

INTERNATIONAL COUNCIL OF MUSEUMS

**ICOM AUSTRALIA**

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2/9/2011

Kim Allen

Assistant Secretary, Regional Participation and National Collections

Office for the Arts

Department of the Prime Minister and Cabinet

PO Box 6500

Canberra ACT 2600

**Re: Public Consultation on Immunity from Seizure, Office for the Arts**

Dear Mr Allen,

In my capacity as the Chairperson of International Council of Museums (ICOM) Australia, I would like to thank you for the opportunity to comment on the on the issue of immunity from seizure for cultural objects on loan. As you would be aware, ICOM is an international organisation of museums and museum professionals. ICOM Australia aims to promote an Australian perspective on the conservation, continuity and communication to society of the world's natural and cultural heritage. As a non-government, non-profit body, ICOM Australia advocates:

- professional cooperation and exchange amongst museum staff,
- raising public awareness of museums,
- training of museum personnel,
- advancement of professional standards,
- elaboration and promotion of professional ethics, and
- combating the illicit traffic in cultural property.

As such we regard the issue of anti-seizure legislation with keen interest, and I am pleased to provide the following comments on questions raised in your discussion paper on behalf of the ICOM Australia Executive.

**Do you generally support the implementation of legislation which would provide immunity from seizure and suit for cultural objects on loan to Australia?**

ICOM Australia supports in principle the implementation of anti seizure legislation, aimed at granting immunity from judicially ordered seizure of artworks and other culturally significant material borrowed temporarily for exhibitions from international sources. We recognize that in the absence of such legislation foreign cultural institutions are becoming increasingly reluctant to lend objects to Australian museums and galleries. Ultimately, this will result in a significant impact on the quality of cultural experiences that can be enjoyed by the Australian community.

In supporting the development of anti-seizure legislation ICOM Australia does not in any way deny the considerable moral, ethical and/or cultural imperatives for the return of wrongfully acquired cultural property. The new legislation should not contravene any international conventions to which Australia is a signatory, such as the *UNESCO Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property 1970*, nor should it be used to sanction any activity which is currently illegal under Australian or International law. To this end, we welcome the statement of principal in the discussion paper on page 6 regarding the Commonwealth Government's recognition of the problem of the illicit trade in cultural property.

In particular ICOM recommends that consultation be undertaken with communities who may be potentially impacted by such legislation such as Aboriginal communities and the Jewish Community. ICOM also supports legislation which promotes due diligence and ethical practices in Australian collecting institutions.

## **1. Exemption for Australian Protected Objects as defined by the PMCH Act**

***Should Australian Protected Objects be excluded from coverage under potential immunity from seizure legislation?***

ICOM supports immunity from seizure legislation that includes Australian Protected Objects. This may provide access to items of potential value to the Australian community which may be currently unavailable for loan due to the threat of seizure. Such items may be of value in providing vital information on the history, environment, identity and other aspects of the Australian community.

## **2. Types of claims**

***What types of claims should be prevented or allowed under this type of legislation? Should Australia consider immunity from seizure with a return guarantee for the object, but not prevent other types of claims for damages, compensation, etc.?***

No comment.

## **3. Publication**

***If a publication requirement was to form part of an Australian model of immunity from seizure, what would be the best way to disseminate this information (online, in a newspaper, etc.)?***

ICOM Australia considers that publication should form a mandatory component of borrowing procedures under any new immunity from seizure legislation, with no exceptions for individual circumstances allowed under the governing legislation. We also encourage the Commonwealth to use the introduction of the new legislation as an opportunity to facilitate public debate on, and create greater awareness of, issues of contested ownership of cultural objects. ICOM

Australia hopes that once the legislation is passed, issues surrounding the ownership of contested objects can be appropriately scrutinised and, where relevant, debated publically.

The appropriate way to disseminate information may vary widely depending on the nature of the objects and the parties that might have a possible claim. For example, persons living on a remote Aboriginal community might not reasonably be expected to see a notice incidentally in a national newspaper or online. In addition to publication, borrowers should be required to take all reasonable steps to directly notify parties known to, or likely to, have specific claims on the objects concerned where they are aware such interests exist.

#### **4. Loan purposes**

***For what purposes should loans be undertaken to make them eligible for immunity protection?***

In responding to this question we note that we are referring only to the Museum sector. Loans eligible for immunity protection should be for a purpose which can be shown to be of community/public benefit, such as a public exhibition or for research. This benefit would also include research into material of importance to the Aboriginal community (such as sacred objects) which would not necessarily be made more widely available.

ICOM Australia is strongly against immunity being extended to commercial (for-profit) organisations.

