

AUSTRALIA'S PROTECTION OF FOREIGN STATES' CULTURAL HERITAGE

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I INTRODUCTION

The international market in art and antiquities includes a demand for archaeological and palaeontological material, such as dinosaur eggs, nests and skeletons. The Liaoning province in north-eastern China is rich in such material, which should be impossible to obtain on the market since China imposes a strict export prohibition on all archaeological and palaeontological material. However, a thriving illicit market for this material has grown, and has now extended to Australia. In June 2004, acting on a request from China, Australian authorities seized 20 tons of palaeontological material in Mandurah, Western Australia. This material had been illicitly excavated in the Liaoning province, illegally exported from China, and imported into Australia.¹ This material was recently returned to China.²

The Australian government does not regard this as merely an example of an illegal export of a commodity from another state, but as 'a serious issue which involves the theft of other people's culture and heritage'.³ Given this, one might question how 20 tons of palaeontological material, consisting of over 1300 individual fossils, could enter Australia undetected; and why the Australian authorities only acted when requested to do so by the Chinese authorities.

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1 *Australia Seizes Over 1300 Fossils, Dinosaur Eggs* (2004) Planet Ark <<http://www.planetark.org/daily/newsstory.cfm?newsid=25578>> at 4 November 2004; 'WA Raids Seize Chinese Fossils Worth Millions', *Sydney Morning Herald* (Sydney), 19 June 2004 <<http://www.smh.com.au/articles/2004/06/17/1087245016562.html>> at 4 November 2004.

2 See 'Australia Hands Back Seized Dinosaur Eggs', *Sydney Morning Herald* (Sydney), 21 June 2004 <<http://www.smh.com.au/articles/2004/06/21/1087669894238.html>> at 4 November 2004; 'Customs Cracks Dinosaur Egg Poaching Plot', *The Age* (Melbourne), 22 June 2004 <<http://www.theage.com.au/articles/2004/06/21/1087669915093.html>> at 4 November 2004.

3 'Australia Hands Back Seized Dinosaur Eggs', above n 2 (Senator Chris Ellison, Minister of Justice and Customs).

This recent incident is a typical example of the illicit trade in cultural heritage, of which archaeological and palaeontological material forms a part.⁴ It raises a number of issues of importance regarding the way in which Australia perceives this illicit trade, and the approach taken to assist foreign states in the protection of their cultural heritage.

The 1970 United Nations Educational, Scientific and Cultural Organisation ('UNESCO') *Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property*⁵ ('UNESCO Convention') attempted to address the problem of the illicit trade in cultural heritage. Australia is a party to this Convention, and has given effect to it by way of the *Protection of Movable Cultural Heritage Act 1986* (Cth) ('PMCHA'). In considering Australia's approach to assisting foreign states in the protection of their cultural heritage, it is important to examine the UNESCO Convention and, in particular, what this article argues to be its underlying structural flaws and ambiguous provisions, which undermine its effectiveness. The Convention's limitations, it is argued, consequently limit the effectiveness of state parties' legislation.

The Australian legislation has been described as 'liberal' in the sense that it provides far greater protection than was necessary to implement the internationally agreed upon protective measures.⁶ This claim will be re-examined in light of the critique of the UNESCO Convention. Further, consideration will be given to whether more might be done by Australia in addressing this illicit trade.

II THE ILLICIT TRADE IN CULTURAL HERITAGE

The oldest threat to cultural heritage is its destruction and expropriation as a 'spoil of war'.⁷ A rather different threat emerged in the 18th and 19th centuries

4 The term 'cultural heritage' is broadly used to describe a range of material that might be considered of cultural importance and thus worthy of greater protection than other property. This includes archaeological and palaeontological material, with which this article is mostly concerned. The term 'cultural property', though emphasising the proprietary component of the material rather than its heritage value as an object that has importance to future generations, will, for the purposes of this article, be regarded as synonymous with the term 'cultural heritage'. For a discussion on the difference between these two terms, see Lyndel Prutt and Patrick O'Keefe, "'Cultural Heritage" or "Cultural Property"?' (1992) 1 *International Journal of Cultural Property* 307.

5 Opened for signature 14 November 1970, 823 UNTS 231 (entered into force 24 April 1972). As at 28 May 2004 there were 104 States Parties. Seventy-seven States voted in favour of the Convention, one against and there were eight abstentions. No record was kept of how each State actually voted.

6 John Ley, *Australia's Protection of Movable Cultural Heritage: Report on the Ministerial Review of the Protection of Movable Cultural Heritage Act 1986 and Regulations* (1991) 125. See also Gregory Tolhurst, 'An Outline of Movable Cultural Heritage Protection in Australia' (1997) 2 *Art, Antiquity and Law* 137.

7 This article does not address the issue of the physical protection of cultural heritage in times of war. Nor will it address the duties of occupying forces to protect cultural heritage within the occupying territories. The *Convention for the Protection of Cultural Property in the Event of Armed Conflict*, opened for signature 14 May 1954, 294 UNTS 215 (entered into force 7 August 1956), the *Protocol for the Convention for the Protection of Cultural Property in the Event of Armed Conflict*, opened for signature 14 May 1954, 294 UNTS 358 (entered into force 7 August 1956) and the *Second Protocol to the Hague*

with the development of an interest in collecting antiquities, and the dawning of the scientific disciplines of archaeology and ethnology. While collecting antiquities and archaeology may have had similar origins, their paths have diverged dramatically. Archaeology seeks to reconstruct the past through the examination of objects *and their physical context*. Primacy is given to the information gained from this scientific examination.⁸ The art and antiquities market value the objects themselves as works of art, though increasingly, provenance affects the market value of these material remains.⁹ The art and antiquities market of the developed world continues to demand vast quantities of cultural heritage, particularly archaeological material, most of which originates in the developing states of South America, Africa and Asia.¹⁰ To satisfy demand, archaeological heritage is ripped from the ground, destroying the archaeological context and depriving all humankind of an interpretation that adds to our understanding of our past.

The demand driven market threatens the archaeological heritage of many economically poor but heritage rich states. It does so because these states do not have the resources to excavate the archaeological sites or, where thought appropriate, to protect these sites *in situ*. Moreover, the archaeological heritage and its context in these countries will continue to be at risk as long as there is a market for the heritage, whether licit or not. Given this, one measure to limit the trade is to prevent the movement of the heritage, particularly to those states in which the market for such heritage is legal and lucrative. Most developing states will therefore either limit or prohibit the export of archaeological heritage found within its borders.

The effect of these measures is that archaeological heritage of particular significance to the living culture of a state may be retained. This retention also allows the heritage to be economically utilised a number of times as exhibits in museums, or sent on international exhibitions, rather than being sold and having a single economic benefit in the sales price. Unfortunately, it is extremely difficult for these states to enforce retentionist legislation. Corruption, maladministration and poor funding in cultural organisations and police, and

Convention for the Protection of Cultural Property in the Event of Armed Conflict, opened for signature 26 March 1999, 38 ILM 769 (entered into force 9 March 2004) will, therefore, not be discussed. For a discussion of these Conventions, see Jirí Toman, *The Protection of Cultural Property in the Event of Armed Conflict* (1996); Patrick Boylan, 'The Concept of Cultural Protection in Times of Armed Conflict: From the Crusades to the New Millennium' in Neil Brodie and Kathryn Walker Tubb (eds), *Illicit Antiquities: The Theft of Culture and the Extinction of Archaeology* (2002) 43.

8 Colin Renfrew, *Loot, Legitimacy and Ownership* (2000) 19.

9 The Art Newspaper's *Year in Review 2003* claimed that in regard to antiquities, '[t]his year's auction results reflect the increasing importance of provenance: the top lots all had exceptional pedigrees': *The Art Newspaper: The Year in Review 2003 – Events, People, Politics and the Market* (2003) 13. This included a unique Roman marble statue, the 'Jenkins Venus', which sold for £7 926 650 at Christie's, London.

10 Neil Brodie, Jennifer Doole and Colin Renfrew, *Trade in Illicit Antiquities: The Destruction of the World's Archaeological Heritage* (2001) includes chapters on the extent of the illicit trade in developing states such as Cambodia, Thailand, China, Pakistan, Afghanistan, India, Kenya, Somalia, Tanzania, Niger, Belize, Peru, Syria, Jordan, Turkey and Cyprus. Some developed states do, however, also suffer a degree of illicit excavation and trade, including the United Kingdom, the United States, Italy and Greece.

most importantly, few alternative lucrative assets available to poor locals, fuel the illicit excavations and trade.¹¹

Thriving markets for art and antiquities exist in many developed states, the most important of which are in the United States, the United Kingdom, Sweden, Japan, France and Switzerland. A view expressed by supporters of a licit trade in archaeological heritage is that much of this heritage belongs to the common heritage of humankind, and that a licit trade allows for the free circulation of all cultural heritage. This circulation has scientific, cultural and educational value in that it inspires understanding and appreciation of other cultures and values, and enriches the culture of all states.¹² However, at present, it is likely that such a free flow of cultural heritage would be a one-way flow, with developing states supplying the art and antiquities market, but unable to participate in the demand market.

