

Comments on the Review of the PMCH Act 1986: Position Paper 2015



SIGNIFICANCE
International

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Preamble

1. The Position Paper for the *Review of the Protection of Movable Cultural Heritage Act 1986* (PMCH Act / the Act) displays a unity of thought and boldness that usually does not result from either Committee process or hamstrung internal policymaker effort. The Attorney-General's Department is to be congratulated for appointing Shane Simpson AM to research and prepare this Paper, as in addition to the above characteristics, Mr Simpson brings deep knowledge of legal and government process, particularly in the field of cultural heritage in Australia, and a very readable writing style.
2. It is appreciated that Mr Simpson diligently reviewed all submissions to the 2009 PMCH Act Review, particularly as it appears that very few of the sanctioned 74 recommendations were implemented.¹ It is also appreciated that Mr Simpson conducted an 'environmental scan' on contemporary legislative practice in this field in other countries.
3. The proposal of a 'new', 'modern', 'flexible', 'risk-based', 'living' model for this legislation, rather than 'piecemeal amendment' (p. 2, 5, 7), is successful in almost every respect.
4. Significance International (SI) concentrates its (constructive) critique in the areas of significance and its assessment, databasing of significance assessments, collections, the proposed Registers of Cultural Property Experts and Expert Cultural Significance Assessors, coordinating Australian legislative Acts with international obligations, some definitions and sundry other points. This response finishes with a bold but logical proposal for expansion of the purview of the PMCH Act.
5. To position this submission for SI readers, who are aware that the core of our work lies with matters of significance and risk, I reference the Ten Agents of Deterioration developed for cultural heritage objects and collections by the Canadian Conservation Institute.² This device helps to locate the business of the PMCH Act, noting the reference to the basing of the proposed model in risk, and certain associated Acts and Conventions. The 10 agents are:

¹ Available at: http://arts.gov.au/sites/default/files/pdfs/PMCH_Review_report_final_for_web.pdf

² Available at: <https://www.cci-icc.gc.ca/resources-ressources/agentsofdeterioration-agentsdedeterioration/index-eng.aspx>

1. Physical Forces
2. Fire
3. Water
4. Criminals
5. Pests
6. Pollutants
7. Light and radiation
8. Incorrect temperature
9. Incorrect relative humidity
10. Dissociation

6. The PMCH Act seeks to address the possibility of illegal activity (4), and, to a lesser extent, negligent activity (10). The latter includes loss of objects or collections, loss of object or collection data, and lack of legal title (usually within a custodial institution). The former includes theft, embezzlement by staff or researchers, and isolated vandalism. Vandalism is not cited in the PMCH Act, but is cited in the Hague Convention 1954³ and Second Protocol (UNIDROIT Convention not checked at all for this paper). All other risks are presumed to be subsequently addressed by the intention to 'protect', expressed in the title of the Act.

Definitions

7. Certain important definitions are given in S5, but one is not given for 'Protect/ion'. This becomes important if one considers the Act in relation to a risk-based approach, and the aim of aligning the Act with the Hague Convention and Protocols (1954 and 1995), the UNIDROIT Convention (1995), and United Nations Security Council Sanctions (pp. 80-89).
8. Referencing the Hague Convention 1954 and Protocols, 'protection' includes responding to the impacts of armed conflict. If modern military practice is understood to include responding effectively to natural and man-made disasters, as per actual Australian Defence Force activity in Australia and therefore the tenets of Blue Shield Australia, a broad definition of protection is advisable in the PMCH Act.
9. This is suggested in awareness that the original impetus in cultural heritage public policy (19th century) was to preserve, protect, safeguard or restore 'the heritage', and the understanding now that the term 'conserve/ation' represents a more realistic general description and aim of cultural heritage activity. Given the criminal focus of the 1970 Convention and consequent PMCH Act, a legal interpretation of 'protect' is acknowledged to be the primary focus of this legislation to date.

³ As there are a number of Hague Conventions covering a range of subjects the Hague Convention concerning cultural property will be named the 'Hague Convention 1954' throughout this paper.

