

**20 January 2021**

Senator the Hon David Fawcett  
Chair, Senate Environment and Communications Legislation Committee  
Parliament House  
CANBERRA ACT 2600

*By email: ec.sen@aph.gov.au*

Dear Chair

**Submission on the National Collecting Institutions Legislation Amendment Bill 2020 (Cth)**

Thank you for the opportunity to make a submission to the Senate Environment and Communications Legislation Committee's (**the Committee's**) inquiry into the National Collecting Institutions Legislation Amendment Bill 2020 (Cth) (**the Bill**). I write this submission in a personal capacity as a NSW solicitor with a longstanding interest in laws concerning Indigenous cultural heritage and museums in Australia. The views expressed in this submission are my own.

This submission specifically addresses the Bill's provisions concerning conditions on the disposal of assets held by the six National Collecting Institutions (**NCIs**). The Bill's Explanatory Memorandum states that the "Bill seeks to introduce a common threshold for all NCI disposals, prescribed in regulations as \$2 million (except for the NGA Regulations which proposes a \$10 million threshold)".<sup>1</sup>

The NCIs are custodians of items including artefacts of significant value to First Nations Peoples in Australia because of their tangible and intangible cultural heritage. For example, the largest gallery in the National Museum of Australia is its First Australians gallery.<sup>2</sup> The Australian National Maritime Museum acknowledges that its "collection has been deeply enriched by many, many Indigenous works from all over Australia", including watercraft of Arnhem Land, the Kimberley and the Murray River.<sup>3</sup> Similarly, the National Gallery of Australia recognises that "As the nation's premier visual arts collecting institution, the Gallery has a crucial role in the collection, exhibition and interpretation of Aboriginal and Torres Strait Islander art".<sup>4</sup> The value of Indigenous cultural heritage to Traditional Owners simply cannot be accurately measured or conveyed through monetary value thresholds.

It is important that statutory provisions relating to the disposal of NCI artefacts are culturally competent and provide appropriate recognition of and consultation with First Nations Peoples in considering disposing of items of Indigenous cultural heritage. There is no specific reference in the Bill's Explanatory Memorandum to Aboriginal or Torres Strait Islander objects or materials. Further, the current laws governing NCIs do not mandate that consultation occur with First Nations Peoples in relation to disposals of Indigenous objects. The majority of the governing laws do not refer to Aboriginal or Torres Strait Islander objects or materials at all. While in many cases NCIs do have internal policies and protocols that provide for proactive engagement with First Nations Peoples in the course of collection management and disposals,<sup>5</sup> NCIs' governing statutes should expressly reflect the expectation that this occur. This Bill provides an opportunity to remedy this omission.

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<sup>1</sup> Explanatory Memorandum, National Collecting Institutions Legislation Amendment Bill 2020 (Cth), [185].

<sup>2</sup> National Museum of Australia, 'First Australians' (2021), <<https://www.nma.gov.au/exhibitions/first-australians>>.

<sup>3</sup> Australian National Maritime Museum, *Connections: Indigenous Cultures and the Australian National Maritime Museum* (2005) 1.

<sup>4</sup> National Gallery of Australia, *Aboriginal and Torres Strait Islander Cultural Rights and Engagement Policy* (2017).

<sup>5</sup> See, eg, Australian National Maritime Museum, *Connections: Indigenous Cultures and the Australian National Maritime Museum* (2005) 13; National Museum of Australia, *Indigenous cultural rights and engagement policy* (2015); *Australian Aboriginal and Torres Strait Islander ancestral human remains management and repatriation policy* (2019); National

### *Recommendations*

Accordingly, this submission recommends that the Committee consult with First Nations-led interest groups and Traditional Owners, if this has not already occurred, in relation to:

- a. possible improvements that could be made to the Bill to recognise and protect any tangible and intangible Indigenous cultural heritage values associated with objects or materials suggested by a NCI for disposal, regardless of the monetary value of those objects or materials;
- b. additional safeguards that may be required in the Bill to ensure that consultation is undertaken by NCIs with First Nations Peoples, including Traditional Owners with authority to speak for the cultural heritage of a particular Indigenous object, before a NCI may determine to dispose of that object;
- c. whether provision should be made in the Bill to require the Minister for Indigenous Australians to grant permission to dispose of an object of Indigenous cultural heritage, or associated with intangible Indigenous cultural heritage, regardless of the object's financial value; and
- d. whether provision should be made in the Bill to empower the Minister for Indigenous Australians to request that consideration be given by a NCI to de-accession an object to First Nations Peoples where that object is an item of Indigenous tangible cultural heritage or has associated intangible Indigenous cultural heritage attributes.