Supporters of a licit trade also point to the ineffectiveness of retentionist legislation, and the consequential flourishing black market.¹³ However, simply removing the exporting limitations would not necessarily protect the archaeological information which can be derived from the archaeological heritage.

An alternative solution could be the imposition of import controls by developed states that accord with developing states' export controls. This approach would acknowledge that, while 'national' archaeological heritage is part of the common heritage of humankind, the state of origin of the material is the most appropriate state to act as the steward of this material. It was such a protection regime that the *UNESCO Convention* sought to establish.¹⁴

Whilst the problem of the illicit trade in archaeological heritage has existed for a considerable time, it is the illicit trade in Iraqi heritage which has drawn the

11 See Edek Osser, 'London and Paris Markets Flooded with Looted Iranian Antiquities', *The Art Newspaper*, January 2004, 9; Martha Lufkin, 'Antiquities Dealer Arrested for Smuggling Iranian Object', *The Art Newspaper*, March 2004, 9; Konstantinos Politis, 'Dealing with the Dealers and Tomb Robbers: The Realities of the Archaeology of the Ghor es-Safi in Jordan' in Brodie and Tubb, above n 7, 257.

12 There is certainly validity in these arguments and scope for a controlled licit trade is conceivable. However, given the current international regime, it is unlikely that such a licit trade would be established in the short term and, as such, this article does not consider these arguments in depth. See John Merryman, 'A Licit International Trade in Cultural Objects' (1995) 4 *International Journal of Cultural Property* 13.

13 *Ibid* 20.

14 To reflect his brief description of the art and antiquities market, in this article, the term 'exporting' and 'importing' state is used in the sense defined by Protz to be

a kind of rudimentary shorthand for a much more complex problem. Although current trade flows may render a country likely to see itself as one or the other, this can change over time. ... Some States see themselves as both, and some States are really 'transit' States with a far bigger through traffic of cultural objects than either definitive import or export: Lyndel Protz, *Commentary on the Unidroit Convention* (1997) 16.

The terms 'developed' and 'developing' are also used in a very general sense, in that many of the 'exporting states' are developing states, and many of the 'importing states' are developed states. The terms 'source' and 'market' states have also commonly been used in a similar sense: see John Merryman, "'Protection" of the Cultural "Heritage"?' (1990) 38 *American Journal of Comparative Law* 513, 513 fn 4.

world's attention to this 'awful business',¹⁵ and has been a central feature in the furore over the Coalition involvement in Iraq.¹⁶ Australia's engagement in this conflict, and that in Afghanistan, has brought Australia into direct contact with the illicit trade in middle-eastern archaeological heritage, a trade that has existed and flourished despite international efforts to eradicate it.¹⁷

Iraq has long had one of the strictest and most effective protection laws in the world, and little Iraqi archaeological heritage left the country, legally or illegally.¹⁸ The 1990 Gulf War made it near impossible to enforce these laws, and the illicit trade began almost as soon as the war ended.¹⁹ Following the United States' victory in 1991, the museums in Kirkuk, Mosul and Basra were looted and archaeological heritage entered the art and antiquities market.²⁰ Following the imposition of sanctions, and the subsequent collapse of the economy, archaeological heritage was perceived to be the only hard currency remaining and illicit excavations of archaeological sites began in earnest.

The destruction of Iraqi archaeological heritage was given dramatic impetus by the 2003 invasion. On entering Baghdad, Coalition forces failed to provide any protection to the city's cultural heritage institution, a surprising omission given the looting of museums in 1991. As a result, the National Museum and Library in Baghdad and the Mosul Museum and Library were extensively looted.²¹ Since this initial catastrophe, archaeological sites throughout Iraq have been targeted and subject to extensive destruction and illicit excavation.²² Within weeks, the first looted archaeological heritage appeared on the art and antiquities markets in New York, Rome²³ and London.²⁴ By April 2004, around 2000 objects had been seized in foreign states, including America, France, Italy and Jordan.²⁵ While impoverished locals initiate the trade by illicitly excavating archaeological sites, it is the dealers and middlemen that supply the market.

15 Christine Alder and Kenneth Polk, 'Stopping This Awful Business: The Illicit Traffic in Antiquities Examined as a Criminal Market' (2002) 7 *Art, Antiquity and Law* 35.

16 The Coalition Forces including, amongst others, the United States, the United Kingdom, Australia, New Zealand, Spain, Italy and Poland, invaded Iraq on 19 March 2003 in an attempt to neutralise alleged weapons of mass destruction and to depose Saddam Hussein.

17 The issue of the illicit traffic in cultural heritage is often a consequence of war or occupation but, for the purposes of this article, this element will be limited to placing the illicit traffic in Iraqi and other middle-eastern cultural heritage in context.

18 See Katherine Sykes, 'The Trade in Iraqi Antiquities: A Conference Held by the Institute of Art and Law in Association with Clyde and Co London, 16th June 2003' (2003) 7 *Art, Antiquity and Law* 299, 304.

19 Many clay-tablets in circulation on the antiquities market are suspected of having originated in Iraq after the Gulf War: see Neil Brodie, 'Editorial' (2002) 11 *Culture without Context* 3.

20 David D'Arcy, 'Iraq's History is Our History Too', *The Art Newspaper*, November 2002, 1.

21 Martin Bailey, 'International Outrage as Great Museum is Sacked', *The Art Newspaper*, May 2003, 1.

22 Martin Bailey, 'Archaeological Sites the Worst Casualties', *The Art Newspaper*, July–August 2003, 5.

23 Martin Bailey, 'Seized: Over 600 Objects Looted from Iraq', *The Art Newspaper*, September 2003, 1. In September 2003, losses from the National Museum in Baghdad amounted to 13 000 objects, which included 4795 cylinder seals, 4997 smaller objects, such as amulets and necklaces, and 545 pieces of pottery and bronze weapons.

24 Jennifer Doole, 'In the News' (2003) 13 *Culture without Context* 15.

25 Martin Bailey, 'The National Museum in Baghdad One Year On', *The Art Newspaper*, April 2004, 5.

These people are not necessarily unscrupulous, 'shady' figures, but rather may include diplomats, Coalition military personnel, aid workers and the media.²⁶

Since the world's attention has been drawn to the illicit trade in Iraqi archaeological heritage, it is worth considering how the *UNESCO Convention* was intended to address the issue of illicit trade and how the Australian implementing legislation might be capable of responding.

III THE INTERNATIONAL RESPONSE TO THE PROBLEM

A The *UNESCO Convention*

1 *The Drafting of the Convention*

Developing countries, rich in cultural heritage, initiated the process of developing an international protective regime.²⁷ The regime envisaged was the prohibition of all unauthorised exports and imports of cultural heritage. This was reflected in early drafts of the *UNESCO Convention*,²⁸ when developed importing states' involvement was limited.²⁹

The prohibition on the importation of cultural heritage without the exporting state's approval (ordinarily through an export permit) threatened the free market in cultural heritage, and caused concern to some developed importing states that wished to protect their art and antiquities market. While the United States did enter the negotiating process at a late stage, other developed importing states did not engage in the process at all, including the United Kingdom and Switzerland. The effect of the United States' participation, however, was profound. With the United States' free market approach, which was diametrically opposed to the regime envisaged by the developing exporting states, a resulting compromise was difficult to achieve. Developed importing states also recognised that within UNESCO, the developing exporting states had a substantial voting majority, and their views could dominate the agenda. However, the United States did gain a

26 The first prominent figure to have been arrested for illegally importing Iraqi cultural heritage into the United States was writer Joseph Braude, author of *The New Iraq: Rebuilding the Country for its People, the Middle East and the World* (2003), having been found by New York Customs to have in his possession three cylinder seals with the Iraq National Museum inventory numbers still attached: see Bailey, 'Seized: Over 600 Objects Looted from Iraq', above n 23, 1.

27 Mexico and Peru, in 1960, were the first states to propose that UNESCO adopt an international convention to address the problem of illicit trafficking in cultural heritage. This proposal was supported by many other South and Central American states: see Kifle Jote, *International Legal Protection of Cultural Heritage* (1994) 196–7.

28 The Convention has been discussed in detail by a number of commentators and will not be dealt with in detail here. See generally Patrick O'Keefe, *Commentary on the UNESCO 1970 Convention on Illicit Traffic* (2000); Paul Bator, 'An Essay on the International Trade in Art' (1982) 34 *Stanford Law Review* 275; Ronald Abramson and Stephen Huttler, 'The Legal Response to the Illicit Movement of Cultural Property' (1973) 5 *Law and Policy in International Business* 932; John Gordon, 'The UNESCO Convention on the Illicit Movement of Art Treasures' (1971) 12 *Harvard International Law Journal* 537.