10. Noting the natural history origin of certain types of objects coming under the banner 'cultural' in the existing PMCH Act, the author asks whether '...the name of the Act and its language be changed so that it better reflects an intention to protect both natural and cultural movable objects of significance?' (p. 6). To this we say: yes and no.
11. We say no, because natural heritage is much larger than the items listed as being held in collecting institutions, which include fossils, meteorites, gems, rocks, minerals. It is actually living, changing and 'out there'.⁴ Legislatively, this larger natural heritage (and place-based cultural heritage) is specifically addressed in the *Environment Protection and Biodiversity Conservation Act 1999* (EPBC Act). As quite different conservation regimes are required under the EPBC Act to suit the types and scales of those heritages, we propose that the listed items and collections can still be comfortably located under the PMCH Act, given that they are typically held within collecting organisations as 'specimens'. Enhanced cross-referencing between these Acts to capture this reality would be helpful.
12. We say yes, because, more generally, we have already touched on a few ways in which the language of the PMCH Act could be updated and made more internally and relatively consistent (between Australian Government Acts, in relation to pertinent UNESCO Conventions and with modern military practice).
13. There is also capacity to smoothe the other headline term 'movable' with UNESCO Conventions. The word 'movable' is used in the Hague Convention 1954 and Protocols, but not in the Convention which nominally underpins the PMCH Act, namely, the *Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property 1970* (1970 Convention), which simply uses 'cultural property'.
14. We note that the term 'spiritual' has been added to the 1986 definition of movable cultural heritage under the proposed model, and that 'ethnology' originates in the 1970 Convention. We suggest that ethnography, as in the PMCH Act, would be more appropriate to Australia. The reason of 'research' is not explicitly listed here, but as many of the elements of the later significance assessment criteria are, it might be worth considering echoing this quality here too. We also note, that dismembered elements of 'artistic or historical monuments or archaeological sites' (1970 Convention Article 1 (d)) are currently absent from this proposed definition.
15. More generally we propose that such a crucial definition be agreed by a meeting of diverse museological experts, some of whom might later sit on the first iteration of the Panel of Cultural Property Experts (p. 42).

⁴ Harrison, R and O'Donnell, D, 2010 'Natural Heritage' in West, S (ed) *Understanding Heritage in Practice*, Manchester University Press, pp. 88-126. Available at: http://www.academia.edu/776656/Natural_Heritage

16. With respect, Leiboff shows the drawbacks of legal definitions and interpretations of the PMCH Act and recommends a deliberate focus on museological conventions in matters relating to heritage and its significance assessment.⁵
17. Thus, In addition to leaders of cultural institutions we suggest that academics from at least the Centre for Heritage and Museum Studies ANU, and the Cultural Heritage Centre for Asia and the Pacific at Deakin University, be invited to offer a range of helpful ideas on this topic.
18. It is interesting to learn that the administration of collections of objects has been problematic under the Act to date (p. 26). We agree that a more prominent solution for citing collections and sub-collections would be more realistic than an almost total focus on object / item in the document language. We note that the 1970 Convention makes several references to collections, as does the Hague Convention 1954 in its definition of cultural property. We also note that one of the aims of putting *Significance* 2001 into a second edition was to shift from an object to a collection focus.
19. Given this guidance and experience, the idea of breaking a collection into sub-collections to facilitate the issuing of permits is understandable, as long as the cross-referencing is diligent, and the process doesn't generate the problems associated with dismantled parts of complex single objects (p. 28).
20. Typological sub-collections may not be a total solution though, as, depending on the collection type a thematic breakdown may be the only logical solution. We suggest that this is another case for the convening of a guiding expert museological group, prior to first reading of the amended Act in Parliament.

Thresholds

21. The prompt questions on page 11, complemented by the detail provided in Appendix 2, shows that 50 years is the minimum suggested standard period across all categories of object in the proposed model. It would be good to know how this period was arrived at, as the 1970 Convention suggests a range of periods from 50 to greater than 200 years, depending on object type.
22. There is an argument for an even shorter minimum period, given the speed of technological change and our tendency not to collect recent manifestations of history.
23. It is presumed that the mechanism for indexing monetary values in thresholds will be indicated in the supporting Regulations.

⁵ Leiboff, J. M, 2006 'Reconstructing the Role of Cultural Significance in the Protection of Movable Cultural Heritage Act 1986 (Cth)', unpubl. PhD thesis, Griffith University: <https://www120.secure.griffith.edu.au/rch/items/5111dfd6-122c-f85f-b159-ca98b8ce2601/1/>.

