

## INTERNATIONAL PROTECTION OF CULTURAL MATERIAL

Discusses legislation relating to the protection of 'movable cultural heritage' and includes an appendix of corresponding legislation in other countries. Topics covered include a discussion of why the old legislation is ineffective, export controls, unlawful import, forfeiture, the Heritage Fund and the effect of the international UNESCO Convention.

### 1. General

Prior to the passing of the Protection of Movable Cultural Heritage Act in 1986, the international traffic in cultural material was controlled by regulations made under the Customs Act 1901.

The only restrictions on import were on the import of cultural property from Papua New Guinea, (Customs (Prohibited Imports) Regulations, Third Schedule, Item 9A). In such cases, importers are obliged to produce the written consent of the Trustees of the Papua New Guinea Public Museum and Art Gallery, to the export or removal of the goods from Papua New Guinea. (For Papua New Guinea legislation refer to National Cultural Property (Preservation) Act (Ch. No. 156).

Restrictions on export however were far more comprehensive but just as ineffective, (Customs (Prohibited Exports) Regulations, Second schedule.

Item Nos 113, 2, 5, 5A, 5B, 5c, 14; Twelfth Schedule Item Nos 1, 2, 3, 5, 6).

The system of export and import control by means of Customs Regulations have proved to be profoundly inadequate. For example, it did not prevent the export in 1981 of a rare Spitfire MK 8 MV 154, which was illegally taken out of the country as aluminium junk - just one of an estimated seventy vintage aircraft that have flown the jurisdiction.

Those empowered with the enforcement of the Customs Regulations find difficulty in defining the categories of prohibited exports and in identifying objects which are subject to restrictions. Moreover there exists no consultative machinery whereby officers can obtain speedy expert advice as to the nature or significance of objects being exported. What is more, the failure of the Regulations to provide for review or redress for those persons refused an export permit, or for the retrieval of illicitly exported material, is an incentive for those with valuable material to use illegal means of export. (For U.S. analogy see "Theoretical Thefts, Real Claims", Art News, March 1983 p11-13).

It took until 1986 for Australia to introduce a comprehensive legislative system of import and export control of heritage material. It should be proclaimed in time for its Bicentennial.

### 2. The New Legislation:

Any effective system must include:

- (a) a procedure for the classification and assessment of cultural material;

- (b) a procedure for the granting or refusing of permits;
- (c) redress for persons affected by the refusal of permits or confiscation of innocently obtained cultural property;
- (d) provision for recovery and return of illegally exported cultural material.

In 1986 Federal Government passed the Protection of Movable Cultural Heritage Act. Its approach is not novel; it is similar in scheme to the Canadian Cultural Property Export and Import Act 1985.

The main features of this legislation may be summarised as follows:

**(1) Ambit**

No longer are aboriginal relics the focus of Australian protective legislation. The movable cultural heritage is defined as including

"objects that are of importance to Australia .... for ethnological, archaeological, historical, literary, artistic, scientific or technological reasons, being objects falling within one or more of the following categories"

- (a) objects recovered from-
  - (i) the soil or inland waters of Australia;
  - (ii) the coastal sea of Australia or the waters above the continental shelf of Australia; or
  - (iii) the seabed or subsoil beneath the sea or waters referred to in sub-paragraph (ii);
- (b) objects relating to members of the Aboriginal race of Australia and descendants of the indigenous inhabitants of the Torres Strait Islands;
- (c) objects of ethnographic art or ethnography;
- (d) military objects;
- (e) objects of decorative art;
- (f) objects of fine art;
- (g) objects of scientific or technological interest;

- (h) books, records, documents or photographs, graphics, film or television material or sound recordings;
- (i) any other prescribed categories.

Not only aboriginal relics are covered. Thus, for example, early examples of farm and mining machinery may well be of significance to the heritage of a country whose economic development has been based on farming and mining, just as early film and sound recordings, books, paintings and craft objects have heightened significance to a country that has come to a quite recent appreciation of the social, aesthetic and economic impact of its arts industries.