29 The United States was not a member of the special committee established in accordance with the *Resolution on Culture*, General Conference Resolution 3.344, UNESCO General Conference, 15th sess (1968) to draft the *UNESCO Convention*. The first draft, issued in August 1969, did not therefore have any United States input: Abramson and Huttler, above n 28, 950.

significant advantage during negotiations as the global political climate of the late 1960s favoured increased United States participation in international organisations and the fostering of better relations with developing states.³⁰ There was also a clear desire (and necessity) to include the United States in the negotiations if the Convention was ever to be effective.³¹ Armed with a large, well-prepared delegation, the United States exerted considerable influence on the final text of the Convention.³² This influence, however, did not necessarily achieve a workable compromise, but rather introduced amendments and gained concessions that have ultimately 'obscured the meaning of the Convention'.³³

The resulting Convention imposes the primary duty to prevent the illicit traffic in cultural heritage on developing exporting states rather than developed importing states such as the United States. Nevertheless, exporting states' interpretation of the Convention envisaged developed states imposing import limitations that would coincide with their export limitations, and many became a party to the Convention. Except for the United States and Canada, few developed importing states became parties. The United States' ratification, however, relied on a narrow interpretation of the terms of the Convention, and was accompanied by a number of 'understandings', and a reservation, which did not mirror the regime anticipated by the developing exporting states.³⁴

While the number of new states parties to the Convention grew steadily after the initial decade of its inception, few were developed importing states. This trend has shifted in the last three years, with developed importing states such as Japan, Denmark, the United Kingdom and Switzerland becoming State Parties.³⁵ Most of these states, however, have adopted as narrow an interpretation of the Convention as that taken by the United States.³⁶

2 *The Convention's Provisions*

The *UNESCO Convention* applies not only to archaeological and palaeontological material, but also to collections of fauna, flora and minerals; property relating to history, science and the social sciences; artistic and historical monuments; coins, pictures, paintings, manuscripts, books stamps, archives and furniture – all collectively termed 'cultural property'.³⁷

30 Abramson and Huttler, above n 28, 956–7.

31 O'Keefe, *Commentary on the UNESCO 1970 Convention on Illicit Traffic*, above n 28, 14.

32 Jote states that '[s]ince it was mainly lawyers from the developed countries that played an active role in the preparation of the text, the final result did little to protect the interests of developing nations in Africa, Asia and Latin America, the major victims of illicit traffic in cultural heritage': Jote, above n 27, 201.

33 O'Keefe, *Commentary on the UNESCO 1970 Convention on Illicit Traffic*, above n 28, 14.

34 *Ibid* 107.

35 The number of ratifications over the decades is as follows: 1970s – 44; 1980s – 24; 1990s – 23; 2001–2004 – 12: O'Keefe, *Commentary on the UNESCO 1970 Convention on Illicit Traffic*, above n 28, 9.

36 Toshiyuki Kono and Eriko Kani, 'Japan's Measures for the Implementation of the 1970 UNESCO Convention' (2003) 8 *Art, Antiquity and Law* 107; Kevin Chamberlian, 'UK Accession to the 1970 UNESCO Convention' (2002) 7 *Art, Antiquity and Law* 231; Roman Plutschow, 'Will Switzerland Finally Ratify the 1970 UNESCO Convention?' (2002) 7 *Art, Antiquity and Law* 163; Martin Bailey, 'Swiss Pass Law to Restrict the Illicit Trade', *The Art Newspaper*, September 2003, 7.

37 *UNESCO Convention*, opened for signature 14 November 1970, 823 UNTS 231, art 1 (entered into force 24 April 1972).

The preamble to the Convention sets out a number of related propositions that underpin the Convention, the foremost of which is that ‘it is incumbent upon every state to protect the cultural property existing within its territory against the dangers of theft, clandestine excavation, and illicit export’.³⁸ This emphasis on an exporting state’s primacy in the protective regime is supported within the Convention’s articles. Since the essence of the illicit traffic in cultural heritage is its exportation from a state contrary to its laws, the Convention requires, in art 6, that states introduce a certificate that authorises the legality of any export, the absence of which indicates illegality.³⁹

Article 3 states that that ‘[t]he import, export or transfer of ownership of cultural property effected contrary to the provisions adopted under th[e] Convention by the States Parties thereto, shall be illicit’. This article has been the subject of much debate, with, for example, the United States and Australia evincing polar interpretations. The debate turns on whether art 3, read with art 6, imposes on states parties a broad duty to regard all cultural heritage exported from a state without an export certificate as illicit. Australia has implemented this broad interpretation, while Canada, for example, has done so only in regard to other signatories to the Convention.⁴⁰ The United States, however, has rejected such an interpretation, arguing that art 3 is limited by the content of the other provisions of the Convention, including arts 7 and 9. This interpretation leaves art 3 ‘emasculated’ and of ‘only minimal significance’.⁴¹

The duties of importing states are primarily contained in art 7, the scope of which was dramatically narrowed through the United States involvement late in the negotiation process.⁴² Article 7(a) is relevant only to museums and similar public institutions in importing states, and requires the state to ensure that these institutions do not acquire illegally exported cultural heritage, and if offered such heritage, to inform the exporting state of the offer. This article only applies to cultural heritage exported after the Convention entered into force for both the exporting and importing state.

Article 7(b) is similarly narrow in scope. It imposes a duty on importing states to prohibit the import of only a sub-category of illicit cultural heritage. This sub-category is limited to goods which have been stolen from a state’s museum, or secular or religious monument, after the date of entry into force of the Convention for both the exporting and importing state, and which have been inventoried by the exporting state. While cultural heritage covered in art 7(b) may be a prohibited import, the importing state will only take appropriate steps to recover and return the heritage if the exporting state complies with a number of onerous obligations. The exporting state must make a request for the return of the cultural heritage through diplomatic channels, and all expenses incident to the

38 See John Merryman, ‘Two Ways of Thinking about Cultural Property’ (1986) 80 *American Journal of International Law* 831, 843.

39 *UNESCO Convention*, opened for signature 14 November 1970, 823 UNTS 231, art 6(a) (entered into force 24 April 1972).

40 O’Keefe, *Commentary on the UNESCO 1970 Convention on Illicit Traffic*, above n 28, 42.

41 Abramson and Huttler, above n 28, 960.

42 O’Keefe, *Commentary on the UNESCO 1970 Convention on Illicit Traffic*, above n 28, 57.

return of the heritage must be born by that state, including the provision of documentation and other evidence necessary to establish the state's claim for return. Most onerous, however, is the requirement that the exporting state pay 'just compensation to an innocent purchaser or to a person who has valid title to that property'.⁴³ The duties of importing states are less clearly defined – they are simply required to take 'appropriate steps' for the return of the property. As O'Keefe notes, this may simply amount to 'advising the requesting State to take legal proceedings'.⁴⁴

Article 9 of the Convention, as proposed by the United States during negotiations, applies to archaeological or ethnological material that is 'in jeopardy from pillage'.⁴⁵ The article recognises that export and import controls might be a feasible way of addressing this issue, but merely provides that states may enter into a bilateral treaty in order to put into effect such controls. Thus, the article does little more than indicate what states might be able to do, notwithstanding the existence of the Convention.⁴⁶

The capacity of importing states to narrow the scope of the Convention, thereby imposing the primary burden of addressing the illicit trade on exporting states, is exacerbated by art 5. This article requires exporting states to draft appropriate laws and regulations; establish and update a national inventory of protected property; promote and develop appropriate institutions; organise and supervise archaeological excavations; and take educational measures to stimulate respect and protection for the cultural property. Implementing art 5 is an expensive and complicated undertaking.

Article 13 imposes a number of obligations on states parties. However, the obligations that apply to importing states are limited, primarily because it is specified that they are to be 'consistent with the laws of each state'. As such, art 13(b) and (c), which requires a state to ensure that its competent authorities facilitate the earliest return of illicitly exported cultural heritage to its rightful owner, and to admit action for the recovery of lost or stolen items brought by, or on behalf of, the rightful owners, may, in practice, do no more than restate the situation that applied prior to the Convention coming into force. Even though art 13(a) requires all states to prevent transfers of ownership of cultural heritage likely to promote illicit import or export, by using all appropriate means, it is exporting states that can most effectively ensure that transfer of ownership does not encourage illicit export. This is particularly the case where cultural heritage is sold to foreign visitors.⁴⁷

At first sight, art 10 may appear a rather innocuous provision. It requires a state to restrict, by education, information and vigilance, the movement of cultural heritage illegally removed from any state party to the Convention. Such

43 *UNESCO Convention*, opened for signature 14 November 1970, 823 UNTS 231, art 7(b)(ii) (entered into force 24 April 1972).

44 O'Keefe, *Commentary on the UNESCO 1970 Convention on Illicit Traffic*, above n 28, 61.

45 Abramson and Huttler, above n 28, 958.

46 For a detailed critique of this article, see O'Keefe, *Commentary on the UNESCO 1970 Convention on Illicit Traffic*, above n 28, 71–6.

47 *Ibid* 86–7.

measures may assist in the reduction of the illicit traffic, but, even if a state has implemented such measures, it may not necessarily be able actually to restrict the trade. This has led Bator to comment that the article is an 'unenforceable undertaking'.⁴⁸ Nevertheless, it imposes a duty on states parties to implement such measures, even if it cannot fulfil a duty actually to restrict the illegal trade. The extent of the measures taken by a state will clearly differ according to whether the state is a developed importing state or a developing exporting state: that is, the measures taken should be consistent with a state's abilities and limitations.