Significance and Representation

24. We support the nomination of *Significance 2.0: a guide for assessing the significance of collections* (2009) (*Significance 2.0*) as the primary reference for determining item and collection significance in the revised PMCH Act. Amongst others, Leiboff recommended this in her submission to the 2009 Review, and it became one of the sanctioned recommendations from that Review (Recommendation 12).
25. In fact, this sort of application is an expression of the aim of the Australian Government in funding both editions of *Significance* (2001 and 2009): 'to eventually have all museums [now collecting organisations] in Australia use a common system and language to describe and assess the significance of the country's collections' (2001: 7).
26. Recommendation 12 advised conducting further research into claims that archives, fine and decorative arts and Indigenous understandings of significance should be conducted before implementation.
27. We are happy that the current Position Paper deals adequately with archives and decorative and fine arts understandings of significance, but query the extent to which Indigenous understandings have been explored.
28. We note that *Significance 2.0* was titled at the time when the interactive ideas of 'Web 2.0' and 'Gov 2.0' were prominent, and the protocol of software versioning was familiar.
29. Thus, publisher, the Collections Council of Australia (CCA), envisaged that the current significance assessment methodology (process and criteria) may change in the future, in line with developing understanding of significance and its assessment. This might lead, for example to renaming of the online resource to *Significance 2.1* for minor changes, or to *Significance 3.0* for a major change. (Note: this approach has also been used, if less obviously in titling, in the collaborative *National Standards for Australian Galleries and Museums*, now up to version 1.4. The CCA was a member of this Taskforce). A comprehensive investigation of Indigenous understandings of significance may re-cast the current assessment methodology.
30. In the meantime we like the slight revision of the criteria expressions, as these more clearly convey their meanings (p. 31) i.e. 'Comparative Analysis Criteria'; and social or spiritual 'connections' references the contemporary attachment test for this form of significance.
31. Please note, however, that the authors of both editions of *Significance* decided against using 'potential' and 'technical' in criteria titles between the 2001 and 2009 versions of the *Significance* publications. Given this fresh suggestion it would be good to revisit their reasoning for this decision.
32. S 8.2.1 talks to the phenomenon of significance changing over time. Certainly, significance assessment should be periodically reviewed. Five

years represents a reasonable nominal period after which to review a significance assessment, but this period should not be enshrined in law, as it would create a cost and administration burden (p. 33). We suggest that circumstances surrounding decisions about when to review a significance assessment be made as need arises, bearing a 5 year rule in mind.

33. In addition to such diachronic change, synchronic change is of equal importance in significance assessment and deserves equivalent attention in the revised Act. It may come about through the discovery of new evidence, or because a person with a different perspective conducts an assessment. This is why consultation with 'knowledgeable people' (not only university trained experts) is vital to each assessment.
34. We note that *Significance 2.0* requires each assessor to sign, name and date their concluding 'statement of significance' (ideally no longer than one page in length), and support it with short lists of references, comparative collections and knowledgeable people consulted (ref. p. 58).
35. As mentioned at Item 34, the checking of comparative objects / collections is required by the *Significance 2.0* significance assessment process. Under the label of 'Representation', and given the problems noted at S 8.3-8.5 in the Position Paper, some reconciliation between this standard *Significance 2.0* practice and the privileging of 'representation' in the proposed model seems to be necessary e.g. in Figure 3.
36. S 8.7 presents 'Figure 3 - Significance and representation summary'. The Detail at 1. should reflect the first dot point on that page (p. 40) as the primary purpose of significance assessment is to understand the meanings, values and importance of an object or collection. Ascertaining the 'degree' of significance via the comparative criteria is usually part of this process. Given that the 'Required considerations' in the Figure already reference the Primary and Comparative Analysis Criteria, an alternative wording under Detail at 1. could be: 'A statement of significance articulates how and why the object is or is not significant'.
37. It is important to note that the authors of the *Significance* publications deliberately use the term 'degree' in regard to the relativity of object / collection comparisons. They reserve the terms 'threshold' and 'level' for use when describing bureaucratic overlays e.g. Part 7 in *Significance 2.0* which deals with national and international levels of significance, required by various grant and register schemes. The PMCH Act is another example of a (welcome) bureaucratic usage of the recommended significance assessment methodology.
38. If Representation is to be retained as a discrete step in the proposed model, then this is where reference to 'level' of significance should be introduced.
39. We suggest that assessors experienced in application of the *Significance 2.0* methodology be gathered to workshop the articulation between standard *Significance 2.0* object / collection comparison and the (arguably) more rigorous official representational checks to satisfy PMCH Act requirements.

