

# **AUSTRALIAN AND INTERNATIONAL LAWS ON EXPORT CONTROLS FOR CULTURAL HERITAGE**

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*Paper presented at the Art Crime  
Protecting Art, Protecting Artists and Protecting Consumers Conference  
convened by the Australian Institute of Criminology  
and held in Sydney, 2-3 December 1999*

Almost every country has laws to protect its cultural heritage. But the effectiveness of these laws is significantly shaped by the pressures of internal economics and international markets, with the result that legal protection and the possibilities of legal action have very different consequences in different locations.

At root is the market inequity of so-called 'art-supply' countries and 'art-market' countries. These euphemisms are a dry economic way to describe the dynamic created by rich nations whose citizens want to own art products and poor nations whose citizens can sell items harvested from their local environments. To the latter people, pottery from Peruvian graves or sculpture from Cambodian temples are economic survival resources in the same way as forests provide timber and rivers provide fish. Selling ceramics and stone-sculpture brings cash into poor communities in need of every penny they can get.

The goods they sell are desired by another kind of society altogether, where such objects placed on display in homes and offices constitute evidence of the new owner's taste, knowledge and wealth. This need grows from the Renaissance tradition of collecting art and antiquities as an activity of the rich and aristocratic; it has been transformed thanks to the 20th century democratisation of wealth. Today (notwithstanding local inequalities) a comparatively huge number of people can afford the pleasures and trappings of art, which still expresses a special aura of prestige.

In these circumstances the definition of art has had to grow to contain enough objects to satisfy the demand. Hence the traditional characteristics of beauty and craftsmanship have enlarged to include non-Western styles which were popularly regarded as primitive less than a hundred years ago. The canon of forms and materials has also grown, admitting ethnographic and vernacular as well as elite cultural products, and finding new value for textiles, whose female connections had traditionally made them secondary goods in most societies.

Thus both the art market and the span of material it seeks are bigger than ever before. Underlying the situation is the perspective that both seller's and buyer's interests are individual. The pure idea of the art market is composed of a series of personal transactions of items that are provenanced to individual owners. But there is another perspective on the same material: a communal interest. It is made explicit in the conceptual transformation of art and antiquities into 'cultural heritage'. Heritage extends the significance of items from individual possessions to a community or national patrimony with meaning for all (or at least for a collectivity) and in which all (or at least the members of the group) have rights.

The rise of heritage is one of the most influential cultural phenomena of the late 20th century.<sup>1</sup> In asserting that a variety of cultural products of the past are public goods and amenities, whether in private hands or public ownership, the ancient struggle between the rights of the individual and the rights of the community moves into a new sphere. About the turn of 19th century museums became the designated custodians of public heritage; indeed, the definition of 'museum quality' came to mean a work of outstanding cultural significance which merited acquisition by the state in order that all could have access to it. In the tradition of princely collecting, the museum thus acquired physical and legal possession of the artefact.

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<sup>1</sup> See David Lowenthal, *Possessed by the Past: The Heritage Crusade and the Spoils of History*, New York, Free Press, 1996.

By the mid-late 20th century, places and buildings also moved into the moral sphere of being the heritage of all. By comparison with objects, relatively few places are actually acquired by the state, because real estate has values that keep it in current use in a way that decorative and prestige items do not (they can be taken out of market circulation with little impact). But the community is asserted to have a right to aesthetic amenity and a sense of social landscape continuity via visual access to authentic historic buildings, even at risk of some limit to the owner's full use and enjoyment.

Cultural heritage as the property of all is the foundational concept of the UNESCO Convention on the Protection of Cultural Property in the Event of Armed Conflict<sup>2</sup>, adopted in the Hague in 1954. It asserts that 'damage to cultural property belonging to any people whatsoever means damage to the cultural heritage of all mankind', (Preamble) which therefore deserves protection in time of war. Cultural property is defined as objects and buildings 'of great importance to the cultural heritage of every people' and includes museums, libraries and sites. In general, the Hague Convention provides for protection against theft, pillage or misappropriation of heritage items during events of international armed conflict, and parties undertake to prevent the export of heritage goods from occupied territory, or failing that, to return them after the war.

