

**SUBMISSION REGARDING:**

**REVIEW OF THE PROTECTION OF MOVABLE CULTURAL HERITAGE ACT  
1986 –**

The Federation, which represents the interests of 1,000 historical societies across the nation with a combined membership of 100,000, is pleased to have had the opportunity to comment on the above Act. Members of the Federation's Committee have examined the Act and are agreed upon the following comments relating to specific sections of the Act and its Regulations:

**'Sect. 7 (Act) states:**

**Movable cultural heritage of Australia**

- (1) A reference in section 8 to the movable cultural heritage of Australia is a reference to objects that are of importance to Australia, or to a particular part of Australia, for ethnological, archaeological, historical, literary, artistic, scientific or technological reasons, being objects falling within one or more of the following categories:
- (a) objects recovered from:
    - (i) the soil or inland waters of Australia;
    - (ii) the coastal sea of Australia or the waters above the continental shelf of Australia; or
    - (iii) the seabed or subsoil beneath the sea or waters referred to in subparagraph (ii);
  - (b) objects relating to members of the Aboriginal race of Australia and descendants of the indigenous inhabitants of the Torres Strait Islands;
  - (c) objects of ethnographic art or ethnography;
  - (d) military objects;
  - (e) objects of decorative art;
  - (f) objects of fine art;
  - (g) objects of scientific or technological interest;
  - (h) books, records, documents or photographs, graphic, film or television material or sound recordings;
  - (j) any other prescribed categories.
- (2) The generality of paragraph (1)(j) is not limited by any of the other paragraphs of subsection (1)'.

**Comment:**

- (i) **The categories listed in 1(a) – (h) in Sect. 7 above do not specifically include a category relating to objects of historical significance yet they are included as a Part 9 in Schedule 1 of the Regulations. The Act needs to be amended to make specific reference to objects of historical significance in Sect. 7.**
- (ii) **What is meant by 'objects of ethnographic art or ethnography' {Sect. 7, Category 1(c)} in the context of this Act? Category 1(b) concerns objects relating to 'members of the Aboriginal race of Australia and descendants of**

the indigenous inhabitants of the Torres Strait Islands' (ATSI). Such objects are part of their ethnography or ethnographic art. We believe Category 1 (c) then can only refer to the ethnographic art or ethnography of other socio-cultural groupings in Australia (eg. Italians, Greeks, Australian groupings whose cultural background is Australian, i.e. their primary language is English Australian and they only identify with 'Australian culture' and not in addition with any other ethnic grouping) but this is not clear. What is meant by Category 1(c) should be more fully explained.

(iii) We are uncertain that 'members of the Aboriginal race of Australia and descendants of the indigenous inhabitants of the Torres Strait Islands' is an appropriate term and suggest that Aboriginal and Torres Strait Islanders and their descendants might be more appropriate. The term 'race' is questionably both taxonomically and in sensitivity.

### Schedule 1 of the Regulations

#### Comments:

- (i) Under Schedule 1 of the Regulations, Part 3.4 relating to Natural Science Objects, the only reference to present-day flora and fauna concerns type specimens. Notwithstanding Item 3.2 and any other legislation relating to the protection of indigenous flora and fauna, we believe there should be specific reference to specimens of indigenous species that are at risk of extinction, on the brink of extinction or have only recently become extinct.
- (ii) Under the Act Objects of Applied Science or Technology 4.3 (ii), Objects of Fine Art or Decoration 5.2 (b) & (c), Documentary Heritage 6.2b(ii), and Part 9.2(ii), Objects of Historical Significance fall into movable heritage categories to be considered for protection if they are 'at least 30 years old' or in the case of 'Objects of Fine Art or Decoration' they may also be 'not less than 20 years old' (Part 2 of the included table). While we agree in principle with the 30-year old requirement and in the case of Objects of Fine Art or Decoration, the 30- and 20- year-old requirement the Federation is of the opinion that the Act should make provision for this provision to be relaxed under certain conditions. Thus, there may be objects of very great national heritage significance which fall within each of the protected categories which don't comply with these age requirements. Examples include:
  - (a) Objects of documentary heritage (for example, certain objects and private documents (eg diaries) associated with a Prime Minister whose term of office was within the last 30 years;
  - (b) There may also be significant objects associated with a nationally acclaimed celebrity (eg. the acclaimed and much honoured Cate Blanchett) which might find a ready market overseas but should be kept in Australia;
  - (c) There might be a less than thirty-year old locomotive which had nationally significant heritage values relating to its industrial-use history and/or a technology to cope with the demands of a unique terrain and/or load requirement, but which has been superseded and is up for sale to the highest local or foreign bidder.
  - (d) There may be under thirty-year-old art productions associated with special events or people of national significance which are not