40. This might best be achieved by arranging a preliminary gathering of some people who may be amongst the first selected 'Expert Cultural Significance Assessors' – chosen partly for their experience in using the *Significance 2.0* significance assessment methodology. We suggest that the authors of the *Significance* methodology and select others be included in this consultation.
41. The argument that a National Register of significant objects is unnecessarily burdensome is accepted (p. 14-15), despite the concomitant requirement of the Hague Convention 1954 Regulations (Article 12) and Second Protocol (Articles 5 and 33) that an International Register of Cultural Property be prepared, if a linked 'statement of significance' database begins to be built. This is a much needed resource for all Australians in making comparisons with similar objects / collections to inform their own assessments.
42. Such a resource would extend the desired achievement of the increased transparency argued for in the Position Paper, for example in relation to permit applications (see Item 49).
43. The Position Paper notes that determination of significance is subjective (p. 31). This is correct and unavoidable. The *Significance 2.0* methodology is purposely discursive to reflect this reality, that is, a conclusion is arrived at via evidenced and tested reasoning, rather than via intuition. In the case of movable cultural heritage significance assessment, Leiboff calls this 'the museological method' of determining significance. The temptation to overlay numerical ranks has been resisted in the Position Paper. This is consistent with the intentions of the *Significance* publication authors who argue that numerical reduction suggests scientific certainty and rigidity, which is inconsistent with the nature of cultural property significance assessment.

Local

44. Insofar as the *Significance* publications deal with levels of significance, they primarily address the 'local'.
45. Several references to the local are made in the Position Paper (pp. 34, 56, 99). However, the relationship of 'local', 'region' and 'state' with 'part of Australia', and the precise role of local government, need to be more clearly articulated in the revised PMCH Act and Regulations.

Panels of Experts

46. The arguments for structuring expert advice via the mechanism of Expert Panels certainly worked well for the CCA's production of Mr Simpson's authored *Collections Law* resource. This model does however need to be supported by a stable secretariat with a long corporate memory, which it readily shares with experts as circumstance demands.

47. In the past, Expert Examiners have experienced difficulty in undertaking significance assessment under the PMCH Act, as this work is simply added to their long list of duties. This situation has intensified since the digitisation of collections and the resulting increase in expectations of very prompt responses to electronic inquiries and new information.
48. We note the points about payments and sabbatical periods on pages 44 and 46. We understand that examiners' employing institutions absorb such payments. Some form of incentive scheme for the individual undertaking this extra work would be welcome, perhaps in the form of time-in-lieu bonuses. We recognise that the form such bonuses take will vary by employer for structural or customary reasons, but urge that this direct compensation be specifically consulted.

Efficiency

49. The ideas of applicants providing more information to support their permit applications (p. 52), and of calling for public inputs to this process, are very good, as are all of the other suggestions for increased efficiencies proposed in the Position Paper.

National Cultural Heritage Account

50. The perennial problem of providing 'ongoing care' for acquisitions has finally been addressed here. This hopefully represents the beginning of a seachange in understanding the true costs of maintaining cultural property long term, which highlights the seriousness of deciding in favour of acquiring new items into public collections.

International Conventions and best Australian arrangements

51. The aim of aligning the revised PMCH Act with the Hague Convention 1954, its Protocols, and the UNIDROIT Convention, and recommending the ratification of the latter three instruments, is laudable – not only for Australia, but as an example to the Asia Pacific Region.
52. Elements of the Hague Convention 1954 are implemented through non-legislative means, including the *Crimes Act 1914* and *Criminal Code Act 1995* (p. 65, 83), as with the PMCH Act 1986 (p. 2). However there is potential for much more complementarity between at least the PMCH Act and the Hague Convention 1954 and Protocols.

53. The 1970 Convention states at Article 5:

To ensure the protection of their cultural property against illicit import, export and transfer of ownership, the States Parties to this Convention undertake, as appropriate for each country, to set up within their territories one or more national services, where such services do not already exist, for the protection of the cultural heritage, with a qualified staff sufficient in number for the effective carrying out of the following functions:

(a) contributing to the formation of draft laws and regulations designed to secure the protection of the cultural heritage and particularly [but not only] prevention of the illicit import, export and transfer of ownership of important cultural property;

(f) taking educational measures to stimulate and develop respect for the cultural heritage...and spreading knowledge of the provisions of this Convention;

and at Article 10:

