

The International Loan of Cultural Property

Australia's Legislative Framework

Cultural Property

The 1970 UNESCO *Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property* defines cultural property as property that is, on religious or secular grounds, of importance for archaeology, prehistory, history, literature, art or science.

Cultural property therefore includes everything from works of art to archaeological artefacts, military objects to archival material, ethnographic material to decorative arts and scientific instruments.

Economics of international loans

Masterpieces from Paris
National Gallery Of Australia 2009-10

- *476,000 visitors*
- *\$94 000 000 contributed to the ACT economy*

Winter Masterpieces
National Gallery of Victoria 2009

- *218,000 visitors*
- *\$23 800 000 contributed to the Victorian economy*

Australia's Legislative Framework

- *Protection of Movable Cultural Heritage Act 1986* (Cth)
- *Foreign States Immunities Act 1985* (Cth)
- *Diplomatic Privileges and Immunities Act 1967* (Cth)

These apply in specific and limited circumstances

The Scale of the Issue

Concerns exist about potential claims on cultural property on loan, possibly relating to:

- Australian cultural objects, which could trigger attempts to retain them in Australia permanently; or
- to foreign objects that may be claimed to have been illegally acquired from their original owners, and/or illegally exported from their country of origin; or
- to foreign objects claimed as part of an unrelated legal dispute with the current owner, the lending institution or the country in which the lending institution is located.

Current Actions – Consultation

1. Are there examples where a lack of immunity from seizure legislation has impacted on state/territory institutions? *If yes, please provide details.*
2. What state and territory legislation would be impacted by the introduction of federal immunity from seizure legislation? Are there gaps in current Australian legislation?
3. What type of objections might be raised against the introduction of federal immunity from seizure legislation? How should these be addressed?
4. Which types of Cultural Heritage Objects would you like to see included under potential immunity from seizure legislation?
5. What are the benefits of implementing federal immunity from seizure legislation? What are the pitfalls? What are the risks, particularly in regard to Australia's international obligations under relevant treaties and conventions?
6. What are the potential cost and workload implications of implementing immunity from seizure legislation? Are these comparable to the cost and workload implications currently involved in seeking and negotiating loans without immunity from seizure provisions in place?
7. Who would be responsible for the administration of immunity from seizure provisions?
8. What type of claims should be prevented/allowed under Australian immunity from seizure legislation? *eg. Claims relating to damages/financial compensation (unjust enrichment), seizure due to sedition/indecency/obscenity, unrelated private legal disputes (as an asset for the repayment of debt), title claims relating to the period 1933-1945 or post 1917 Russia etc.*
9. Are there any models, or features of models, of immunity from seizure legislation with which you are familiar, and consider appropriate for an Australian model?

International Models

- Automatic Immunity – objects on loan to cultural institutions for temporary exhibitions are automatically granted immunity from seizure. (*Belgium*)
- Application – an application, usually including detailed provenance information, must be submitted to the government or managing authority prior to the objects' importation into that jurisdiction (*Switzerland, France, United States*)
- Application and publication – as above, with the additional requirement that the objects intended for import must be publicised and accompanied with a period of non-objection (*United Kingdom, France, Israel*)
- Immunity from forfeiture – objects on loan for exhibition are excluded from forfeiture provisions under unlawful import laws (*New Zealand, Ireland, Australia*)
- Sovereign Immunity – immunity provisions may only be available in the event that the lender is a 'sovereign'. (*Belgium, France*)

Hypothetical

The Australian Government provides for the immunity from seizure for objects on loan from overseas to public collecting institutions in Australia upon application. Immunity will be granted at the discretion of the Minister for the Arts or his delegate. The objects must be arriving in Australia for the purposes of public exhibition, and are subject to particular requirements. Immunity from seizure is only granted by request, to objects or collections for which the lender is seeking immunity as part of the loan agreement.

Operation

- **Immunity from seizure is not automatic under this model.**
- It is available when lenders insist on this protection, and are able to provide full/best provenance
- 60 day online publication requirement.
- Potential claimants are able to notify the Australian Government that they may make a claim on the object/s.
- If no objections are raised, an immunity from seizure certificate will be granted on the conditions that:
 - a. no legitimate claim has been made to the property during the publication period
 - b. the import of the object/s is not illicit
 - c. the loan agreement stipulates that the property must be returned to the lender following the exhibition.

The immunity can be applied for up to two years in advance of an object entering Australia. As a Federal Law, this legislation overrides all inconsistent state and territory laws, excepting public records laws which allow state and territory public record offices to seize and retain ownership of documentary heritage/records which were created by the relevant state/territory government.

Discussion

- Is the absence of comprehensive immunity from seizure legislation having a serious and detrimental effect on the business and operations of museums and galleries?
- Do you see this type of legislation as necessary in Australia?
- Is it preventing or inhibiting the loan of cultural objects from overseas?
- Is there a genuine need for this legislation, or would it serve mainly to appease the requests of international lenders?

Scenario

- Are there any state and territory laws under which the man may be able to seize this object?
- What actions could be taken by him currently if this were to occur?
- What actions could the Museum and Gallery take?

Scenario 2

- Are there any state or territory laws which could be used to seize or remove this film from the Museum and Gallery's custody?
- What actions could be taken by a member of the community currently if they were offended by an object or objects in the exhibition?
- What actions could the Museum and Gallery take if a claim like this was made?