The Convention establishes the Blue Shield emblem to mark listed buildings or refuge-stores of heritage objects, a kind of Red Cross for heritage resources. Alas, war is a dirty business, and the articles of the Convention are frequently violated. Thus for instance, an estimated 4,000 items were stolen from Iraqi museums during the Gulf War, and monuments marked with the Blue Shield were deliberately bombed in Croatia in 1993.<sup>3</sup> In March 1999, the parties to the Hague Convention agreed that there was a need to improve the protection of cultural property in the event of armed conflict. They resolved on a second, updated Protocol which puts controls on 'imperative military necessity' and enhances protection via listing with the International Committee of the Blue Shield.<sup>4</sup>

The removal of cultural property via the agents of colonialism was an issue that particularly affected the post-World War 2 decolonising countries. This history of plunder and the burgeoning art trade impelled UNESCO to act again, introducing its Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property, adopted in 1970 in Paris.<sup>5</sup> The Convention does not formally resolve the question of public or private ownership of material that might be traded illicitly, but it speaks in the voice of the state and national interest in cultural heritage.

The UNESCO Convention is based on the notion that 'cultural property constitutes one of the basic elements of civilisation and national culture', that it 'enriches the cultural life of all peoples' and that states should therefore respect their own and all other nations' cultural heritage by protecting it against theft, clandestine excavation and illicit export. (Preamble) 'Cultural property' is a catch-all term defined broadly and illustrated with a catalogue of examples; broadly, it is 'property which, on religious or secular grounds, is specifically designated by each State as being of importance for archaeology, prehistory, history, literature, art or science'. (Article 1) Slightly abbreviated, the following lists the specific examples:

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<sup>2</sup> [http://www.unesco.org/culture/laws/hague/html\\_eng](http://www.unesco.org/culture/laws/hague/html_eng)

<sup>3</sup> ICOM Secretariat, 'The illicit traffic of cultural property throughout the world', 1998:  
<http://www.icom.org/traffic.html>

<sup>4</sup> [http://www.unesco.org/culture/legalprotection/war/html\\_eng/protocol2.htm](http://www.unesco.org/culture/legalprotection/war/html_eng/protocol2.htm)

<sup>5</sup> <http://www.unesco.org/general/eng/legal/cltheritage/bh572.html>

- a) Collections/specimens of fauna, flora , minerals, palaeontology
- b) Items representing the history of science, technology, military, society, famous lives, great events
- c) Products of archaeological excavations (legal or clandestine)
- d) Dismembered artistic/architectural elements
- e) Antiquities > 100 y.o. eg coins
- f) ‘Objects of ethnological interest’
- g) ‘Property of artistic interest’: paintings, statuary, prints etc in any medium (‘excluding industrial designs and manufactured articles decorated by hand’)
- h) Manuscripts, incunabula, books, documents of special interest
- i) Stamps, single/collections
- j) Archives including audio and visual
- k) ‘Articles of furniture more than 100 y.o. and old musical instruments’

Lists such as this say more about the mentality of the culture which devises them, including its legal expectations and apparatus, than about the real possibility of comprehensiveness, but it is a habit that persists in almost all similar legislation. Suffice it to note that the list defines items for which there is a market; obviously, there is no need to protect objects which no one want to buy. However, the market can and does change, according to fashion and other cultural shifts. It is doubtful whether southeast Asian textiles or 18th century wallpaper - both very collectable today - are covered in these definitions other than by stretching the ethnology or social history categories, and in any case, both might be explicitly excluded by the caveat about manufactured articles in part g).

The central purpose of the UNESCO Convention is to urge signatories to prepare laws and regulations of their own; to keep a national inventory of protected property; to supervise archaeological works; to establish rules for curators, collectors and dealers; and to educate the respect of all people for their cultural heritage. (Article 5) It introduces specific controls on museums not to collect illegally exported material, a response to the tradition of collecting which aimed to establish a ‘universal survey’ of humanity’s wonders; this was particularly the style of the museums of the great imperial powers, such as the British Museum and the Louvre. (Article 7) The UNESCO Convention provides a mechanism for state parties to request the return of cultural property illicitly exported after the Convention came into effect, and requires state parties to respond; following the law traditions of many UN members, it specifies compensation to an ‘innocent purchaser’ unaware of an object’s stolen status.

It sounds simple and admirable, but time has shown up major weaknesses. First, the Convention requires local legislation to actively implement its objectives, and reluctant players such as the United Kingdom have claimed that the time and cost of such legislation is more trouble than the results would be worth; the United Kingdom continues to claim (despite vast evidence of dubious trade) that voluntary professional codes for dealers, auctioneers, museums and collectors are an adequate way to control illicit imports and exports. Second,

the Convention calls for national inventories as the basis for identifying claimable objects; unfortunately inventories have proved to be both difficult and expensive, specially for poor countries, but even for the rich, in that adequate documentation of museum objects is a never-finished task. Third, the concept of the ‘innocent purchaser’ reeks of bad faith in a market where a blind eye and an arm’s length are regarded as equivalent to innocence.

