Enhancing the protection of foreign cultural material

A new model is proposed for the protection of foreign cultural material. This is illustrated below. The changes will increase the effectiveness and transparency of the processes to recover and return foreign cultural material. The suggested changes include:

- provisions to protect stolen and looted cultural material
- consolidation and extension of criminal sanctions
- modern law enforcement provisions that encompass a range of powers, including injunction, search and seizure powers that provide for more effective prosecution and reflect current best practice
- enhanced clarity, due diligence obligations and transparency of process
- adoption of the UNIDROIT mechanisms to give foreign claimants access to Australian courts
- retention of non-court procedure for objects stolen from inventoried collections or identified sites
- availability of an alternative dispute resolution mechanism for claimants and Australian owners
- time limitations for the bringing of claims limitations regarding claims against illegal exports to clarify expectations for importers in regard to due diligence as to title and provenance
- consolidation of processes across government for the return of looted and stolen material.

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Proposed process regarding foreign claims

1. Object is seized on suspicion for safeguarding by the Department for a period of 3 months. Safeguarding period may be extended at any stage of these processes. Request for seizure does not have to be made by a foreign government.
2. If object is NOT listed in the inventory of a foreign collection, monument or site:
   - Australian owner has opportunity to cede ownership.
   - If Australian owner does NOT:
     - Foreign claimant has time limited period to commence legal action against Australian owner (includes mandatory dispute resolution process).
     - If foreign claimant does NOT pursue legal action within time period:
       - Object is returned to Australian owner.
   - Opportunity for foreign government and Australian owner to provide documentation or cede ownership.
   - Minister’s decision regarding appropriate action.
   - If decision is to return object to foreign government:
     - Time limited opportunity for Australian owner to commence proceedings to prevent forfeiture.
3. Consideration

Introduction and background

The Protection of Movable Cultural Heritage Act 1986 provides Australia’s regulatory framework for the import and export of significant cultural material. It has allowed Australia to fulfill its obligations under the UNESCO Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property 1970 and seeks to provide protection to both Australian and foreign cultural material.

Such legislation must balance the public interest in protecting cultural material with the public and private interests of property ownership and the maintenance of a legitimate trade in such material. The Minister for the Arts has appointed Australia’s pre-eminent cultural property lawyer, Mr Shane Simpson AM to conduct this important review and recommend the changes necessary to:

- deliver a balanced, more efficient, and more flexible system
- permit Australia to fulfill its international role in the protection of movable cultural property.

Methodology of the review

The review is currently in Stage 2. A Position Paper has been developed that describes a new model for the protection of cultural heritage. This summary document provides an overview of that Position Paper and the proposed changes.

Invitation to comment from Mr Shane Simpson AM

In my Position Paper I set out in some detail my view as to the numerous issues that need attention with regard to the Act and how they might be best resolved. I have taken the, perhaps unusual, approach of proposing preferred models for change because I believe that this will promote more focussed and incisive comment from the sector.

I look forward to considering your comments once you have had a chance to consider the proposals described in the Position Paper. If you support an approach, tell me. If it won’t work, tell me why and how the issue can be better resolved. Similarly, if I’ve missed an issue, tell me what it is and what you think should be done. I do not promise that the final report will reflect your view but I can assure you that it will have been properly considered.

How to provide feedback and comment

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Modernising the process for export control of Australian cultural material

The new model provides clearer definitions of the cultural material protected by the Act, and reconfigures the National Cultural Heritage Control List to provide objective standards to define objects regulated by the Act. It also establishes a new system of categorising cultural material as defined below.

Improvements to the export permit process

There are a number of key improvements to the features of the export process for cultural heritage material. These include:

- Improved clarity for exporters through the use of objective criteria for determining whether a permit application is necessary.
- New, transparent, flexible and shortened decision processes.
- Improved use of external experts for the assessment of permit applications and the provision of advice.
- Modernisation of enforcement powers and procedures.
- Better articulated purpose and priorities of the National Cultural Heritage Account.
- Simplification of the process for temporary export permits, including broadening eligibility for General Permits.

Significance and representation process

The significance and representation of an object is an important part of determining whether it can be exported.

There are a number of proposed changes to significance and representation that include:

- a positive test for the determination of the significance level required to deny the export of an object;
- clarification and articulation of the criteria for significance and representation assessment;
- recognition of significance assessments undertaken by state and territory agencies.

Proposed export permit process

Outcome
- Is the object an APO?
  - If NOT an APO
    - Check Declared Australian Protected Object List
  - If an APO
    - Permanent export prohibited unless exception applies

Process
- Does the owner/agent have a general permit?
  - If yes
    - Check whether object is covered
    - Application made by owner/agent to the Department for temporary or permanent export permit
  - If no
    - Department carries out preliminary assessment
      - If clear
        - Expert permit issued by Department
        - Can be subject to conditions
      - If unclear
        - Deny export permit

Features of change
- New thresholds for age and value
- Refined and coherent categories
- Removal of significance and representation from definitions
- Minister to have discretion to override age and value thresholds
- One consolidated list of all objects denied permanent export
- Extended eligibility criteria to other trusted organisations
- Allows the General Permit system to deal with more export applications
- Application to provide more information regarding current owner, the object and its provenance
- It is the expert’s role to describe significance of object and representation from definitions
- Decision to be made by the Department, not the Minister
- The function of the Panel is to provide flexible access to appropriate expertise
- No longer expert’s role to make recommendations as to export permission
- It is uncertain whether the object is a DAPO
- Has concerns about the potential non-return of the object

Self assessment
- Application for permit and assessment required

Automation assessment
- An APO that is assessed to be of such significance and is not adequately represented in Australian public collections, and has therefore been denied permanent export, or
- A declared object that has been declared on the DAPO list

Declared Australian Protected Object
- An Australian Protected Object (APO) is an APO that has been determined to be significant to Australia or a part of Australia, according to the new significance criteria.

Australian Protected Object
- A Declared Australian Protected Object (DAPO) receives the highest level of protection, and is an:
  - APO that is assessed to be of such significance and is not adequately represented in Australian public collections, and has therefore been denied permanent export;
  - Object that has been declared on the DAPO list.

Australian Heritage Object
- An Australian Heritage Object (AHO) is cultural property that exceeds the relevant age and value thresholds, as set out in the updated Control List.

Application to provide more information regarding current owner, the object and its provenance
- The Department is empowered to issue temporary export permits for periods of less than six months without the need for a significance assessment, unless:
  - It is uncertain whether the object is a DAPO
  - It has concerns about the potential non-return of the object

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