This submission addresses five issues:

1. the absence of statutory safeguards for Indigenous tangible and intangible cultural heritage;
2. why specific safeguards should exist for objects of Indigenous tangible cultural heritage or associated Indigenous intangible cultural heritage in NCI collections;
3. shortcomings of other legislative protections for Indigenous cultural heritage;
4. the need to ensure NCIs retain appropriate discretion to manage and dispose of assets in a culturally-competent manner;
5. what amendments should be made to the Bill.

#### *1 The absence of statutory safeguards for Indigenous tangible and intangible cultural heritage*

The Acts governing the NCIs provide conditions for when and how a NCI may dispose of an item in its collections.

The issue is that neither these Acts nor this Bill currently provide any processes or safeguards particular to objects of tangible Indigenous cultural heritage or items associated with intangible Indigenous cultural heritage.

Section 7(3) of the *National Museum of Australia Act 1980* (Cth), for example, provides that:<sup>6</sup>

The Museum shall not dispose of historical material except in accordance with section 9 or 9A.

Further, sections 9 and 9A of the *National Museum of Australia Act 1980* (Cth) provide that:

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Museum of Australia, *Australian Aboriginal and Torres Strait Islander secret/sacred, sensitive and private material policy* (2019); National Gallery of Australia, *Aboriginal and Torres Strait Islander Cultural Rights and Engagement Policy* (2017).

<sup>6</sup> Cf the *Australian National Maritime Museum Act 1990* (Cth) ss 9(5), 10; *National Gallery Act 1977* (Cth) s 9; *National Library Act 1960* (Cth) s 7A(b).

## **9 Disposal of historical material in national historical collection**

- (1) Subject to subsection (3), where the Council is satisfied that historical material in the national historical collection:

- (a) is unfit for the collection; or
- (b) is not required as part of the collection;

the Council may resolve that the historical material be disposed of by sale, gift or destruction.

- (2) Where the Council is satisfied that the exchange of historical material in the national historical collection for other historical material would be advantageous to the collection, the Council may resolve that the first-mentioned historical material be disposed of in exchange for that other historical material.

- (3) The Council shall not resolve that historical material be disposed of by destruction unless the Council is satisfied that the material has no saleable value.

- (4) Where:

- (a) the Council has resolved, in accordance with this section, that historical material be disposed of; and
- (b) if the value of that historical material exceeds \$250,000, the Minister has approved of that disposal;

the Museum may dispose of that historical material accordingly.

Note: Particulars of any disposals of historical material under this section must be included in the annual report (see section 38).

## **9A Disposal of historical material not in national historical collection**

- (1) Subject to subsection (2), the Council may resolve that historical material owned by or in the possession of the Museum, but not in the national historical collection, be disposed of by sale, gift, exchange for other historical material, or destruction.

- (2) The Council shall not resolve that historical material be disposed of by destruction unless the Council is satisfied that the material has no saleable value and cannot be disposed of in any other way.

- (3) Where:

- (a) the Council has resolved, in accordance with this section, that historical material be disposed of; and
- (b) if the value of the historical material exceeds \$250,000, the Minister has approved of the disposal;

the Museum may dispose of the historical material accordingly.

Note: Particulars of any disposals of historical material under this section must be included in the annual report (see section 38).

While the Bill proposes to vary the financial thresholds in the NCI laws, it nonetheless preserves a financial threshold as a safeguard in the disposals process.

No similar safeguard is provided, however, for items whose intrinsic value cannot be measured in monetary terms, such as tangible or intangible Indigenous cultural heritage values.