The essential feature of art 10, however, applies to developed importing states. It requires states parties to ensure that

antique dealers, subject to penal or administrative sanctions ... maintain a register recording the origin of each item of cultural property, names and addresses of the supplier, description and price of each item sold and ... inform the purchaser of the cultural property of the export prohibition to which such heritage may be subject.⁴⁹

The aim of this article is to make it easier to trace illicit traffic, and also to benefit purchasers by assuring them of the provenance of the cultural heritage. The provenance of any item of cultural property is of the utmost importance, in that a complete and accurate provenance of an item which is legally eligible for sale inevitably leads to a higher sale price.

It is unfortunate that the obligations in this regard are limited to those that are 'appropriate for each country'.⁵⁰ Certainly such a limitation does benefit poorer exporting states which might simply not have the resources to implement and enforce such measures. Importing states, however, should certainly be able to implement these obligations. It is also unfortunate that many market states have been reluctant to implement this article fully. The United States, for example, on acceptance of the Convention, entered an understanding that it interpreted the phrase 'as appropriate for each country' as permitting each state to determine the extent of its regulation. This interpretation has allowed the United States to implement minimal controls on its antiquities market, relying more on industry self-regulation.

How then might this Convention assist a state such as Iraq in preventing the loss of its archaeological heritage? Simply because Iraq prohibits the export of archaeological heritage does not mean that another state will prevent its import. For those importing states that are party to the Convention, there will be a prohibition placed on their public museums and similar institutions acquiring this material, but not necessarily on private importers. Whilst all archaeological material looted from the Iraqi public museums and libraries cannot be imported into states party to the Convention, the archaeological heritage looted from sites across the country can. Some restriction on the importation of this archaeological material, therefore, exists; however, successful prohibition, seizure and

48 Bator, above n 28, 378. Cf O'Keefe, *Commentary on the UNESCO 1970 Convention on Illicit Traffic*, above n 28, 77.

49 *UNESCO Convention*, opened for signature 14 November 1970, 823 UNTS 231, art 10(a) (entered into force 24 April 1972).

50 *Ibid.*

restitution is heavily dependant on Iraq's ability to identify the loss of an object, to address the issue with the importing state through diplomatic channels, and to have the financial ability to prove its claim, pay possible compensation, and pay for the physical restitution of the object to Iraq.

The Convention has failed to establish a satisfactory regime to deal with the problem of the illicit trade in cultural heritage.⁵¹ Central to this failure is the imbalance between the duties imposed on developing exporting states and those undertaken by developed importing states. As Merryman indicates, when considering a restructuring of the international regime that applies to cultural heritage, '[t]he strongest force for reconstruction resides in the power of the major importing nations, *de facto* and under international law, to decide whether and under what circumstances to recognise and enforce foreign export controls'.⁵² To address this problem, more is required of these states. In this regard, these states might reconsider art 2 of the Convention, which states:

1. The States Parties to this Convention recognize that the illicit import, export and transfer of ownership of cultural property is one of the main causes of the impoverishment of the cultural heritage of the countries of origin of such property and that international co-operation constitutes one of the most efficient means of protecting each country's cultural property against all the dangers resulting therefrom.
2. To this end, the States Parties undertake to oppose such practices with the means at their disposal, and particularly by removing their causes, putting a stop to current practices, and by helping to make the necessary reparations.

This article is of importance not only because developed importing states that are a party to the Convention acknowledge the problems faced by developing exporting states, but more importantly because importing states undertake to remove the causes of the illicit traffic. While importing states too readily highlight problems in developing exporting states, such as poverty, corruption and maladministration, as the major causes of the illicit trade, it is also evident that the demand in the developed states' art and antiquities markets drives the trade. The Convention requires states parties to address this cause and to stop current practices that contribute to the illicit trade.

B The *UNIDROIT Convention*

The *UNESCO Convention* addresses the problem of the illicit traffic in cultural heritage from a public law perspective, requiring state action, particularly by means of administrative procedures.⁵³ Following a report to UNESCO on national legal control of illicit traffic, UNESCO requested that the International Institute for the Unification of Private Law ('UNIDROIT')⁵⁴ consider the private law aspects of this trade, which might be standardised by way of a convention or model law. In particular, this would deal with issues of ownership, limitations

51 See Merryman, 'A Licit International Trade in Cultural Objects', above n 12, 27; Jote, above n 27, 201.

52 Merryman, 'A Licit International Trade in Cultural Objects', above n 12, 42.

53 Prott, *Commentary on the Unidroit Convention*, above n 14, 15.

54 UNIDROIT is an independent intergovernmental organisation established in 1926, which has its Secretariat based in Rome.

periods, the position of the bona fide purchaser and the payment of compensation in some cases. The resulting *Convention on Stolen or Illegally Exported Cultural Objects*⁵⁵ ('*UNIDROIT Convention*') deals with both stolen and illegally exported cultural heritage, establishing a system for the return of objects to the true owner in the case of stolen objects, or to the state of export when the cultural heritage has been illegally exported. The *UNIDROIT Convention* therefore complements the *UNESCO Convention*; however, by doing so it relies on the importing states to accept the basic broad premise of the *UNESCO Convention* that all illicitly exported cultural heritage should be subject to import restrictions. No major importing state is a party to the *UNIDROIT Convention*, nor is Australia. While there are valid arguments for Australian accession to this Convention, these are beyond the scope of this article.⁵⁶

IV AUSTRALIA'S PROTECTION OF FOREIGN CULTURAL HERITAGE

A The Protection of Cultural Heritage in Australia

The protection of cultural heritage in Australia was slow to develop.⁵⁷ This was due mainly to an under-appreciation of both Aboriginal culture and, perhaps because of its youth, of migrant cultural heritage.⁵⁸ However, some objects were protected to some extent by various state legislation relating to fixed cultural property and by federal legislation in the form of the *Customs Act 1901* (Cth) ('*Customs Act*'). The latter was reactive, in the sense that it was applied on a piecemeal basis to address crises as they arose, and it eventually protected categories of objects such as coins minted before 1901, ships and ship's stores, fossil material and geological specimens, archaeological material, and documents relating to land settlement between Aboriginal people and early explorers.⁵⁹ The adoption of the *UNESCO Convention* coincided with the Whitlam Government's review of the National Estate, which included movable cultural heritage. This set

55 Opened for signature 24 June 1995, 34 ILM 1326 (entered into force 1 July 1998). As at 8 April 2004 there were 23 States Parties.

56 For a more detailed discussion of the UNIDROIT Convention, see generally Prott, *Commentary on the Unidroit Convention*, above n 14; Paul Jenkins, 'The UNIDROIT Convention on Stolen or Illegally Exported Cultural Objects' (1996) 1 *Art, Antiquity and Law* 163.

57 Much of the literature on the protection of cultural heritage in Australia focuses on the retention and protection of Australian cultural heritage: see, eg, Ben Boer, 'Cultural and Natural Heritage' (1987) 4 *Environmental and Planning Law Journal* 63; Susan Shearing, 'Protecting Movable Cultural Heritage' (1996) 13 *Environmental and Planning Law Journal* 477; Sarah Leighfield, 'Of Ships and Sealing Wax: Planning the Preservation of Movable Cultural Heritage in Australia' (2000) 17 *Environmental and Planning Law Journal* 214; Cheryl Simpson, 'Cultural Heritage on the Move: Significance and Meaning' (1996) 14 *Law in Context* 45; Alice Erh Soon Tay, 'Law and the Cultural Heritage' in Isabel McBryde (ed), *Who Owns the Past? Papers from the Annual Symposium of the Australian Academy of the Humanities* (1985) 107; Tollhurst, above n 6, 137.

58 Ley, above n 6, 20; Simpson, above n 57, 47.

59 Ley, above n 6, 21. The *Customs (Prohibited Exports) Regulations 1958* (Cth) governed the classes of cultural heritage that required export permits. Permits were issued by delegates under the Minister of Customs, who were usually State and Territory officers, such as museum directors.

in motion the preparatory steps that would lead to the adoption of the *PMCHA* and Australia's accession to the *UNESCO Convention*; yet, it still took over a decade to achieve.

It is clear that this national regime for implementing the Convention is designed primarily for the protection of Australian cultural heritage and the prevention of illicit exports. This is quite natural given that the primary obligations of the Convention are imposed on exporting, rather than on importing, states. However, in introducing the legislation, the then Minister for the Arts, Heritage and the Environment, the Hon Barry Cohen MP, stated the function of the legislation was not only to protect Australian cultural heritage, but also to 'extend certain forms of protection to the cultural heritage of other nations'.⁶⁰

Australia has not been a prominent importing state, and few requests have been received from other states for the return of their cultural heritage. Nevertheless, there is a market in Australia for art and antiquities, much of which does come from foreign states.

When the *PMCHA* was debated, the Minister explained that the Act was not intended to restrict the flow and trade of cultural heritage.⁶¹ The 1991 Ministerial Review of the *PMCHA* revealed that antique dealers in New South Wales, Victoria and Queensland imported furniture and other cultural heritage from Europe, particularly the United Kingdom, for sale in Australia, while little was exported. In most cases, these imports were certified as being exempt from any European cultural heritage legislation.⁶² For obvious reasons, it is difficult to determine the extent of the illegal importation of cultural heritage. The 1991 Ministerial Review did conclude at the time that 'although the position is not sufficiently clear to draw a firm conclusion that there is no significant illegal import or export trade in objects contrary to the Act, the evidence is quite strong that at present the extent of such activity is not great'.⁶³ While there is no evidence to suggest that this has changed, there is certainly more scope for illicit importation given Australia's more active role in the Middle-East, and the vast quantity of illicit cultural heritage pouring out of states such as Iraq and Afghanistan.