To resolve these problems, the UNIDROIT Convention on Stolen or Illegally Exported Cultural Objects<sup>6</sup> was adopted in Rome in 1995.<sup>7</sup> The new Convention moves the frame for action on stolen cultural property (including illegally excavated material) from state action to private action in the national court of either the vendor or the buyer. UNIDROIT enlarges the definition of cultural property by including the significance which may be lost through illicit trafficking, in terms of ‘significant cultural importance for the requesting state’. It acknowledges the importance of the intact, entire object and its relation to its in-situ environment (such as might be destroyed by the removal of sculptural elements from a building or the break-up of a collection); and the importance for traditional or ritual use of the object by its indigenous owners (as in the removal to museums of ancestral objects). (Article 5(3)(a-d))

Perhaps the most radical assertion of UNIDROIT is the principle that ‘The possessor of a cultural object that has been stolen shall return it’, notwithstanding the rights of a bona fide buyer or the need to facilitate free trade. (Article 3) Compensation is limited to buyers who can demonstrate due diligence in assessing the provenance of the purchase. Due diligence amounts to a responsible investigation of authenticity, which might be assumed to be required by any rational buyer, including consideration of the circumstances of acquisition, the character of the parties, the price paid, as well as efforts to check registers of stolen material (such as the Art Loss Register) or relevant catalogues (such as the duplicate catalogue of the Angkor Conservation Centre held by a Paris institution). It is hoped that this language will fundamentally alter the market forces governing transactions in art and antiquities by putting the burden of proof squarely on the would-be seller of stolen cultural property.

A further innovation of UNIDROIT is its extension of time limits on legal action. A claim for restitution must be brought within three years of the claimant becoming aware of the location of the stolen object and the identity of its possessor, and technically, within fifty years of the theft. The recent discoveries of cultural property removed in World War 2 indicates the importance of long limitation periods for claims, but also the difficulty of specifying them. Hence the time limit is removed altogether for items forming an integral part of a monument or archaeological site, or belonging to a public collection, or for sacred objects belonging to a tribal or indigenous community. (Article 3(4) and 3(8))

To date, 98 states have ratified the Hague Convention (Australia in 1984); 88 states are party to the UNESCO Convention (Australia in 1989), also including the USA, Japan, and most of Europe, though an important player like France signed on only in 1997 and the United Kingdom is still not a signatory. 70 nations have adopted the UNIDROIT Convention; Australia is not yet among them, since ratification requires, in our federal system, long, slow consultation with the states.

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<sup>6</sup> <http://www.unidroit.org/english/conventions/c-cult.htm>

<sup>7</sup> UNESCO commissioned the Institute for the Unification of Private Law (UNIDROIT), Rome, to review the problems of legal control of the illicit traffic in cultural property. Lyndel V. Prott, *Commentary on the UNIDROIT Convention on Stolen and Illegally Exported Cultural Material*, Leicester, Institute of Art and Law, 1997, p.12.

As an aside from this discussion of international laws concerning the illicit trade in cultural property, it might be noted that the only instrument acknowledged in the United Kingdom is a European Community Directive on the Return of Cultural Objects Unlawfully Removed from the Territory of a Member State and an accompanying Regulation, issued in 1993.<sup>8</sup> The Directive applies, of course, only to members of the EC. By contrast, the United States was the first of the major 'art market' countries to implement the 1970 UNESCO Convention.<sup>9</sup> Further, the US has enacted focussed agreements and emergency actions, specifically preventing the import of undocumented archaeological and ethnological material from Peru, Mali, Guatemala, El Salvador, Cyprus, Canada and Bolivia.<sup>10</sup>

The prerequisite for Australia to ratify the 1970 UNESCO Convention was the development of national legislation, the Protection of Movable Cultural Heritage Act, 1986.<sup>11</sup> The Act controls the export and import of the most significant elements of Australia's movable cultural heritage, where export would 'significantly diminish Australia's cultural heritage'. It does not affect an individual's right to own or sell heritage objects within Australia. The Act is based on a National Cultural Heritage Control List, and advised by a National Cultural Heritage Committee which can administer the National Cultural Heritage Account of \$500,000 p.a.