Outdated laws that value heritage through Eurocentric lenses, such as financial criteria, adversely impact First Nations Peoples by failing to protect tangible and intangible heritage, and misconceiving

the importance of Indigenous heritage to contemporary cultural practice. Godden has warned that continuing to use western legal categories to seek to characterise or define Indigenous culture is a “form of post-colonial repression”.<sup>7</sup>

Similarly, the NSW Land and Environment Court has stated that the continued harming of Indigenous cultural heritage in the 21<sup>st</sup> century has “the tendency to perpetuate the ‘national legacy of unutterable shame’ caused by the dispossession of Aboriginal persons from their lands as a consequence of colonisation”.<sup>8</sup>

A contributing factor to why cultural heritage laws continue to fall short in Australia is the continued lack of engagement with and inclusion of First Nations Peoples in processes concerning their culture.

As the Australian National Maritime Museum has stated, “Consultation with those concerned is the appropriate and essential first step in the development of any museum project involving Indigenous communities or individuals”.<sup>9</sup> This approach should be enshrined in NCI legislation, especially any amendment relating to powers of disposal.

The Joint Standing Committee on Northern Australia is currently inquiring into the destruction of the 46,000-year-old caves at the Juukan Gorge in the Pilbara region of Western Australia and how Aboriginal and Torres Strait Islander cultural heritage laws might be improved to guarantee the protection of culturally and historically significant sites.

This Bill presents an opportunity to learn more broadly from the Juukan Gorge incident and improve the management of objects of tangible and intangible Indigenous cultural heritage in NCIs by introducing mandatory consultation and engagement with First Nations Peoples when disposal of an Indigenous object is being considered.

It is important to note, as considered further below, that “disposal” does not necessarily mean “destruction” and in the context of the NCI statutes includes disposal from a NCI by gift or sale. Disposal may not necessarily be a bad outcome for an object, such as where a NCI is seeking to repatriate an Indigenous object to its Traditional Owners.

This submission suggests that mandatory consultation with First Nations Peoples should be a precursor to any decision being made to dispose of an item of tangible or intangible Indigenous cultural heritage, whether by repatriation, destruction or other means of disposal.

## 2 *Why should specific safeguards exist for objects of Indigenous tangible cultural heritage or associated Indigenous intangible cultural heritage in museum collections?*

Aboriginal and Torres Strait Islander Peoples have continuously inhabited, cared for Country and practised their culture in Australia for more than 65,000 years.<sup>10</sup> The 2017 Uluru Statement from the Heart recognised that:<sup>11</sup>

<sup>7</sup> Lee Godden, ‘Indigenous Heritage and the Environment: “Legal Categories are Only One Way of Imagining the Real”’ (2002) 19(4) *Environmental and Planning Law Journal* 258, 258, citing R Coombe, ‘The Properties of Culture and Politics of Possessing Identity’ in J Hart and R Bauman, *Explorations in Difference: Law, Culture and Politics* (University of Toronto, 1996) 252.

<sup>8</sup> *Chief Executive, Office of Environment and Heritage v Ausgrid* [2013] NSWLEC 51, [43] (Pepper J), quoting *Mabo v Queensland (No 2)* (1992) 175 CLR 1, 104 (Deane and Gaudron JJ).

<sup>9</sup> Australian National Maritime Museum, *Connections: Indigenous Cultures and the Australian National Maritime Museum* (2005) 1.

<sup>10</sup> Australian Law Reform Commission, ‘Acknowledgement of Country’, *Pathways to Justice – An Inquiry into the Incarceration Rate of Aboriginal and Torres Strait Islander Peoples*, ALRC Report No 133 (2017) 4.

<sup>11</sup> National Constitutional Convention, *The Uluru Statement from the Heart* (2017) <<https://ulurustatement.org/the-statement>>.

Our Aboriginal and Torres Strait Islander tribes were the first sovereign Nations of the Australian continent and its adjacent islands, and possessed it under our own laws and customs. This our ancestors did, according to the reckoning of our culture, from the Creation, according to the common law from 'time immemorial', and according to science more than 60,000 years ago.

