

REVIEW OF THE PROTECTION OF MOVABLE CULTURAL HERITAGE ACT

Comments compiled by the Western Australian Museum

1. Introduction

1.1 The Western Australian Museum is pleased to provide feedback on the Position Paper issued in 2015 as part of the Review of the Protection of Movable Cultural Heritage Act.

1.2 The Museum is very supportive of this review and this short response deals with some of the general and specific observations, comments and suggestions from the Museum.

2. General comments

2.1 We applaud the intent of the Review, as itemised in *Principals for the Proposed Model* of the Position Paper. The Review is reasonable, well considered and contains some important recommendations which, if implemented, will not only strengthen the Act in specific areas, but will also sensibly relax some of the provisions to facilitate the responsible and legitimate movement of movable cultural heritage.

2.2 With respect to the easier facilitation of movement, we particularly welcome the comments regarding the importance to adequately reflect contemporary Australia's commitment to the international community. We cannot complain about the relatively limited amount of Australian cultural material shown globally if we do not facilitate its movement, at least on a temporary, or loan, basis.

2.3 We agree with the methodology which proposes a 'root and branch' review informed by consultation, rather than attempting to make piecemeal amendments to the current legislation. Indeed, we recognise the limitations listed in part A, section 3, only too readily, and wholeheartedly endorse the principles expressed in Part A, section 4.

2.4 We do continue to have reservations about arbitrary age and value criteria as neither is necessarily an indicator of cultural significance and both are problematic when dealing with biological material.

3. Specific Comments

3.1 **Part B, Section 5: Definitions**

We support the proposals in Part B, Section 5, to clarify the nomenclature and definition to make it clear that both natural and cultural objects are covered.

Similarly, we support the proposal to clarify the meaning of Australian-related: the proposals are still somewhat involved, but they are certainly an improvement on what exists! The inclusion of 'soil' seems rather specific and a pedant might suggest that this implicitly excludes fossils in subterranean rocks! Could you not just say, *on, above, or below the land, and inland and coastal waters of Australia?* (Above would include things that do fly!)

3.2 Part B, Section 6: Classification

If there is a section with which we have significant concerns it is this one. Whilst fully concurring with the criticism of the current classification, we fear that this one also has problems.

In the first place, we remain sceptical of the criteria for defining an Australian Heritage Object. As we note, above, neither age, nor value (itself an arbitrary characteristic) are reliable indicators of heritage value. Furthermore, such criteria are particularly problematic when assessing biological material. We understand that there is a desire to provide a 'lowest common denominator' to at least ensure that material does not fall through the net, however, such a system, almost by default, reduces the perceived (perhaps real) heritage value of other material that whilst not meeting these criteria, may be of considerably greater cultural and national value.

We do support the proposals for Declared Australian Protected Objects (DAPOs) and do agree that a more dynamic system of managing this is necessary, rather than a 'National Register' which is both divisive and inflexible.

We certainly support the principle of lending the most significant objects overseas as part of the ongoing cultural exchange between Australia and the rest of the world.

3.3 Part B Section 7 National Cultural Heritage Control List

We understand the need to refine the classifications and definitions, particularly in relation to Aboriginal and Torres Strait Islander material.

The fossil example given is an interesting one and reveals some of the flaws in the creation of AHOs. As noted, there would also need to be considerable liaison with the resources industry otherwise, without the 'blanket' permit, the coal extraction industry could find itself with a lot more work to do!

With respect to numismatic objects (7.10 New Part 4.4) in particular (but not exclusively), there should be some cross reference to other relevant legislation such as the Historic Shipwrecks Act (1976)

We do believe that further thought needs to be given to the designation of collections (7.13). Sometimes, it is the integrity of a collection of particular material (e.g. a series of natural science specimens; a collection of contemporary ceramics; a collection of Aboriginal cultural materials etc.) that gives it its real environmental or cultural value. It is, we would suggest, demonstrative of an 'arts-informed' approach that the example given are around collections of a particular collector: whilst this will often be the defining characteristic of a collection, it is by no means the only one. Furthermore, invoking the problem of value thresholds with such a collection is more demonstrative of the inadequacy of monetary value as an indicator of significance, than it is of the difficulty of dealing with collections.