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

54. The Hague Convention 1954 (Articles 3, 7.2, 25) and Second Protocol Articles 5, 30, 33) contain similar encouragements to educate the public (in addition to the military) about appreciating and respecting cultural property, and to make preparations for protecting cultural property from emergencies.
55. Using the early question posed by the author: ‘...should the name of the Act and its language be changed so that it better reflects an intention to protect both natural and cultural movable objects of significance?’ as a departure point, and satisfied with our two point response to this question at Items 11 and 12, at the end of this short journey we propose an extension of this line of questioning, as per Item 56.
56. ‘Should an Australian Protection of (Movable) Cultural Property Act not be more wide-ranging than one focused on the 1970 Convention, because movable cultural heritage is under-catered for in Australian Government legislation generally (notwithstanding Acts supporting specific National collecting agencies), and particularly in the case of cultural property in local and emergency situations?’⁶

⁶ The EPBC Act includes objects, but only when related to the heritage place under consideration; the 2011 *State of the Environment* chapter on heritage neither continued earlier work on movable cultural heritage (across 1996, 2001 and 2006 Reports) nor proposed an alternative model, even for objects relating to National or Commonwealth listed sites; the draft *Australian Heritage Strategy* focuses overwhelmingly on places. Icons’ are mentioned, and only one object is named, Matthew Flinders’ 1804 map of Australia, which the Australian Government proposes to secure on long-term loan to Australia.

57. Apart from being consistent with international heritage policy and practice, including movable cultural heritage (MCH) as an equal component in Australian Government heritage legislation has a number of potential benefits for Australia.
58. Primary amongst these is the potential to shift to a 'sustainable collections' approach to MCH. This approach builds community capacity and connection in identifying significant items using the *Significance 2.0* methodology (for which purpose this resource was expressly designed),⁷ addressing directly the 'glut of heritage' problem observed in the heritage literature since at least 1998.⁸
59. In reality, movable cultural heritage, particularly in the forms of archival and archaeological records, are essential components in making sense of places and properly assessing their significance. However, these vital resources are often acknowledged, at best, as footnotes in guidelines such as *The Burra Charter*. Significance International was a voice recommending the inclusion of *Significance 2.0* as a resource in the Preamble to 2013 revision of *The Burra Charter*, but other suggestions for recognising objects and collections were not as successful.⁹
60. In the same way in which the Position Paper proposes making Australian legislation 'ratification-ready' for as-yet unratified UNESCO Conventions of relevance, we propose that this revision of the P(M)CH Act be revised to enable the future usages recommended in this section.
61. Regarding emergency situations, Blue Shield Australia (BSA) has been set up in good faith to coordinate efforts between museums, libraries, galleries, archives and place-based heritage peak bodies, following the recommendation in the Second Protocol of the Hague Convention 1954.
62. However, BSA is not officially supported¹⁰ and has therefore hardly been able to research, develop and disseminate dedicated knowledge about cultural property and its management in risky situations. Better articulation of expert civil bodies (types listed at Item 61) with Australian Defence Force and Emergency Management Australia would be a good place to start.

⁷ Every public library in Australia was gifted a copy of *Significance 2.0*, and the resource is freely available online.

⁸ Lowenthal, David. *The Heritage Crusade and the Spoils of History*. Cambridge, U.K.; New York: Cambridge University Press, 1998, pp. 11-12; Araoz Gustavo F. "Preserving Heritage Places under a New Paradigm." *Journal of Cultural Heritage Management and Sustainable Development* 1, no. 1 (2011), p. 57; Harrison, Rodney. "Forgetting to Remember, Remembering to Forget: Late Modern Heritage Practices, Sustainability and the 'crisis' of Accumulation of the Past." *International Journal of Heritage Studies* 19, no. 6 (September 2013): 579–95.

⁹ Please see Significance International News Item, 'Report: Burra Charter 2013 Review', 2 December 2013: <http://www.significanceinternational.com/tabid/67/newsid394/65/Report-Burra-Charter-Review-2013/Default.aspx>

¹⁰ Blue Shield committees in different countries are supported in a range of ways, including full government funding e.g. Austria.

63. In conclusion, the PMCH Act 1986 will certainly benefit from the proposed new model outlined in the 2015 Position Paper, even more so if increased attention is paid to the points raised above, particularly in regard to the articulation of the proposed significance approach under the revised Act with standard *Significance 2.0* significance assessment practice.
64. However, we strongly recommend that the opportunity is taken at this time to make the illicit import, export and transfer of ownership of cultural property one part of a larger P(M)CH Act which aligns thoroughly with other relevant Australian Government public policies i.e. the *Environment Protection and Biodiversity Conservation Act 1999*, and the forthcoming *Australian Heritage Strategy*, as well as with the suite of UNESCO Conventions discussed in the Position Paper.