*This sovereignty is a spiritual notion: the ancestral tie between the land, or 'mother nature', and the Aboriginal and Torres Strait Islander peoples who were born therefrom, remain attached thereto, and must one day return thither to be united with our ancestors. This link is the basis of the ownership of the soil, or better, of sovereignty. It has never been ceded or extinguished, and co-exists with the sovereignty of the Crown.*

The Productivity Commission identifies recognition of culture as being inextricably linked to the ongoing wellbeing, social and economic development of First Nations Peoples in Australia.<sup>12</sup>

Engagement with tangible and intangible heritage continues to inform First Nations' contemporary cultural practices.<sup>13</sup> Intangible heritage refers to the "knowledge and precepts of past generations"<sup>14</sup> often associated with tangible objects of cultural heritage or sites, such as songlines, stories, lore and living practice.<sup>15</sup>

Over centuries, museums have played a significant role in protecting Indigenous artefacts that might otherwise have been destroyed in the dislocation and disruption wrought by colonisation and the systemic dispossession experienced by First Nations Peoples in Australia. NCIs hold the potential to make a substantial contribution to advancing reconciliation in 21<sup>st</sup> century Australia by engaging in good faith with First Nations Peoples and involving them in decision-making regarding the management of objects and materials with Indigenous cultural heritage values.

This submission recognises that many NCIs do engage with Traditional Owners as best practice and in good faith. As noted above, this consultation and engagement is facilitated through NCI policies and protocols.<sup>16</sup>

Nevertheless, Australian legislation should fundamentally reflect and affirm this expectation, consistent with the *United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP)*<sup>17</sup> which the Federal Government adopted in 2009.<sup>18</sup>

The rights of First Nations Peoples to maintain, control, protect, practice, develop and revitalise their cultural traditions and customs are recognised in Article 31 of the *UNDRIP*, which provides that:

<sup>12</sup> Steering Committee for the Review of Government Service Provisions, *Overcoming Indigenous Disadvantage: Key Indicators 2014*, Productivity Commission (2014) 26–7.

<sup>13</sup> See *Yaegl People #2 v Attorney General of New South Wales* [2017] FCA 993, [5] (Jagot J), cited in Elizabeth Pearson, 'Old Wounds and New Endeavours: The Case for Repatriating the Gweagal Shield from the British Museum' (2016) 21(3) *Art Antiquity and Law* 201.

<sup>14</sup> David Lowenthal, 'Heritage – and its Interpreters' (1986) 5(2) *Heritage Australia* 42, 42–3.

<sup>15</sup> State of New South Wales and Office of Environment and Heritage, 'Ministers' foreword', *A proposed new legal framework – Aboriginal cultural heritage in NSW* (2017), 2.

<sup>16</sup> See, eg, Australian National Maritime Museum, *Connections: Indigenous Cultures and the Australian National Maritime Museum* (2005) 13; National Museum of Australia, *Indigenous cultural rights and engagement policy* (2015); Australian Aboriginal and Torres Strait Islander ancestral human remains management and repatriation policy (2019); National Museum of Australia, *Australian Aboriginal and Torres Strait Islander secret/sacred, sensitive and private material policy* (2019); National Gallery of Australia, *Aboriginal and Torres Strait Islander Cultural Rights and Engagement Policy* (2017).

<sup>17</sup> *United Nations Declaration on the Rights of Indigenous Peoples*, GA Res 61/295, UN GAOR, 61st sess, 107th plen mtg, sup no 49, UN Doc A/RES/61/295 (13 Sept. 2007) arts 11–12 ('*UNDRIP*').

<sup>18</sup> Minister for Families, Housing, Community Services and Indigenous Affairs, Jenny Macklin MP, 'Statement on the United Nations Declaration on the Rights of Indigenous Peoples' (Media Release, 3 April 2009) <[http://www.un.org/esa/socdev/unpfii/documents/Australia\\_official\\_statement\\_endorsement\\_UNDRIP.pdf](http://www.un.org/esa/socdev/unpfii/documents/Australia_official_statement_endorsement_UNDRIP.pdf)>; see also Emma Rodgers, 'Aust adopts UN Indigenous declaration', *ABC News* (online), 3 April 2009 <<http://www.abc.net.au/news/2009-04-03/aust-adopts-un-indigenous-declaration/1640444>>.

