



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



Contents

Introduction to the Review	1
Objectives of the Review:	2
Introduction to the Discussion Paper:	3
Other reference materials:	3
Part 1: Questions raised in this Discussion Paper:	4
1. National Cultural Heritage Control List	4
2. Thresholds and the PMCH Regulations	4
3. Significance and the PMCH Regulations to Australia	5
4. Indigenous objects	5
5. A National Register?	5
6. Export Permit Applications	5
7. Temporary Export Permit Applications	6
8. Expert Examiners	6
9. National Cultural Heritage Account	7
10. Enforcement provisions	7
11. Broader arts and culture policy framework	7
12. International Conventions	7
Part 2: Current operation of the Act:	8
Exporting cultural heritage objects from Australia	8
Operation of the PMCH Act	9
Options for Control List	9
Thresholds and the PMCH Regulations	10
Permits, general permits, and certificates of exemption	15
Private action to recover stolen objects	20

Review of the Protection of Movable Cultural Heritage Act 1986 and Regulations
Discussion Paper

© Commonwealth of Australia

This work is copyright. Apart from any use as permitted under the Copyright Act 1968, no part may be reproduced by any process without prior written permission from the Commonwealth, available from the Australian Government Department of the Environment, Water, Heritage and the Arts.

Australian Government Department of the Environment, Water, Heritage and the Arts
GPO Box 787 Canberra ACT 2601

This discussion paper is available at www.arts.gov.au/public_consultation

Image credits:

Clockwise from top left:

Newmont's Normandy Nugget © Newmont Mining Corporation

Ned Kelly's armour © DEWHA

1911 Clayton and Shuttleworth steam traction engine © Millthorpe & District Historical Society

Rönisch piano © ANU School of Music and DEWHA

Wokali Shield © South Australian Museum

Trilobite fossil © South Australian Museum

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
GPO Box 787
CANBERRA ACT 2601, or

PMCHReview@environment.gov.au

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

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

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

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.'¹

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).

¹ Patrick J O'Keefe, 'Developments in cultural heritage law: what is Australia's role?' [1996] Australian International Law Journal, p.100.

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;
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?

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 (HCC) 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: 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.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

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;
- 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.

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.²

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 UNIDROIT³ 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>

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.⁴ 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

2 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 handback taking place on 15 February 2008 (see <http://www.environment.gov.au/minister/garrett/2008/pubs/mr20080115.pdf>). Other recent handbacks 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.

3 UNIDROIT is the International Institute for the Unification of Private Law.

4 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)).

action through the courts.⁵ 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?

⁵ 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.