No longer is "heritage" the domain of bones, rock drawings, the indigenous and the pre-historic. It also includes the significant, if more recent, effects of European colonisation, settlement and dominance.

## (2) **Export Controls**

The regulations to the Act will prescribe a list of objects that constitute the movable cultural heritage of Australia and which will be subject to export control. This list shall be known as the National Cultural Heritage Control List.

The stated criteria for inclusion in this list will include factors such as age, rarity, quality, monetary value and extent of inclusion in public collections. Moreover, the control list will distinguish between Class A subjects, namely, those objects so rare and important as to be considered inalienable from Australia and Class B objects which in certain circumstances may (and perhaps usually will) be given an export permit.

Both in drawing up the lists and in exercising his discretion to grant export permits, the Minister shall be advised by a committee to be known as the National Cultural Heritage Committee.

This group will be made up of four museum representatives, an academic, a nominee of the Minister for Aboriginal Affairs and four other persons "having experience relevant to the cultural heritage of Australia".

## (3) **Unlawful Import**

The unlawful import of cultural material that has been illegally exported from its country of origin attracts heavy penalties. Moreover such objects are liable to forfeiture.

Ownership in forfeit objects vests in the Commonwealth of Australia and the costs incurred in transporting or disposing of the objects are deemed to be a recoverable debt due to the government. That said, it must be immediately recognised that the rights and advantages enjoyed by foreign owners or governments are strictly limited. For example, the power to search

for and seize a protected object of a foreign country cannot be exercised unless the inspector reasonably believes that the Australian Government has already received a request for the return of the object from the relevant foreign government (s. 41). Similarly, no person will be charged or any object forfeited unless the Australian government has received a formal request for the object's return.

This means that requests for return must be from government to government. Private initiatives are not within the contemplation of the Act.

#### (4) **Forfeiture**

In addition to the above it should be noted that where a person illegally exports an Australian protected object, the object is forfeited.

In contrast, when such illegal export is only attempted, or when a person imports cultural property that has been illegally exported from its country of origin, the object is only liable to forfeiture. In such cases, the onus is on the owner, or the person who had possession, custody or control of the object immediately before it was seized, to bring court action for the recovery of the object. If the person fails to do so, or fails in those recovery proceedings, the object will be forfeited.

Where an object is forfeited, all rights in the object automatically vest in the Australian government. Thus, when the object is physically recovered, it shall be disposed of in accordance with the directions of the Minister. This is a significant power, for the Minister may, for example, direct that the object be held by a nominated institution or in the case of aboriginal relics, perhaps order that the objects be handed over to their traditional owners rather than persons with more recent claim to title.

The automatic vesting of title in the government facilitates the bringing of legal proceedings for the retrieval of illegally exported objects for the legal principle of *nemo dat quod non habet*, (namely, that one cannot pass onto another, a better legal title than that oneself enjoys). As such, proceedings must be commenced by either the owner or a person entitled to possession (see *Attorney-General of New Zealand v. Ortiz* [1983] 2 W.L.R. 809 at 817 ). The government thus has the necessary *locus standi* to demand return of the culturally significant object. If it were otherwise it would sometimes be difficult to establish who could have the locus standi to bring recovery proceedings except perhaps special interest groups or so-called traditional owners. But in a country in which class actions do not exist and the right to bring representative actions is procedurally restricted, such suggestions are hardly practicable.

(5) **Heritage Fund**

Any system of export control is an infringement upon the individual's normally accepted rights of property ownership. It is a system which is based on the principle that, in any balancing between the interests of the nation and those of the individual, the national interests must prevail. That is not to say that the individual must harshly suffer.

Most exports of culturally significant material from Australia are for the purpose of resale i.e. financial profit. Thus the Act has established the National Heritage Fund to facilitate the purchase of objects prohibited from export. Given the low amount that the government has budgeted for this purpose, it must be assumed that the fund will be used primarily to provide incentive moneys, while the bulk of the necessary funds are obtained by public appeal or corporate donation.