1. Indigenous peoples have the right to maintain, control, protect and develop their cultural heritage, traditional knowledge and traditional cultural expressions, as well as the manifestations of their sciences, technologies and cultures, including human and genetic resources, seeds, medicines, knowledge of the properties of fauna and flora, oral traditions, literatures, designs, sports and traditional games and visual and performing arts. They also have the right to maintain, control, protect and develop their intellectual property over such cultural heritage, traditional knowledge, and traditional cultural expressions.
2. In conjunction with indigenous peoples, States shall take effective measures to recognize and protect the exercise of these rights.

As a 'living culture',<sup>19</sup> the value of Indigenous objects to First Nations Peoples must be understood through the lens of 'cultural continuation'.<sup>20</sup> That is, engagement with heritage continues to inform and influence contemporary cultural practices.<sup>21</sup>

In this way, objects of Indigenous cultural heritage in museum collections like the Gweagal Shield in the British Museum's collection or the Dja Dja Wurrung Barks can be distinguished from other items in collections because of their direct link to living peoples.<sup>22</sup> Although undoubtedly significant, artefacts such as the Parthenon Sculptures are considered to form part of the cultural history of modern Greece whereas artefacts like the Gweagal Shield or the Dja Dja Wurrung Barks retain live links and contemporary relevance to the ongoing, omnipresent cultural practice of First Nations Peoples in Australia.<sup>23</sup> To the living descendants of the Gweagal People, the Shield holds "immense significance and importance"<sup>24</sup> as a repository of cultural knowledge that continues to inform their contemporary practice and traditions.<sup>25</sup>

Rodney Carter, a Yorta Yorta and Dja Dja Wurrung man, was interviewed as part of the National Museum of Australia's *Encounters* Exhibit and explained in reference to the Barks that:

The importance of those objects – the value and significance – actually rests with the people that have connections to the creation of those objects. I believe the creation of these objects is for the people themselves. It's about what they believe to be important and to be communicated amongst the group.<sup>26</sup>

Australia's First Nations Peoples have suffered such prolonged and systematic cultural decimation that objects like the Shield and the Dja Dja Wurrung Barks are critical in enabling tradition and cultural knowledge to continue to be shared and passed down through generations. Dja Dja Wurrung Elder Aunty Fay Carter was also interviewed as part of the *Encounters* Exhibit and explained, "how many things can we point at and say: this is our history, this is part of our history, our ancestors did this. We're connected to our ancestors through these relics."<sup>27</sup> Similarly, Greg Lehman, a Palawa man and descendant of the Trawulwuy people, said:

We don't want certain objects back simply because they're old, or because they're worth a lot of money at auction. It's because these are objects that are important to cultural practitioners

<sup>19</sup> See Gregory J. Tolhurst, 'A Comment on the Return of Indigenous Artefacts' (1998) III *Art Antiquity and Law* 15, 16.

<sup>20</sup> See Pamie Fung and Sara Wills, 'There's So Much in Looking at those Barks: Dja Dja Wurrung Etchings 2004- 05', *South Pacific Museums: Experiments in Culture*, (Monash University ePress, 2006) [11.1]–[11.16].

<sup>21</sup> See *Yaegl People #2 v Attorney General of New South Wales* [2017] FCA 993 (31 Aug 2017), [5] (Jagot J.).

<sup>22</sup> Pamie Fung and Sara Wills, 'There's so much in looking at those barks: Dja Dja Wurrung Etchings 2004-05', *South Pacific Museums: Experiments in Culture*, (Monash University ePress, 2006) [11.1]–[11.16].

<sup>23</sup> Gregory Tolhurst, 'A Comment on the Return of Indigenous Artefacts' (1998) 3(1) *Art Antiquity and Law* 15, 16.