3.4 Part B, Section 8 Significance and representation

New Definition of Significance:

Pages 30-31 of the position paper discuss the proposed new definition of 'significance'. The draft criteria described below are based on those in *Significance 2.0* which has broad acceptance in the sector, although is not always as easily applied to natural science objects.

The key, of course, is assessing the level of significance that determines inclusion under this legislation. The two questions posited in 8.2 crystallise this and are probably the two most 'significant questions of significance!'

The proposed rewording of the test in section 10(6) of the Act for denial of export permits is also supported. The current test requires proof of a negative proposition – the suggested new wording '...that its retention is important to the cultural heritage of Australia' is clearer and easier to apply.

The proposals to better address the question of 'Equivalent quality' (8.4) are particularly welcome as is the quest for a positive, rather than negative test of significance (8.6).

3.5 Part B, Section 9: National Cultural Heritage Committee

We agree with the abolition of the NCHC: it represents an old-fashioned, inefficient and overbearing approach: the model proposed would be a great improvement.

3.6 Part B, Section 10: Making the System faster and more efficient

Yes, please(!) – especially, as proposed, for temporary purposes (e.g. loans) and also, including the recognition of 'accredited' public institutions which will be trusted to ensure the return of material, not least because that material belongs to them and their governing bodies! In this respect, the extension of eligibility criteria for 'General Permits' (10.3) is supported.

The only concerns with the new suggested streamlined mechanism for assessing an item's eligibility is that this places a great deal of responsibility on the Departmental assessor to be suitably knowledgeable in their preliminary assessment.

Similarly, as noted, above, an initial assessment based purely on the criteria of statutory tests/thresholds according to only age and value will not always identify significant material. While the new proposal that the 'Department should have an ability to seek expert advice and review the significance of any object that does not fall within the thresholds' is supported, this initial assessment should formally consider the criteria for significance as suggested in section 8.1 of the Position Paper in addition to the threshold tests for age and monetary value.

3.7 Part B, Section 11: The National Cultural Heritage Account

The broadening of the purpose of the account beyond acquisition is welcomed. We would like 'conservation' to be added to the purposes (preservation is mentioned in 11.2.1, however, conservation might be more appropriate).

3.8 Part C: Protection of Foreign Cultural Material

We support the thorough and sensible proposals throughout section C to prohibit illegal import and export of cultural material and to comply with a wide range of international legislation and agreements. As noted, this will need to take into account current Immunity from Seizure provisions.

3.9 Part D: Offence Provision

Again, the WA Museum is broadly in support of the approach and provisions sought. One concern has to be in the area of **Enforcement** (25), because of issues of resources and capacity: in short, it must be recognised that the goals of the legislative regime need to be enforced and resourced in order to be realised.

WA Museum staff, for instance, have noted that it is likely that “underground” trade in material likely exists given the low number of applications for export approval. For example, the Museum’s curators of anthropology and archaeology have only processed three applications in the past five years. This would seem to be an unusually low number relative to the international interest in, for example, Aboriginal cultural artefacts.

Since about 1990, the WA Museum’s meteorite expert believes at least 100 meteorites found in Australia (or roughly a fifth of all meteorites currently known from Australia) have been illegally exported (i.e. without permits or letters of clearance) by persons unknown. Proof of the illegal export of these meteorites is supported by the scientific literature as the meteorites were officially named by the Nomenclature Committee of the Meteoritical Society and details of their discovery were published in the *Meteoritical Bulletin of the Societies Journal*, *Meteoritics and Planetary Science*.

In effect, the PCMH Act may have driven traffic in Australian meteorites largely underground. More assertive application of the PMCH Act, leading to increased prosecutions, where necessary, is an essential part of the response.

4. Comments on specific items in the Appendices

The following comments relate to the appendices and deal with specific matters and categories of material.

4.1 Appendix 1 - Declared Australian Protected Objects (DAPO)

Page 101: There are terms in the list which could be problematic, for instance:

“any items originating from a registered Australian Sacred Site shall be presumed secret/sacred”

The terminology Sacred Site is frequently contested, given the equivocal status of sacred sites and other sites of significance. Recent proposed changes to the *WA Aboriginal Heritage Act* and its administration demonstrate this.