**represented in public art collections but are worthy of consideration for protection under the Act.**

**Under these current regulations, however, such items could not be considered for protection under this legislation.**

- (iii) **There does not seem to be any specific provision in the Act to deal with objects that are of national significance which are bequeathed by a person living in this country to a person in another country. We believe there needs to be some way in which the overseas beneficiary can be monetarily compensated if it is decided to keep the object in Australia.**

**Perhaps the beneficiary could also be officially thanked for the contribution to protection of Australia's cultural heritage and receive an official documentary history of the object and colour photos for their own records and also have the right to visit the museum / library where it is held when visiting Australia and to inspect / view the item. Furthermore, if it is on loan and on display in the country of the beneficiary's residence perhaps the person could have free entry to inspect / view the item.**

- (iv) **Schedule 1 Sect. 4.3, Objects of Applied Science or Technology makes provision for any kinds of agricultural, any engineering, air transport, rail transport, road transport, scientific interest, water transport, weaponry objects and any objects of scientific interest to be protected under the Act.**

**The rules state that objects in these categories can be exported if they are represented 'in two public collections' but nowhere does it define what characteristics of that product must be taken into account when assessing whether or not it requires protection under this Act. This is a weakness because it might allow some types of objects (eg. locomotives) which have important heritage values which are not represented in 2 public collections to be exported. Thus, an exporter or dealer can claim that the content of the shipping container is a "steam engine" and as there are two 'steam engines' in state ownership he has a case for an export permit. We are of the opinion that the Act and/or the Regulations should be strengthened to ensure that model type, manufacturer, and significant usage in Australia are taken into account by relevant experts when assessing heritage values for the purpose of granting a permit or license to export.**

**Section 8: 'National Cultural Heritage Control List (Act)**

- (1) Subject to subsection (2), the regulations shall prescribe a list, to be known as the National Cultural Heritage Control List, of categories of objects that constitute the movable cultural heritage of Australia and are to be subject to export control.
- (2) The Control List shall divide such objects into 2 classes, namely:
- (a) Class A objects, being objects that are not to be exported otherwise than in accordance with a certificate; and
  - (b) Class B objects, being objects that are not to be exported otherwise than in accordance with a permit or certificate.
- (3) Subsection (2) does not prevent the division of Class A objects and Class B objects into sub-classes and other divisions or categories.
- (4) Nothing in this section shall be taken to limit the application of subsection 33(3A) of the *Acts Interpretation Act 1901*.

**Comment Sect. 8:**

- (i) **With reference to the Class A and Class B objects, the difference between a ‘certificate’ and a ‘permit’ is not clear. Since apparently the difference between Class A and Class B objects is whether they are issued with a ‘certificate’ or ‘a permit or a certificate’ it would seem to us that the Act should make clear what it means by ‘certificate’ and ‘permit or certificate’ in each case. Furthermore, if ‘certificate’ is the same for Class A and Class B objects why would an object categorised as Class B and assigned a certificate be categorised differently from Class A objects?**

**Section 22: Register of expert examiners (Act)**

- (1) The Committee shall, in accordance with the regulations, maintain a register of the names of persons determined by the Committee to be expert examiners for the purposes of this Act.
- (2) In subsection (1), *person* includes:
- (a) a body or association of persons, whether incorporated or not; and
  - (b) a person resident or domiciled outside Australia.’