<sup>24</sup> Aboriginal Tent Embassy, 'Gweagle [sic] Artefacts – Claim of Right' (Media Release, 28 March 2016).

<sup>25</sup> See generally Environment and Natural Resources Committee, *Inquiry into the Establishment and Effectiveness of Registered Aboriginal Parties*, Parliament of Victoria Parliamentary Paper No 191, Session 2010-2012 (2012) 9 [2.3], quoting Ben Boer and Graeme Wiffen, *Heritage law in Australia* (Oxford University Press, 2006) 265.

<sup>26</sup> Peter Yu, 'Plotting the future by learning from the past' in National Museum of Australia, *Encounters – Revealing stories of Aboriginal and Torres Strait Islander Objects from the British Museum* (National Museum of Australia Press, 2015) 132, quoted in Pearson, above n 13, 202.

<sup>27</sup> Ibid 131.

today; to be able to reference their own practices; to be able to build and continue those conversations about the continuity of necklace making, of basket making, the making of men's objects.<sup>28</sup>

The way that objects of Indigenous cultural heritage are managed in NCI collections therefore merits different processes and safeguards. These should include mandatory consultation with First Nations Peoples in relation to any proposal for disposal, enshrined in the NCIs' governing Acts.

### 3 *Shortcomings of other legislative protections*

There is widespread consensus that Australia's laws do not provide adequate protections for Aboriginal and Torres Strait Islander cultural heritage generally.<sup>29</sup> At least five different Commonwealth statutes seek to discrete aspects of Indigenous cultural heritage,<sup>30</sup> however these provide at best fragmented protections and intangible heritage receives "virtually no direct attention" in Australian legislation at any level of governance.<sup>31</sup> None of these laws currently mandate the type of engagement countenanced by this submission in a context of disposing of NCI collection items.

For example, the *Aboriginal and Torres Strait Islander Heritage Protection Act 1984* (Cth) (**ATSIHPA**) does empower the Minister, on application, in particular circumstances to make a declaration to protect and preserve an object of Indigenous significance from injury or desecration.<sup>32</sup> However, there are many possible scenarios where a disposal by a NCI would not necessarily result in injury or destruction, such as the making a gift or a sale. In such circumstances an order may not be able to be made under the *ATSIHPA* but consultation with First Nations Peoples should nonetheless occur.

Even where it does operate, the *ATSIHPA* serves as a defensive, not a proactive, protection, as compared with the consultation and engagement with First Nations Peoples that this submission proposes should occur as a mandatory pre-condition to considering any disposal by a NCI.

### 4 *The need to ensure NCIs retain appropriate discretion to manage and dispose of assets in a culturally-competent manner*

It is critical that NCIs are supported by statute to retain discretion to manage and dispose of assets in a culturally-competent manner, as the circumstances of each case may dictate.

Any conditions on disposals will likely need to operate both ways – ie, to offer protection in some circumstances from the destruction and loss of assets of Indigenous cultural heritage value (whether inadvertently or deliberately but contrary to the wishes of Traditional Owners) as well as to permit the gifting and repatriation of artefacts to Traditional Owners where considered appropriate.

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<sup>28</sup> Ibid 206.

<sup>29</sup> See generally Lauren Butterly and the Hon Justice Rachel Pepper, 'Are Courts Colourblind to Country? Indigenous Cultural Heritage, Environmental Law and the Australian Judicial System' (2017) 40(4) *UNSW Law Journal* 1313, 1315, citing Pamela Faye McGrath and Emma Lee, 'The Fate of Indigenous Placed-Based Heritage in the Era of Native Title' in Pamela Faye McGrath (ed), *The Right to Protect Sites: Indigenous Heritage Management in the Era of Native Title* (AIATSIS Research Publications, 2016) 1, cited in 'Colonial statutes and statues: Rethinking the law on Aboriginal cultural heritage in New South Wales' (2018) 23(3) *Art Antiquity and Law* 197.