Apart from the recent request from Chinese authorities for the return of the palaeontological material mentioned above, a number of other relevant cases have arisen.⁶⁴ During an investigation in the mid-1990s into drug-related

60 Commonwealth, *Parliamentary Debates*, House of Representatives, 27 November 1985, 3741 (Barry Cohen, Minister of the Arts, Heritage and the Environment).

61 *Ibid.*

62 Ley, above n 6, 135.

63 *Ibid.* 36.

64 Prior to the enactment of the *PMCHA*, some cases of illicitly exported cultural heritage found in Australian public institutions were returned as a matter of goodwill. For example, in 1977 a number of objects were returned to the National Gallery of Papua New Guinea and the Solomon Islands Museum by the Australian Museum Trust: see Annette Wiltshire, 'Movable Cultural Heritage: Part 1' (1992) 3 *Arts and Entertainments Law Review* 9, 10. In 1989, the Australian Museum returned the 'Paracas Mantle' (dating from between 600–15 BC) to the Peruvian National Museum of Anthropology and Archaeology, from where it had been stolen in 1973. Since the object had been imported into Australia prior to the

offences, the Australian police uncovered 35 Greek ceramics that had been stolen from the Corinth Museum and the Byzantine Museum in Athens.⁶⁵ Responding to a request by the Greek authorities, the ceramics, valued at over \$4 million, were seized under the *PMCHA* and returned to Greece.

However, not all requests have had such a successful outcome. Recently, for example, Spain requested the seizure and return of gold coins recovered from the wreck of the *Douro*, sunk in 1882, in Spanish waters.⁶⁶ Unfortunately, before Spain could provide the evidence of an infringement of Spanish laws to the satisfaction of Australian authorities, the coins were exported to the United Kingdom, where they were sold on the art and antiquities market.⁶⁷ A similar case arose in 2001, when the Government of Indonesia requested the return from Australia of a number of ship containers of ceramics illegally exported from Indonesia. The ceramics had been recovered, by an Australian salvage company, from an historic shipwreck, the *Tek Sing*, in Indonesian waters. They were imported into Australia without the company obtaining all of the appropriate export permits from Indonesian authorities. Australian authorities acted to have the ceramics seized and returned to Indonesia. Unfortunately, of the 47 shipping containers of ceramics, only seven were seized and returned to Indonesia. The others had been exported from Australia before Australian authorities had sufficient information from the Indonesian government to act under the *PMCHA*.⁶⁸ These were sold at auction in Europe.⁶⁹

B The Australian Legislation

The *PMCHA* came into force on 1 July 1987. Having implemented legislation, Australia was able to deposit its instrument of acceptance to the *UNESCO Convention* in 1989, with it coming into force for Australia on 30 January 1990.⁷⁰

1 Scope of the Legislation

The *PMCHA*, like the *UNESCO Convention*, applies to situations of illegal export from a state, rather than theft, though often both are at issue.⁷¹ In some

commencement of the *PMCHA*, the Act was not applicable: see Ley, above n 6, Appendix I, 1-1.

65 Department of the Environment and Heritage, *Unlawful Import of Cultural Heritage Objects into Australia* <<http://www.deh.gov.au/heritage/movable/import.html>> at 4 November 2004.

66 Department of the Environment and Heritage, *Annual Report on the Operation of the Protection of Movable Cultural Heritage Act 1998 and the Administration of the National Cultural Heritage Account 1999–2000* (2000) <<http://www.deh.gov.au/heritage/movable/pubs/annual1999.pdf>> at 4 November 2004. See also Kendall McDonald, 'Sovereign Power', *Diver*, November 1996, 38.

67 Email from Peter Mitchell, Deputy Director, Movable Cultural Heritage Unit to Craig Forrest, 13 April 2004.

68 Email from Peter Mitchell, Deputy Director, Movable Cultural Heritage Unit to Craig Forrest, 22 May 2002. See also Department of the Environment and Heritage, *Environment Australia Annual Report 2001–2002* (2002), <<http://www.deh.gov.au/about/annual-report/01-02/pubs/2001-2002.pdf>> at 4 November 2004; 'The Legacy of the *Tek Sing*', *Baltic and International Maritime Council Review* (2001) 58.

69 Chris Walsh, 'Secrets of the Deep' (2000) 72 *Geographical* 53, 55.

70 Ley, above n 6, 2.

71 Tolhurst, above n 6, 138.

cases, developing exporting states vest all ownership of cultural heritage in the state so that illegal export will also amount to theft. Where theft is at issue, Australia, like most other states, will admit actions from legitimate owners according to the rules of private international law.

The *PMCHA* also does not apply to requests for the return of legally exported cultural heritage. Museums in many developed states feel under threat, not only with regard to retentive policies associated with the existing illicit trade, but also with regard to cultural objects, acquired legally, but subsequently subject to claims by the state from where they originated. The foremost of which is Greece's claim for the return of the Parthenon Marbles.⁷² Included in such claims are claims for the return of human remains, which are of particular interest to Australia and its Aboriginal people since many of their ancestral remains found their way into European museums.

The International Group of Organisers of Large-Scale Exhibitions, which consists of the directors of the world's leading museums and galleries, has been actively promoting the concept of the 'universal museum' as a buffer to state claims for the return of their cultural heritage. It argues that museums that contain cultural heritage from numerous states serve 'not just the citizens of one nation, but the people of every nation'.⁷³ While important in the cultural heritage sphere, and of relevance to the broader issues associated with the illicit trade in cultural heritage, this conflict requires resolution at a political level.

2 *Illegal Import into Australia of Foreign Cultural Heritage*

Section 14 of the *PMCHA* is central to the issue of illegal imports of cultural objects. Notably, s 14(1) states:

Where:

- (a) a protected object of a foreign country has been exported from that country;
 - (b) the export was prohibited by a law of that country relating to cultural property;
 - and
 - (c) the object is imported;
- the object is liable for forfeiture.

Section 14 has been described as 'a significant element of the liberal position Australia has taken internationally in relation to the protection of other countries' objects of cultural heritage'.⁷⁴ One reason s 14 is viewed in this way is a result of the lack of a cut-off date for the illegal export from the exporting state. A number of important exporting states have protective legislation dating back many years.⁷⁵ Export in contravention of this legislation fulfils the requirement of s

72 See Ellis Tinios, 'The Fate of the Parthenon Sculptures in Athens', *The Art Newspaper*, December 2002, 8–11; John Merryman, *Thinking About the Elgin Marbles: Critical Essays on Cultural Property, Art and Law* (2000).

73 Martin Bailey, 'We Serve All Cultures, Say the Big, Global Museums', *The Art Newspaper*, January 2003, 1.

74 Ley, above n 6, 125.

75 States with protective legislation dating back many years include Greece (1834), Italy (1872), France (1887), India (1904), Peru (1929), Iran (1932) and Iraq (1933): see Ley, above n 6, 124, 127; O'Keefe, *Commentary on the UNESCO 1970 Convention on Illicit Traffic*, above n 28, 9.

14(b) and it does not matter that the export took place prior to the *PMCHA* coming into force. However, s 14 will only apply to objects imported into Australia after the Act came into force.⁷⁶ At least with regard to museums and similar institutions, s 14 does exceed the requirements of art 7 of the *UNESCO Convention*; though, as O'Keefe notes, this interpretation is 'in full accord with article 3'.⁷⁷

The lack of a cut-off date for the illegal export is, however, controversial.⁷⁸ The Australian National Gallery, in a submission with respect to the 1991 Ministerial Review of the *PMCHA*, called for s 14 to be amended to include a date applicable to the illegal export from the exporting state, such as the date the *UNESCO Convention* came into force for Australia.⁷⁹ This, it is argued, would give these institutions greater security when obtaining cultural heritage from other states.⁸⁰ Such an approach would, however, exacerbate the difficult position in which many exporting states find themselves as it would require these states to prove that the exportation took place after the particular cut-off date.⁸¹

The *PMCHA* also goes further than required by the *UNESCO Convention* in that the legislation will apply to any cultural heritage illegally exported from a state irrespective of whether that state is a party to the Convention.⁸² Unlike Australia, other states, such as Canada, do require reciprocity. Australia's approach is valuable to those exporting states that do not have the resources necessary to give effect to the Convention and have therefore not yet become a party to the Convention. This is particularly important in the Asia-Pacific region where few states are party to the Convention.⁸³

3 The Enforcement Mechanism of the Legislation

To give effect to the *UNESCO Convention* and to enforce s 14, the *PMCHA* provides for the seizure and forfeiture of illicitly imported cultural heritage, and

76 Recently, the Italian government requested the return of a first century Roman statue stolen from the Villa Torloni in Italy, sold to an Australian antiques dealer in London, and imported into Australia. Unfortunately the import took place prior to the commencement of the *PMCHA* and no action could be taken under the Act: email from Peter Mitchell, Deputy Director, Movable Cultural Heritage Unit to Craig Forrest, 13 April 2004.