Is there, for instance, consideration of the rights of Prescribed Bodies corporate (i.e. Native Title claimants) to advise on materials from sites?

Page 102: “*western brass breastplates*”

This will requires careful implementation. There is a range of “kingplates’ on the market purporting to be legitimate WA examples that, after careful examination, the WA Museum staff are certain to be fakes, however, this is often contested by other experts.

Page 102: “*documentation and audio-visual material embodying secret/sacred images or ceremonies*”

Does this include digital copies of such and will there be consideration of cultural impacts of ‘sharing’ such material?

Page 104: additional DAPO included under Visual Arts, Craft and Design Material

- *bark paintings and sculptures from the Kimberley region produced prior to 1975 and valued at more than \$25,000;*
- *East Kimberley School paintings produced prior to 1991 and valued at more than \$150,000; and*
- *Western Desert paintings produced prior to 1974 and valued at more than \$50,000.*

In a Western Australian context, this seems heavily biased towards two-dimensional paintings, which seems to reflect a Western ‘art-appreciation’ analysis of importance rather than on e of cultural significance.

Also, many of these were produced for sale and, therefore, \$25,000 appears to be quite a low threshold and, in any case, were produced for an increasing international market!

4.2 Appendix 2 - National Cultural Heritage Control List

Page 109: National Control List – versus DAPO

This needs tightening up taking into account specific objects from WA, especially as the process for export does not, at this level, require input from the State or from an expert assessor with local knowledge.

There seems to be an implicit assumption that all wooden artefacts of specific categories are identical, and not reflective of individual craftsmanship, or rarity [especially regarding context and good condition].

Missing from DAPO are:

- objects produced straddling the frontier [e.g. later in WA than the east coast],
- particular categories, including South West material culture [kodj, taaps, booka], Murchison/Gascoyne coastal Pilbara material culture [e.g. represented in Clements collections in international institutions, but not in WA]

If these are not covered by DAPO, then the process of assessment by expert examiners/assessors does not occur until later. Does there need to be a mid-stage process for some categories of objects that are AHOs but not DAPOs? This would include specifying more stringent examination of material from specific regions.

4.3 Appendix 2 - National Cultural Heritage Control List

New Part 2: 2.1

In this section, Natural Science Material is an Australian Heritage Object if it is:

(d) “a type specimen of present-day flora or fauna or mineral if a permit or authority under the Environment Protection and Biodiversity Conservation Act 1999 is not in force for the type specimen”.

A type specimen may then be declared as an “Australian Protected Object” if it fulfils three different criteria (see 2.2 on page 110). Type specimens would fall into this category as they are an Australian Heritage Object (see 2.1), are Significant, and are not Adequately Represented in public collections in Australia.

The document may require further clarification on the word “type specimen”. The current edition (Fourth Edition, 1999) of the *International Code of Zoological Nomenclature*, which is regulated by the International Commission on Zoological Nomenclature, defines two main categories of type specimens, primary and secondary. Primary types include holotypes, syntypes and lectotypes, whereas secondary types include paratypes and paralectotypes. Each named species or subspecies usually has a single primary type (a holotype or lectotype), but may have one or more additional specimens (or parts of specimens) that may either be syntypes (if a holotype was not nominated in the original description), paratypes or paralectotypes.

Most taxonomists would consider that a primary type more 'valuable' than a secondary type and, therefore, would most likely prefer that only primary type specimens be declared as Australian Protected Objects, rather than all type specimens.

The Western Australian Museum reports annually on use of the General Permit (25) in relation to meteorite and fossil loans overseas. To date we have not reported against our general permit for loan movement of Australian type specimens overseas. However, we are currently developing a new CMIS system and annual reporting on all outward international loans under the Protection of Moveable Cultural Heritage Act will be done automatically through this system.

Thank you for the opportunity to comment. We hope that these comments are taken in the spirit they are offered i.e. constructively and with the intention of supporting what we consider a very important process.

We congratulate you on the significant progress, so far.

Kind regards.

Yours sincerely.

Alec Coles