#### **5. Australian Indigenous movable cultural heritage**

***Recognising the unique challenges faced by Indigenous communities in relation to their cultural material, should extra provisions be made to ensure appropriate protection?***

ICOM Australia recognizes that in the context of anti-seizure legislation issues pertaining to Australian Indigenous cultural material are particularly sensitive. The Commonwealth is encouraged to consult closely with the Indigenous communities specifically over this issue. It may also be necessary to engage specialist expertise in addressing this question.

**6. Periods of Dispossession, Occupation or Nationalisation of Property**  
***Should immunity be provided for objects for which provenance gaps exist during known periods of war, looting or theft, for example Europe in 1933-45 and 19th century colonial North Africa? What is a reasonable amount of information that should be provided for objects in this circumstance?***

Again ICOM Australia recognizes that in the context of anti-seizure legislation issues pertaining to the dispossession of property such as that seized by the Nazis during the Holocaust, are particularly sensitive. The Commonwealth is encouraged to consult closely with relevant communities, such as the Jewish community, over this issue. ICOM Australia encourages the Commonwealth to consult with cultural institutions and other relevant bodies from the Pacific, such as PIMA (Pacific Islands Museums Association), over any possible implications of anti-seizure legislation for institutions in this region.

**7. Inter-country and inter-state loans**

***If Australian objects, including Australian Protected Objects (APOs) were included as eligible for coverage under potential immunity from seizure legislation, should coverage also extend to loans between Australian states and territories which may not have an international element (i.e. the objects are from Australian collections, not international collections)?***

No comment.

## **8. Assurances**

### ***What assurances or guarantees should be requested of the lender?***

All loans indemnified under anti-seizure legislation should be supported by positive evidence of legal title, and borrowers should take all reasonable steps to ensure that the previous history of a loan object does not include illegal acquisition. ICOM Australia considers that this would normally be expected to include appropriate information and assurances from the lender.

## **9. Eligibility**

### ***What institutions or organisations should be eligible for immunity provisions?***

ICOM Australia considers that provision of immunity from seizure should not be restricted to Commonwealth, State and Territory institutions, but should be accessible to smaller cultural institutions who can demonstrate an appropriate capacity to exercise appropriate duty of care in relation to provenance. It is also important that the requirements for seeking indemnity under the legislation are not so extensive or onerous that smaller cultural institutions will be prevented from using this scheme by virtue of size alone.

## **10. Standardisation**

### ***Should standard loan forms be introduced for institutions wishing to access immunity guarantees from the Australian Government?***

On passing of the legislation, a standard clause should be inserted into all loan agreements providing a guarantee of unencumbered provenance/legal title for the object/s offered on loan and/or that due diligence has been followed in ascertaining such provenance and legitimacy.

## **11. Legitimate claims**

It is probable that, even where due diligence has been exercised, there will be some situations in which new information emerges over the course of a loan which calls into question the legitimacy of a lender's ownership. We encourage the Commonwealth to consider introducing mechanisms that require, in such a cases, a borrower to make mandatory disclosures to the lender and relevant parties/authorities in the lending jurisdiction regarding the new information.

ICOM Australia is party to the *International Council of Museums Code of Ethics 2006*, which establishes a general ethical framework for resolving disputes over contested objects. The ICOM code of ethics requires that all acquisitions (including gifts and loans) must be supported by positive evidence of legal title. Borrowers should take all reasonable steps to ensure that the previous history of a loan object does not include illegal acquisition. ICOM recognises that even where due diligence is exercised, unforeseen circumstances mean a borrower may still face claims for the seizure of objects as a result of disputes over ownership.

The legislation should not provide a mechanism by which cultural institutions or other borrowers can abrogate their moral obligation, and their duty of care, to ensure that any objects brought into Australia are not stolen or illegally exported. Cultural institutions or other borrowers seeking an indemnity through anti-seizure legislation must continue to carry out an appropriate process of due diligence, and an audit mechanism should be developed (and resources made available) so that compliance can be monitored. In this respect, we welcome the comments on page 6 of the discussion paper regarding the need for lenders and borrowers to comply with recognised international standards of due diligence.

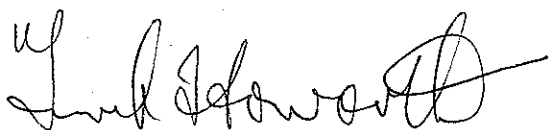
Immunity should be able to be revoked at any time if full disclosure (of what might reasonably be known) was not made by the lender or the borrower

under the terms of the legislation – not just if the disclosure was in some way false, as the scenario suggests.

## **Conclusion**

Please do not hesitate to contact me to seek clarification over any of the points raised above. We look forward to continued dialogue on this issue with your Department.

Yours Sincerely

A handwritten signature in black ink, appearing to read "Frank Howarth". The signature is fluid and cursive, with a long horizontal stroke extending to the right.

Frank Howarth, Chairperson ICOM Australia