77 O'Keefe, *Commentary on the UNESCO 1970 Convention on Illicit Traffic*, above n 28, 105.

78 See, eg, *R v Heller* (1983) 27 Alta LR (2d) 346; aff'd (1984) 51 AR 73. In this case a Canadian court ruled that an illicit export needs to have taken place after Canada had become a State Party to the *UNESCO Convention* in order for any action to be taken. For a criticism of this decision, see O'Keefe, *Commentary on the UNESCO 1970 Convention on Illicit Traffic*, above n 28, 15–16.

79 Ley, above n 6, 127.

80 *Ibid* 126.

81 Source states are already under a considerable burden, in terms of proving that the cultural heritage was exported after the export limitation legislation came into force: see, eg, *Bumper Development Corporation Ltd v Commissioner of Police of the Metropolis* [1991] 4 All ER 638; *Government of Peru v Johnson* 720 F Supp 810 (CD Cal, 1989).

82 Commonwealth, *Parliamentary Debates*, House of Representatives, 27 November 1985, 3741 (Barry Cohen, Minister of the Arts, Heritage and the Environment).

83 The only greater Asia-Pacific states party to the *UNESCO Convention* are Australia, Japan, China, Bangladesh, and North and South Korea: see UNESCO, *Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property* <<http://erc.unesco.org/cp/convention.asp?KO=13039&language=E>> at 8 November 2004.

the imposition of penalties for infringements, as well as containing provisions concerning the expense of returning cultural objects to the exporting state. While the Movable Cultural Heritage Unit of the Department of the Environment and Heritage administers the Act,⁸⁴ enforcement is undertaken by inspectors, who are ordinarily federal, State or Territory police officers.⁸⁵ Importantly, this excludes customs officers. Inspectors have wide powers under the Act, which include: entering and searching, with or without a warrant, any land, premises, structure, vessel, aircraft or vehicle; arresting, without a warrant, any persons suspected of committing an offence under the Act; and seizing any object that is believed, on reasonable grounds, to be forfeited.⁸⁶ However, in relation to foreign cultural heritage, these powers can only be exercised if the inspector believes that a request for the return of the cultural heritage has been received from a foreign state.⁸⁷ This request is not only important in enabling inspectors to undertake appropriate investigations, but is also required in order to institute proceedings for a contravention of s 14.⁸⁸

Section 14(1) provides for the forfeiture of illicitly imported cultural heritage. Forfeiture is not automatic; it will only occur if the Australian authorities are satisfied 'that there is evidence that, on a balance of probabilities, the object in question was in fact illegally exported from the country of origin'.⁸⁹ Where a foreign object is forfeited, all title and interests in the object vest in the Commonwealth without the need for further proceedings. The Minister then has discretion to determine how the object will be dealt with.⁹⁰ The Act also provides that any costs incurred by the Commonwealth in transporting or disposing of these objects, which may include the repatriation of the cultural heritage to the exporting state, are a debt due to the Commonwealth by the person who was the owner of the object immediately before it was forfeited.⁹¹

Section 14(2) provides for offences in the case of anyone who imports any object knowing that it is 'a protected object' of an exporting state that has been exported contrary to the law of the exporting state. Currently, the penalties that apply are a fine not exceeding A\$100 000, or five years' imprisonment, or both, for a natural person; and a fine of A\$200 000 for a body corporate.⁹² While knowledge of the illegality of the export is not considered with regard to the forfeiture of the cultural heritage, it is of the utmost importance in regard to s 14(2). What constitutes knowledge in this context is not always clear and is the

84 Department of the Environment and Heritage, *The Protection of Australia's Movable Cultural Heritage: Overview* <<http://www.deh.gov.au/heritage/movable/index.html>> at 4 November 2004.

85 *Protection of Moveable Culture and Heritage Act 1986* (Cth) s 28.

86 *Protection of Moveable Culture and Heritage Act 1986* (Cth) ss 30–35.

87 *Protection of Moveable Culture and Heritage Act 1986* (Cth) s 41(a).

88 *Protection of Moveable Culture and Heritage Act 1986* (Cth) s 41(b).

89 *Ley*, above n 6, 125.

90 *Protection of Moveable Culture and Heritage Act 1986* (Cth) s 38.

91 *Protection of Moveable Culture and Heritage Act 1986* (Cth) s 38(c).

92 The 1991 Ministerial Review did recommend a review of these penalties so as to provide for a more effective deterrent effect. In particular, it recommended that the fine for a corporate body be increased to A\$500 000: *Ley*, above n 6, 143.

subject of much debate within the art and antiquities markets of many developed states.

C Problems with the Australian Legislation

The Australian approach to assisting foreign states in the protection of their cultural heritage reflects the *UNESCO Convention* bias of imposing the primary responsibility for protection on the exporting states. This approach has resulted in cultural heritage, such as the *Douro* coins and the *Tek Sing* ceramics, being allowed to leave Australia and enter the art and antiquities markets of developed states, rather than being returned to their state of origin. It also poses risks to Iraqi heritage as the *PMCHA* relies on the exporting state taking responsibility for initiating any investigation. In addition, the Act allows illicitly imported cultural heritage to flow through the customs barrier and, therefore, does not provide a sufficiently rigorous control regime of the art and antiquities market within Australia.

1 *Initiation of Investigation by Exporting States*

The philosophy underlying the *PMCHA* was explained by Cohen, when introducing the legislation, in the following terms: ‘If a foreign Government does not consider an object sufficiently important to lodge such a complaint, we do not consider ourselves as having an obligation to protect that country’s property on its behalf’.⁹³ This view, and the resulting regime, is problematic for two reasons. First, it ignores the view that the cultural heritage of all nations makes up the cultural heritage of all humankind, and the onus of protection falls on all states, not simply the state of origin. Secondly, it assumes that any lack of complaint is the result of a conscious evaluation by the exporting state of the value of the illicitly imported cultural heritage. This assumption ignores the reality of the position of many exporting states, such as Iraq, which do not have the personnel, facilities and infrastructure to know of an illicit export and import and to make an appropriate complaint.

At the heart of this approach is s 41, which provides:

- (1) A power conferred by this Part shall not be exercised by an inspector in relation to a protected object of a foreign country unless the inspector believes on reasonable grounds that the Commonwealth has received from the Government of the country a request for the return of the object.
- (2) Proceedings for a contravention of section 14 in relation to a protected object of a foreign country shall not be instituted unless the Commonwealth has received from the Government of the country a request for the return of the object ...

The ability of inspectors under the *PMCHA* to seize cultural heritage which they believe, on reasonable grounds, to be forfeited, or liable to forfeiture, is greatly undermined. While these provisions make it difficult for inspectors to act, the legislation at least provides that the mere production of a document purporting to be signed by the Secretary to the Department and stating that the

93 Commonwealth, *Parliamentary Debates*, House of Representatives, 27 November 1985, 3741 (Barry Cohen, Minister of the Arts, Heritage and the Environment).

Commonwealth has received a request from the government of a specified state for the return of a specified protected object is prima facie evidence of such a request, allowing the full exercise of the inspectors powers.⁹⁴

The approach of the Movable Cultural Heritage Unit, however, is progressive and it is fortunate that the difficulties faced by exporting states are appreciated. In suspicious circumstances, the Unit will inform the exporting state of a possible illegal export and offer assistance in investigating the incident.⁹⁵ Unfortunately, before the Unit can actually act, the formal requirements of ss 14 and 41 must be complied with. This weakness in the *PMCHA* has been acknowledged and a possible amendment to s 41 is currently being considered. This amendment would allow inspectors under the Act to seize suspected foreign cultural heritage and hold them for a statutory period while investigations are conducted.⁹⁶ This would assist a foreign state in that the cultural heritage would be held from the moment suspicion arises, rather than from the time the state is able to make a request to the Australian authorities. This would be particularly helpful for a state such as Iraq, which is unlikely to be aware of any illicit export or to be able to initiate any request at the present time.

2 *Administrative, Evidentiary and Financial Burdens*

For proceedings relating to a contravention of s 14 to commence, a request must have actually been received. A request is ordinarily made in writing by the state reclaiming an object, and received from the diplomatic representative of that state in Australia.⁹⁷ The *PMCHA* requires the foreign state to satisfy a number of evidentiary criteria before Australian authorities can act. For illicitly imported objects to be seized, Australian authorities must be satisfied that the cultural heritage is actually that of the requesting state. Fortunately, Australia gives effect to art 13(d) of the *UNESCO Convention*, recognising the right of the requesting state to determine for itself what constitutes its heritage. A simple justification of its claim would ordinarily suffice. For example, in the case of the *Tek Sing*, Indonesia's claim was based on the fact that the shipwreck was a major maritime disaster of historical significance and that the wreck was situated in its territorial sea.⁹⁸ The requesting state would also have to provide the Australian authorities with evidence that the export violated their laws relating to cultural heritage. This would ordinarily not be an onerous burden and a citation of the violated laws would be sufficient.⁹⁹

94 *Protection of Moveable Culture and Heritage Act 1986* (Cth) s 41(3). For a detailed discussion on this aspect of the Act, see Tolhurst, above n 6, 146–8.