**Comment Sect. 22:**

- (i) **The Federation agrees that the Register of Expert Examiners should be retained but there should be provision in the Act requiring the National Cultural Heritage Committee to publicly call for expressions of interest in being placed on the Register. We believe that if this provision is not included in the Act, the NCHC, no matter how knowledgeable about those who are professionally relevant to undertake the work required, could well miss out on having the kind of expertise which will ensure that appropriate recommendations are made to the Minister.**

**Sect. 16: Functions of Committee (Act)**

‘The functions of the National Cultural Heritage Committee are:

- (a) to furnish advice to the Minister, either of its own motion or on request made to it by the Minister:
- (i) in relation to the operation of this Act;
  - (ii) in relation to objects that should be included in, or removed from, the Control List;
  - (iii) in relation to the classification and re-classification of objects so included; and
  - (iv) in relation to the operation of the National Cultural Heritage Account;
- (b) to furnish advice to the Minister pursuant to subsections 10(4) and 10A(5);
- (c) to establish and maintain the register referred to in section 22; and
- (d) to consult and co-operate with appropriate authorities of the Commonwealth, of the States and of the Territories, and with other organisations, associations and persons, on matters related to its functions’.

**and**

**Section 28: Inspectors**

- (1) The Minister may, by instrument in writing, appoint a person as an inspector.
- (2) By force of this subsection:
- (a) a member or special member of the Australian Federal Police; and
  - (b) a member of a police force of a State or Territory; is an inspector.
- (3) The Minister may make an arrangement with a Minister of a State for and in relation to the exercise of powers, and the performance of duties, of inspectors under this Act by officers of the State.
- (4) An arrangement may contain such incidental or supplementary provisions as the Minister and the Minister of the State think necessary.

- (5) The Minister may arrange with the Minister of a State with whom an arrangement is in force for the variation or revocation of the arrangement.
- (6) An arrangement, or the variation or revocation of an arrangement, shall be in writing and a copy of each instrument by which an arrangement has been made, varied or revoked shall be published in the *Gazette*.

***Comment with reference to Sections 16 ,Subsection (ii) & 28 (the whole):***

- (i) **The Federation is of the opinion that the categories of persons that are inspectors under this Act are not only too limited but those categories are not always well positioned to monitor what is coming into and leaving the country. Customs Officers, and those persons who are responsible for sorting overseas and incoming mail and screening luggage at airports are much better placed to do this and should be considered for inclusion in the list. While Section 28 (3) may allow the Minister to include further categories of government officers as inspectors we believe the above additional categories should be clearly indicated as inspectors in the Act.**
- (ii) **It is apparent that the Committee will be strongly dependent upon Inspectors or on those citizens wishing to export items to present them to the Committee's agents for consideration as to whether or not they should be permitted to enter or leave the country.**

**Neither the Act nor the Regulations, however, makes provision for the appropriate training of inspectors to recognise items which should be referred to the Committee. The Federation finds it difficult to understand how an untrained policeman would be able to recognise whether a historical document or map, a painting or photograph, a book, an indigenous cultural object, an item of equipment etc. are things which might be of national heritage significance and appropriate to refer to the Committee for consideration as a prohibited export. Without such training many items may be missed. For example, are there inspectors at airports who examine travellers' luggage for objects of movable heritage? If there are, they have not become apparent to the members of the Federation.**

- (iii) **There does not seem to be any provision in the Act or the Regulations for the Committee to promote the requirements of the Act to the public. We have never become aware when leaving Australia and returning of any posters, pamphlets or loud speaker announcements at points of exit or entry relating to the Act. How can people abide by the law in this regard if they are unaware of it. They need to know the regulations. the nature of the permit system and where inspections can be carried out.**

It seems to us, therefore, that as it is the Act and its regulations do not provide adequate legislative protection for Australia's movable heritage particularly in connection with the promotion and policing of its provisions and its associated regulations.

Associate Professor Don Garden  
**PRESIDENT**

5 February 2009