The Control List consists of Part A, classes of objects of such significance that they may not be exported at all (chiefly indigenous sacred, secret objects, plus a historical category of Victoria Cross medals awarded to Australians), and Part B, items which require permission to be exported. The categories and their thresholds were revised in 1998, based on some rationalising of groups, focussing on items of specifically Australian cultural significance, and compensating for changes in art market prices, which are employed as filters to identify works likely to be of significance. Broadly, the Class B Control List comprises the following:

- Australian Aboriginal and Torres Strait Islander heritage, > 30 y.o., not made for sale
- Archaeological objects > 50 years buried in Australia
- Natural science objects, including fossils and meteorites not adequately represented in Australian public collections
- Applied science/technology of significance to Australia, > 30 y.o., not adequately represented in two Australian public collections
- Fine/decorative arts of significance to Australia, > 30 y.o., > \$250,000 paintings; Aboriginal art > 20 y.o.
- Documentary heritage > 30 y.o., not represented in two Australian public collections
- Numismatic objects of significance to Australia, not represented in two Australian public collections, > \$15,000
- Philatelic objects of significance to Australia, not represented in two Australian public collections, > \$150,000 (collections)
- Historically significant objects > 30 y.o., not represented in two Australian public collections

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<sup>8</sup> <http://europa.eu.int/scadplus/leg/en/lvb/l11017b.html>

<sup>9</sup> <http://e.usia.gov/education/culprop/97-446.html>

<sup>10</sup> <http://e.usia.gov/education/culprop/pefact.html>

<sup>11</sup> [http://www.dcita.gov.au/nsapi-text/?MIval=dca\\_dispdoc&ID=7](http://www.dcita.gov.au/nsapi-text/?MIval=dca_dispdoc&ID=7)

The list demonstrates the difference between the heritage of the Old World and the heritage of the New, and some different aspects of the global collector market, which is not confined to artworks and antiquities. In fact, the range of items for which export permits were issued in 1997-98 indicates the nature of Australia's movable cultural heritage — or rather, that segment which has a market value. Of 108 applications, there were 29 fossils, four mineral specimens and two meteorites. The largest category was eleven cars, such as a 1911 Vauxhall and a 1912 Rolls Royce; two motor cycles; two steam engines; three aeroplanes.<sup>12</sup> Among the four applications to export indigenous artworks was one consisting of six paintings from Papunya whose case has still not been resolved. Works of the early 1970s, they are among the earliest examples of the Central Desert movement in acrylic painting, a special case for which the thirty year rule for both ethnography and art was reduced to twenty years. The National Cultural Heritage Committee has requested further research on their significance.

Informal evidence suggests that there is substantial non-compliance with the Protection of Movable Cultural Heritage Act. A shipping container full of dismembered ironmongery might be scrap, or it might be a trove of 19th century portable steam engines, early 20th century agricultural machinery or 1950s diesel tractors, for all of which there is a big collector market in the United States, the United Kingdom and Europe. In fact, local historic machinery enthusiasts have proved to be a major source of information about the predations of foreign dealers, but controlling the traffic is subject to the same difficulties as other countries experience with other types of cultural property. Objects which have been refused export permits are known to have been smuggled out, and one is currently flaunted on the website of a British collector group.<sup>13</sup> Ignorance informs other illegal exports, as in the 1999 case of the 25kg gold nugget, 'King of the West', which was forfeited to the Commonwealth on discovery in a New York auction house, but restored to the prospector-owner at the direction of the Minister. It is now moving through the legal channels of obtaining an export permit, but meanwhile it seems possible that a local sponsor may acquire the specimen for an Australian museum, perhaps with assistance from the National Cultural Heritage Account.

The Protection of Movable Cultural Heritage Act also enables action on other nations' cultural property that has been illegally exported to this country. Items have been returned after due process, such as a Peruvian feather mantle purchased by the National Gallery of Australia. The Secretariat that administers the law is presently investigating alleged illegal exports including fossil dinosaur eggs from China, gold coins from a Spanish shipwreck and a number of antiquities from Greece and Italy.

Such actions ought to be possible in the reverse direction among UNESCO Convention signatories. But the return of illegally exported Australian cultural property is hampered by particular conditions in our traditional markets. As already noted, the United Kingdom is not party to the UNESCO Convention at all, and the United States legislation defines cultural property very specifically as significant archaeological objects (more than 250 years old and recovered through excavation) or significant ethnological objects (the product of a tribal or non-

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<sup>12</sup> *Annual Report 1998-99 on the Operation of the Movable Cultural Heritage Act 1986*, DCITA, 1999, p.16-18.