95 Email from Peter Mitchell, Deputy Director, Movable Cultural Heritage Unit to Craig Forrest 14 April 2004.

96 *Ibid.*

97 Email from Peter Mitchell, Deputy Director, Movable Cultural Heritage Unit to Craig Forrest, 13 April 2004.

98 *Ibid.*

99 *Ibid.*

The *UNESCO Convention* requires the exporting state to bear all expenses incidental to the return of the cultural heritage.¹⁰⁰ The *PMCHA*, however, contains a helpful provision for exporting states. Section 38(c) provides that any costs incurred by the Commonwealth in transporting or disposing of these objects, which may include the repatriation of the cultural heritage to the exporting state, are a debt due to the Commonwealth by the person who was the owner of the object immediately before it was forfeited. This section of the Act was not necessary for the implementation of the Convention, but is a welcome and useful mechanism. However, it is not always an available option. For example, it is unfortunate that in the case of the *Tek Sing*, the importers of the ceramics went into liquidation before an action for the considerable costs incurred in the repatriation to Indonesia could be pursued.¹⁰¹

The *UNESCO Convention* also requires an exporting state to pay just compensation to an innocent purchaser of an illicitly imported object.¹⁰² The reason for the inclusion of this requirement is that developed importing states were concerned not to distort the art and antiquities market by imposing too high a burden on purchasers to determine the provenance of cultural heritage purchased. The payment of compensation can be an extremely onerous burden, particularly since the prices commanded by some cultural heritage on the market of developed states are so high as to put any possible compensation well beyond the means of developing exporting states.

The *PMCHA* does not address the question of compensation. At least in relation to other states that are a party to the Convention, the Minister would have discretion as to whether such compensation would be required from the requesting state.¹⁰³ However, Australian purchasers will not necessarily have recourse to such compensation since it is not provided for in the legislation. The 1991 Ministerial Review did contain a recommendation to include a provision for compensation to be made, at the discretion of the Minister or a court, to the possessor of cultural heritage, by the true owner where the cultural heritage was purchased for value without knowledge of its true ownership. This would only occur if the bona fide purchaser had taken reasonable action in accordance with acceptable international standards to ensure that the provenance of the cultural heritage was sound.¹⁰⁴ It is fortunate that such a recommendation has not been acted upon. To do so would further burden exporting states while benefiting purchasers in developed importing states.

100 *UNESCO Convention*, opened for signature 14 November 1970, 823 UNTS 231, art 7(b) (entered into force 24 April 1972).

101 Email from Peter Mitchell, Deputy Director, Movable Cultural Heritage Unit to Craig Forrest, 14 April 2004. The costs involved included the costs of opening the seven shipping containers and accounting for all 71 939 pieces of ceramics, a task that took four months.

102 *UNESCO Convention*, opened for signature 14 November 1970, 823 UNTS 231, art 7(b) (entered into force 24 April 1972).

103 O'Keefe, *Commentary on the UNESCO 1970 Convention on Illicit Traffic*, above n 28, 65.

104 Ley, above n 6, xix.

3 *Lack of Import Control at the Customs Barrier*

The role of the customs service will naturally affect both imports and exports of cultural heritage. The difficult issue of enforcement and the role of the customs service were noted by the United States in the initial negotiations of the *UNESCO Convention*, which considered that any imposition of import control would require an extremely burdensome and expensive customs infrastructure.¹⁰⁵ As a result of compromises made during negotiations, the Convention does not require states parties to control the import into their territory of illicit cultural heritage at the border itself. Some countries have, however, chosen this method,¹⁰⁶ though Australia has not. As Tolhurst notes in relation to the *PMCHA*, 'the most distinguishing aspect of the enforcement provisions is that customs officers form no part of the enforcement mechanism'.¹⁰⁷ While federal, State and Territory police officers are inspectors under the legislation,¹⁰⁸ customs officers are not; moreover, they cannot seize objects unless a seizure warrant for forfeited goods under s 203A of the *Customs Act* is issued.¹⁰⁹ The Movable Cultural Heritage Unit does, however, have a memorandum of understanding with the Customs Service. While the Service does not have a formal role to play in terms of the Act, it is often the case that investigations are instigated upon information received from the Customs Service concerning suspicious imports.¹¹⁰ Indeed, in the case of the *Tek Sing*, the initial investigation was the result of anonymous information given to the Customs Service at first instance.¹¹¹

This limited formal role of the Customs Service hampers efforts to detect illicit imports.¹¹² At least in relation to exports from Australia, this limited role was explained as being due to the difficulties a customs officer would face in enforcing the wide scope and complexity of the categories of cultural heritage protected under the *PMCHA*. It was thought that the resulting benefits of this enforcement role would be outweighed by the significant resource costs that would be incurred.¹¹³ It would be even more difficult for a customs officer to fulfil this duty with regard to exporting states' cultural heritage, since these are defined in different ways by different states.

105 Abramson and Huttler, above n 28, 954–7. See also O'Keefe, *Commentary on the UNESCO 1970 Convention on Illicit Traffic*, above n 28, 13. The United States does, however, apply a customs barrier for cultural heritage that is governed by bilateral treaties entered into with states such as Mexico.

106 The Czech Republic, for example, requires a valid export permit to accompany any cultural heritage before it is allowed into the State: O'Keefe, *Commentary on the UNESCO 1970 Convention on Illicit Traffic*, above n 28, 18.

107 Tolhurst, above n 6, 146.

108 *Protection of Moveable Culture and Heritage Act 1986* (Cth) s 28.

109 Ley, above n 6, 37. This may be compared with the Canadian scheme, in which customs officers do have the primary role of enforcement of the Canadian legislation. However, Canadian customs officers actually grant export permits after having received expert examiners' advice.

110 Email from Peter Mitchell, Deputy Director, Movable Cultural Heritage Unit to Craig Forrest, 14 April 2004.

111 Email from Peter Mitchell, Deputy Director, Movable Cultural Heritage Unit to Craig Forrest, 22 May 2002.

112 Annette Wiltshire, 'Movable Cultural Heritage: Part 2' (1993) 1 *Arts and Entertainment Law Review* 1, 3.

113 Ley, above n 6, 119.

Nevertheless, the 1991 Ministerial Review did recommend that the Customs Service take a more active role at the customs barrier.¹¹⁴ This could take one of two possible forms. First, the informal arrangement between the Customs Service and the Movable Cultural Heritage Unit could be formalised so that Customs are required to inform the Unit of suspicious imports. The specialised identification skills of the Unit could be utilised by customs officers with regard to suspicious imports. The second, and preferred option, would be to create a specialised unit within the Customs Service, who would be inspectors under the *PMCHA* and who would investigate any suspicious imports. Such involvement of the Customs Services need not require the search of all incoming people and material, but could take a more strategic approach, searching only those people or material that experience, research and profiling indicated might be a specific risk. This might include, for example, the creation of a database of illicitly exported cultural heritage, including those items stolen from the Baghdad museums and the National Library.¹¹⁵

Whichever of these two options may be utilised, a further form of protection at the customs barrier might also be available. Currently, travellers entering Australia are not required to declare any items that might be covered by the *PMCHA*.¹¹⁶ By requiring a declaration of at least archaeological or palaeontological material, inspectors might be made aware of possible imports contrary to the *PMCHA*, and a further offence of failing to make an appropriate declaration would strengthen the protection regime in Australia.

4 *Difficulties in Control Over the Art and Antiquities Market*

The protection regime envisaged by the *UNESCO Convention* provides, in art 10, for those involved in the art and antiquities market to keep records of the heritage bought and sold. Such a system would allow for the illicit trade to be more easily identified, and would play a deterrent role in that penalties would be imposed for dealings in the illicit trade. The *PMCHA*, however, does not fully adhere to this proposed regime.

On accepting the *UNESCO Convention*, Australia entered a reservation to art 10, stating:

The Government of Australia declares that Australia is not presently in a position to oblige antique dealers subject to penal or administrative sanctions, to maintain a register recording the origin of each item of cultural property, names and addresses of the supplier, description and price of each item sold and to inform the purchaser of the cultural property of the export prohibition to which property may be subject. Australia therefore accepts the Convention subject to a reservation as to Article 10, to the extent that it is unable to comply with the obligation imposed by that Article.

114 Ibid xviii.

115 The creation and use of such a database was one of the main recommendations made to the United Kingdom Government in respect of its implementation of the *UNESCO Convention*: see Department of Culture, Media and Sport (UK), *Ministerial Advisory Panel on Illicit Trade Report* (2000), <http://www.culture.gov.uk/NR/rdonlyres/ewsnptejzzinogwydpseq3x63lpxtf6kx6c55nlvwpv2ngmraihbqf7h7pdf7y5kk7wxswfgcpx3t3yapzmx3kb42f/Report_AdPanel_Illicit_Trade.pdf> at 4 November 2004.

