the Arts
100	Museums Australia

101	Confidential
102	Australian National Maritime Museum
103	Sovereign Hill Ballarat
104	Ken Campbell
105	Queensland Museum
106	Victorian Aboriginal Heritage Council
107	National Library of Australia
108	National Gallery of Australia
109	National Archives of Australia
110	NSW Government
111	ArtsSA
112	Stephen Cassidy, Director, Indigenous Languages and Intangible Culture, DEWHA
113	Australian National Herbarium
114	Victorian Government
115	Harold Gallasch
116	Confidential
117	Confidential
118	British Museum



## Appendix C: Acronyms and Abbreviations used in this Report

<b>A</b>	
ACBPS	Australian Customs and Boarder Protection Service
APO	Australian Protected Object
AFP	Australian Federal Police
ACGA	The Australian Commercial Galleries Association
ASHES	Australian Steam Heritage Education Society
ATSIHP	<i>Aboriginal and Torres Strait Islander Heritage Protection Act 1984</i>
ATSIAB	Aboriginal and Torres Strait Islander Arts Board of the Australia Council
AAT	Administrative Appeals Tribunal
AHECC	Australian Harmonized Export Commodity Classification
AADA	Australian Antique and Art Dealers Association
ANMM	Australian National Maritime Museum
ACGA	Australian Commercial Galleries Association
AusAID	Australian Government Overseas Aid Program
APTA	Australian Philatelic Traders Association
AWM	Australian War Memorial
ATO	Australian Taxation Office
AGS	Australian Government Solicitor
AAV	Aboriginal Affairs Victoria
AGD	Attorney-General's Department
<b>B-F</b>	
Control List	National Cultural Heritage Control List
CCA	Collections Council Australia
CAAMD	Council of Australian Art Museum Directors

CAMD	Council of Australian Museum Directors
Class A	Class A object- unable to export
Class B	Class B object- can be exported with a permit
CHPT	Cultural Heritage Practitioners Tasmania
CGP	Cultural Gifts Program
DNREAS	Department of Natural Resources, Environment and the Arts (NT)
DEWHA	Department of the Environment, Water, Heritage and the Arts
DFAT	Department of Foreign Affairs and Trade
EPBC	<i>Environment Protection and Biodiversity Conservation Act 1999</i>
EPHC	Environment Protection and Heritage Council
FMA	<i>Financial Management and Accountability Act 1997</i>
FAHS	The Federation of Australian Historical Societies
<b>H-N</b>	
HAS	<i>Historic Shipwrecks Act 1976</i>
HOCl	The Heads of Collecting Institutions
ICOMOS	International Council on Monuments and Sites
ICOM	International Council of Museums
INTERPOL	International Criminal Police Organization
ICH Convention	Convention for the Safeguarding of the Intangible Cultural Heritage 2003
MA	Museums Australia
MoU	Memorandum of Understanding
NCHA	National Cultural Heritage Account
NCHC	National Cultural Heritage Committee
NAVA	National Association for the Visual Arts
NFSA	The National Film and Sound Archive
NHL	Australian Government's National Heritage List

<b>O-Z</b>	
OIL	Office of International Law
PMCH Act	<i>Protection of Movable Cultural Heritage Act 1986</i>
PINs	Penalty Infringement Notices
RAP	Registered Aboriginal Party
RICP	Return of Indigenous Cultural Property
UNESCO	United Nations Educational, Scientific and Cultural Organization
UNIDROIT	International Institute for the Unification of Private Law
HERCON	National Heritage Convention
WAM	Western Australian Museum
WIPO	World Intellectual Property Organisation