<sup>13</sup> Bredgar and Wormshill Light Railway: <http://home.clara.net/billbowman/bwlr.htm>. Stock No.7: 'A 0-4-2 side tank built by Société Nouvelle des Etablissements Decauville-Ainé, Corbeil, France in 1897 (works no. 246) and exported to Australia where it worked at Frederick Buss' Invicta Mill, Avondale, Queensland. In 1918 it was sold to Millaquin Mill, Bundaberg, Queensland. Sometime later it was transferred to Qunaba Mill, Bundaberg where it was as 'Frenchy'. In 1963 it was sold to a Tod Watson who lent or hired it to a private railway in Canberra. In 1996 it joined the stock of the BWLR where it is in the process of being rebuilt.' This engine was refused an export permit in 1993: *Annual Report 1993-94 on the Operation of the Movable Cultural Heritage Act 1986*, DCITA, 1999, p.4.

industrial society). Though Australian indigenous material would be recognised under these definitions, the kind of items described in the most recent Protection of Movable Cultural Heritage permit list, and indeed, the 'King of the West' nugget, would not be recognised.

Then there is the argument that bad laws are made to be broken, or more bluntly, that people are always going to break laws that run counter to human nature. The excesses of human nature are, of course, among the objects of the rule of law, but many aspects of the laws protecting the export of cultural heritage objects could undoubtedly be improved. There is the implication that cultural material must remain in its country of origin. This necessity varies from place to place depending on the history of collecting/looting and the state of the nation's own museum collections, but it can well be argued that multiple objects sufficiently represented in museums might well be traded legally, perhaps bringing in an export tax. Dealers in antiquities argue that duplicate or minor archaeological items which have been recorded in controlled excavation could enter the free market to the economic benefit of finders and states.<sup>14</sup> All such suggestions point to the need for workable systems of export permits which respond to local conditions.

Such are the limitations of laws. The more effective means of protecting cultural heritage is a change in public attitude. This is not as ethereal as it might sound, as demonstrated by public attitudes towards the protection of endangered species of wildlife; the personal choice not to buy garments or ornaments made of protected animal-materials is increasingly popular, though admittedly, not among all. Such choices in the collector markets for art, antiquities and other heritage objects are much less frequent. It is to be hoped that art lovers can be convinced of the tragedy of dismembering monuments to provide fragments that satisfy another culture's aesthetic tastes. Further, the idea that heritage belongs to all, not just individuals, has a moral power that touches many.

Thankfully for the integrity of museums, the precepts of the UNESCO Convention have been adopted more or less whole-heartedly by professional museologists throughout the world, bolstered by the various national museum codes of ethics, the majority of which follow the Code of the International Council on Museums (a UNESCO affiliate).<sup>15</sup> This change is concomitant with a transformation in the concept of museum authority and responsibility, shifting from a highly prescriptive view of institutional rights to collect all and any cultural material to a more socially-responsive posture. Even once flagrant looter-museums such as the Metropolitan Museum, New York, have demonstrated new standards of ethical action with regard to acquiring and returning illegally-exported objects.<sup>16</sup>

Australian public museums today can be confidently said to practise the highest standards of respect for indigenous and other cultures' heritage materials. A number of major museums have returned items requested by Pacific and indigenous groups, and procedures for request and return exist in most, if not all. Nonetheless, the big, old museums are inevitably tainted by the rapacious traditions of older-style museology, and have been cast into the frontline of attack as symbolic bastions of cultural imperialism. Museums are taking responsibility for this history, and finding new directions in cooperative conservation of cultural heritage as a joint project between the owners and makers of culture and the public interest.

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<sup>14</sup> James Ede, 'The Antiquities Trade: Towards a more balanced view', in Kathryn W. Tubb (ed.), *Antiquities Trade or Betrayed: Legal, Ethical and Conservation Issues*, London, Archetype, 1995, p.213.

<sup>15</sup> <http://www.icom.org/ethics.html>

<sup>16</sup> eg, Lawrence Kaye and Carla Main, 'The Saga of the Lydian Hoard: From Usak to New York and back again', in Tubb *Op.Cit.*

The contest between public and private interests in cultural heritage persists. While national and international legal instruments slowly weave nets to control illegal action, much remains to be achieved at the national level of regulating rational practice at the coalfaces of cultural heritage management (from improved documentation to controlled excavation to export permit systems). Even more pressing is the project to transform public values about the rights and responsibilities of ownership of cultural property; here is the important nub for future action.