116 Ley, above n 6, 39.

The difficulty in giving effect to art 10 is a result of the Commonwealth and State division of powers, with the regulation of antique dealers falling within the States' jurisdiction. The same applies in the United States, which has not implemented art 10 at a federal level, and has left it to individual States to address. Most States have failed to do so, and those in which there is a thriving art and antiquities market, such as New York, are unlikely to do so.¹¹⁷ Giving effect to art 10 is, however, a difficulty, not an impossibility, for both the United States and Australia. A concerted effort to structure a uniform code that would allow the reservation to be withdrawn would strengthen Australia's commitment to assisting foreign states in the protection of their cultural heritage.¹¹⁸

While there is a need to address the regulation of the art and antiquities market in Australia, the degree to which this might make use of the penalties provided for in the *PMCHA* is difficult to determine since there have been no prosecutions for a contravention of s 14(2).¹¹⁹ Seizure of the heritage is all that has occurred. In the case of the *Tek Sing*, for example, the importers had certain Indonesian documentation relevant to the export, though they had failed to obtain all the necessary documentation.¹²⁰ For the objects to be seized, it was not necessary to show any intention to evade the Indonesian export legislation. However, to succeed in the prosecution of an infringement of s 14(2), it would have to be shown that the importer knew that the heritage was 'a protected object of the foreign country' and that it had been exported contrary to that country's laws. The difficulty appears to be in the interpretation of knowledge. Given the lack of Australian precedent, it may be worth considering a recent persuasive precedent that would support a more rigorous protection regime in Australia.

The degree of knowledge required by a defendant has been the subject of much debate in the United States. While the extent of the United States' implementation of the *UNESCO Convention* is limited, United States courts will admit action for the recovery of stolen cultural heritage, including in situations where the heritage is regarded as stolen, when the exporting state vests all ownership of items of cultural heritage in the state and deems its export illegal. The United States recently admitted such an action in the case of *United States v Schultz*,¹²¹ to the consternation of many in the United States art and antiquities market. Schultz, a prominent antiquities dealer, and past president of the National Association of Dealers in Ancient, Oriental and Primitive Art, was charged with dealing in stolen property contrary to the *National Stolen Property Act*.¹²² The

117 Marina Papa Sokal, 'Stemming the Illicit Trade in Antiquities' (2002) 11 *Culture without Context* 26.

118 The 1991 Ministerial Review recommended that legislation be enacted allowing this reservation to be withdrawn: Ley, above n 6, xviii.

119 Email from Peter Mitchell, Deputy Director, Movable Cultural Heritage Unit to Craig Forrest, 13 April 2004.

120 Email from Peter Mitchell, Deputy Director, Movable Cultural Heritage Unit to Craig Forrest, 14 April 2004.

121 178 F Supp 2d 445 (SDNY, 2002); aff'd 333 F 2d 393 (2nd Cir, 2003). In another case, a notable person in the antiquities market, the Smithsonian Chief Executive, Lawrence Small, was recently charged with illegal import of cultural heritage: see Jason Kaufman, 'Smithsonian Boss Pleads Guilty to Possession of Banned Artefact', *The Art Newspaper*, March 2004, 4.

122 18 USC § 2315 (1940).

property, the head of a statue of Amenhotep III, had been illegally excavated and exported from Egypt. The Egyptian legislation not only prohibits the export of such archaeological heritage, but also vests ownership in the state.¹²³

The judge's instruction to the jury on the degree of 'knowledge' required for a conviction was that a defendant could not intentionally choose to remain ignorant of the facts or the law in order to avoid legal consequences. Such deliberate avoidance could be treated as positive knowledge.¹²⁴ Dealers, collectors and others engaged in trade would therefore have to ensure that the provenance of an item was determined and that the laws of the potential state of origin were considered. It is submitted that such an interpretation should be taken with regard to the *PMCHA* and that, when appropriate, prosecutions be undertaken.

D Iraqi Cultural Heritage in Australia

The *PMCHA* has not proved to be a particularly effective protection regime. It did not prevent looted cultural heritage from Spain or Indonesia travelling through Australia to the art and antiquities market of Europe. Nor would it provide an effective protection mechanism for Iraqi cultural heritage, since it would be difficult for Australian authorities to identify this material at the customs barrier, and it is unlikely that the Iraqi authorities would be aware of the illicit export from Iraq, or import into Australia, given the current state of Iraqi governance. Neither Iraq nor Australia, then, would be aware of the illicit trafficking and thus be able to begin an investigation. These difficulties apply to many other states besides Australia, and given the furore over the looting of the Iraq National Museum and Library, the international community is cognisant of the lack of a vigorous international protective regime, and the need to address this issue.

An initial response to the looting was the adoption, in May 2003, by the United Nations, of *Resolution 1483*, which replaced the sanctions imposed on Iraq after the 1990 Gulf War. The Resolution requires member states to

take appropriate steps to facilitate the safe return to Iraqi institutions of Iraqi cultural property ... including by establishing a prohibition on trade in or transfer of such items and items in respect to which reasonable suspicion exists that they have been illegally removed ...¹²⁵

This Resolution has significance for all states, not only those that are party to the *UNESCO Convention*.

Australia, like its Coalition partners, has implemented legislation to address *Resolution 1483*. The *Iraq (Reconstruction and Repeal of Sanctions) Regulations 2003* (Cth) make it an offence to trade in items of Iraq's cultural heritage that

123 Marth Lufkin, 'Criminal Liability for Receiving State-Claimed Antiquities in the United States: The "Schultz" Case' (2003) 8 *Art, Antiquity and Law* 321. See also Patty Gerstenblith, 'The McClain/Schultz Doctrine: Another Step Against Trade in Stolen Antiquities' (2003) 13 *Culture without Context* 5.

124 Patty Gerstenblith, '*United States v Schultz*' (2002) 10 *Culture without Context* 27, 29.

125 *Resolution 1483*, SC Res 1483, UN SCOR, 4761st plen mtg, 3, S/RES/1483 (2003).

were illegally removed from Iraq after 2 August 1990.¹²⁶ The offence will be committed if the person 'ought reasonably to suspect [cultural object] was illegally removed from' Iraq;¹²⁷ this is arguably a lesser degree of knowledge than required by s 14(2) of the *PMCHA*.¹²⁸ Any person in possession of such items is required to hand them over to appropriate authorities, which for this purpose includes a member of the United Nations or Australian Defence Force; a representative of the Iraq National Museum or the National Library of Iraq; a representative of the place from which the item was removed, or is reasonably suspected of having been removed; or a member of the federal or State police. The Commonwealth is to make arrangements for the return of the object to Iraq in cases where it is handed over to Australian personnel or representatives. The regulations only address certain issues associated with Iraqi cultural heritage; remaining issues continue to be governed by the *PMCHA*. The weaknesses of this legislation would then be manifest.

V CONCLUSION

In discussing the development of the *UNESCO Convention*, Abramson and Huttler commented that 'for any international action in this field to gain sufficient participation to assure at least some efficacy, it must incorporate a spirit of compromise and adopt a multivalued system'.¹²⁹ In hindsight, the compromise reached has done little to establish an effective protection regime. The imbalance in the assigned duties has long favoured developed importing states by imposing on developing exporting states the more onerous duties of addressing the illicit trade. These states have not been able to fulfil these duties, and the illicit trade in cultural heritage has flourished. To address this problem, developed importing states need to take greater responsibility in providing regulatory and preventative measures.

It has been said of the Australian legislation that, in relation to the protection of foreign states' cultural heritage, it is liberal in the sense that it not only fulfils the spirit of the *UNESCO Convention*, but also provides for a more vigorous protection regime than required by the Convention.¹³⁰ While this may, in some respects, be true in comparison with the narrow interpretation of the Convention implemented by states such as United States, it does not necessarily mean that the

126 See Department of Foreign Affairs and Trade, 'Iraq (Reconstruction and Repeal of Sanctions) Regulations' (Press Release, 28 May 2003), <http://www.foreignminister.gov.au/releases/2003/fa055_03.html> at 4 November 2004.

127 *Iraq (Reconstruction and Repeal of Sanctions) Regulations 2003* (Cth) reg 7(b).

128 The United Kingdom's implementation of *Resolution 1483 (The Iraq (United Nations Sanctions) (Amendment) Order 2004* (UK)) is noteworthy, in that it not only bans the illicit trade in Iraqi heritage, but also reverses the burden of proof with regard to 'knowing' of the illegality. Defendants will bear the burden of proving that they did not know that the Iraqi heritage was looted: see Kevin Chamberlain, 'The Iraq (United Nations Sanctions) Order 2003 – Is it *Human Rights Act* Compatible?' (2003) 8 *Art, Antiquity and Law* 357.

129 Abramson and Huttler, above n 28, 949.

130 Ley, above n 6, 131. See also Tolhurst, above n 6, 137.

Australian legislation provides a particularly effective regime for the return of illicitly exported cultural heritage to countries of origin. This is primarily because the *PMCHA* reflects the *UNESCO Convention's* structure and imposes on exporting states the primary obligation to protect their own cultural heritage. This approach requires reconsideration in light of the Convention's failure to provide an effective protection regime. While this might have resource implications, it is necessary if we are to effectively protect the world's cultural heritage.