**3. International Ramifications of the Federal Legislation**

(a) The 1970 UNESCO Convention

The new Act will permit Australia to accede to the Convention. Indeed at time of writing the procedures leading to accession have been initiated.

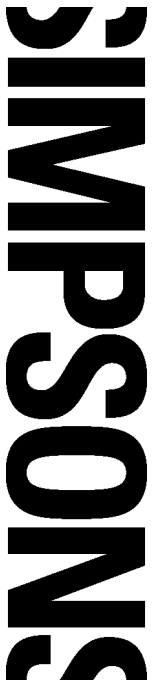
Only fifty-four countries have signed the Convention and most of these are countries that have suffered enormous loss of cultural material. This reflects upon the effectiveness of the Convention for its effectiveness is largely dependant on the reciprocity offered by its members. Of the signatories, only the United States of America and, to a lesser extent, Canada, have large collections of culturally significant material imported from other countries. Others, such as Britain, are notably absent. This is difficult to understand, other than in terms of the present conservative political climate in England, for membership of the UNESCO Convention does not affect material that was obtained prior to accession. The treaty is not retrospective. It is not an undertaking to give back all fruits of wrongdoing; it is a promise to do the right thing in the future.

The relationship between Britain and Australia remains significant to the ex-colony not only because Britain retains important collections of Australian heritage material gathered in the nineteenth and early twentieth century, but also because London remains the most important international market place for such Australian material. [It may be argued that London plays this dominant market role in the cultures of all ex-British colonies and may explain why only seven other members of the British Commonwealth have bothered to become signatories to the Convention, (Canada, Cyprus, India, Mauritius, Nigeria, Sri Lanka and Tanzania), in spite of the fact that thirty two Commonwealth counties have legislation relating to the protection of cultural heritage (see Appendix).

Australia's membership of the Convention will do nothing to control or improve its relationship with Britain in such matters. Its only effect will be to permit Australia to take the higher moral ground. More important, membership of the Convention will enhance Australia's ability to retrieve culturally significant material from the powerful New York market.

## APPENDIX

Bangladesh	Antiquities Act 1968
Belize	Ancient Monuments and Antiquities Ordinance
Botswana	Monuments and Relics Act 1970
Brunei	Antiquities and Treasure Trove Enactment 1967
Canada	Cultural Property Export and Import Act 1975
Cyprus	Antiquities Law 1935
Gambia	Monuments and Relics Act 1974
Ghana	National Museums Decree 1969
India	Antiquities and Art Treasures Act 1982
Kenya	Antiquities and Monuments Act 1963
Lesotho	Historical Monuments, Relics, Fauna and Flora Act 1967
Malawi	Monuments Act 1965
Malaysia	Antiquities Act 1976
Malta	Antiquities (Protections) Act 1925
Nauru	Nauru Antiquities Ordinance 1935
New Zealand	Antiquities Act 1975
Nigeria	Antiquities Ordinance 1952 Antiquities (Prohibited Transfers) Decree 1974
Papua New Guinea	National Cultural Property (Preservation) Act 1965



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St Vincent and the Grenadines	Preservation of Historical Buildings and Antiquities Act 1976
Seychelles	National Monuments Act 1979
Sierra Leone	Monuments and Relics Ordinance 1947
Solomon Islands	Protection of Wrecks and War Relics Act 1980
Sri Lanka	Antiquities Ordinance 1940
Swaziland	National Trust Commission Act
Tanzania	Antiquities Act 1964
Tonga	Preservation of Objects of Archaeological Interest Act 1969
Uganda	Historical Monuments Act 19670
United Kingdom	Export of Goods Control Ordinance
Vanuatu	Joint Regulation No. 11 of 1965
Western Samoa	Samoan Antiquities Ordinance 1954
Zambia	National and Historical Monuments and Relics Act 1948
Zimbabwe	National Museums and Monuments of Rhodesia Act 1972

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