<sup>30</sup> *Aboriginal and Torres Strait Islander Heritage Protection Act 1984* (Cth); *Protection of Moveable Cultural Heritage Act 1986* (Cth); *Environment Protection and Biodiversity Conservation Act 1999* (Cth); *Aboriginal Land Rights (Northern Territory) Act 1976* (Cth); *Native Title Act 1993* (Cth); Department of Agriculture, Water and the Environment, *Indigenous heritage laws* (Australian Government, 2020) <<https://www.environment.gov.au/heritage/laws/indigenous>>; see generally Elizabeth Pearson, 'Colonial statutes and statues: Rethinking the law on Aboriginal cultural heritage in New South Wales' (2018) 23(3) *Art Antiquity and Law* 197.

<sup>31</sup> B Boer and G Wiffen, 'The Content & Context of Heritage Law' in *Heritage Law in Australia* (Oxford University Press, 2006)22.

<sup>32</sup> Section 12.



This submission recommends that consideration be given to whether one method of achieving this, in addition to mandating consultation with First Nations-led organisations, would be a requirement for the Minister for Indigenous Australians to be involved in the decision-making process where the asset the subject of the disposal is an item of Indigenous cultural heritage or associated Indigenous intangible cultural heritage.

In the United Kingdom, statutes governing museums have been strictly construed to prevent museums from being able to release items from their collections, even in extenuating circumstances.<sup>33</sup> Sections 3(4) and 5 of the *British Museum Act 1963* (UK) severely restrict the Trustees' power to dispose of, including repatriate, objects in the British Museum, except in the very limited circumstances provided by the legislation. As a result, law reform was required to allow for the repatriation of Indigenous remains,<sup>34</sup> and to repatriate objects from the Museum's collection that had been stolen from lawful owners during the Nazi occupation in Europe.<sup>35</sup> Limitations continue to operate to prevent the repatriation of tangible items of Indigenous cultural heritage, which as outlined above often possess associated intangible cultural heritage attributes.

The Gweagal Shield in the British Museum's collection is a prime example.<sup>36</sup> The unadorned, wooden shield is believed to have been taken by the crew of the HM Bark *Endeavour* from the Gweagal People of the Dharawal Nation during Lieutenant James Cook's first encounter with Aboriginal Australians at Botany Bay in 1770.<sup>37</sup> This artefact came into the Museum's possession sometime between 1772-8,<sup>38</sup> some three decades before the Rosetta Stone and 40 years before the Parthenon Sculptures. It was loaned to the National Museum of Australia from 2015 to 2016 as part of the *Encounters* exhibit.

Even if, as has been suggested by some recently,<sup>39</sup> the Shield is not the same shield as was collected by the *Endeavour* crew, the Gweagal Shield is nonetheless significant as a rare surviving example of Aboriginal culture pre-dating colonisation.<sup>40</sup> It is one of the oldest Aboriginal artefacts to have been removed from the country<sup>41</sup> and one of the first examples of the British dispossession of Indigenous Australians that subsequently 'underwrote the development of the nation'<sup>42</sup>. The Shield is not considered to be a secret or sacred object.<sup>43</sup> Yet, it retains great cultural and historic value as a traditional object made by people of the longest continuing culture on earth. The Shield is made from red mangrove, a tropical species from the New South Wales North Coast 500 km. north of Kamay Botany Bay. Thus, it has also historical significance as a remnant of the exchange trade networks that existed in pre-colonial Australia.<sup>44</sup>

<sup>33</sup> *A-G v Trustees of the British Museum* [2005] EWHC 1089 (Ch) (27 May 2005), [38]–[39] (Sir Morritt V-C)

<sup>34</sup> *Human Tissue Act 2004* (UK).

<sup>35</sup> *Holocaust (Return of Cultural Objects) Act 2009* (UK).

<sup>36</sup> See generally Elizabeth Pearson, 'Old Wounds and New Endeavours: The Case for Repatriating the Gweagal Shield from the British Museum' (2016) 21(3) *Art Antiquity and Law* 201.

<sup>37</sup> Valerie Attenbrow and Caroline Cartwright, 'An Aboriginal Shield collected in 1770 at Kamay Botany Bay: an indicator of pre-colonial exchange systems in south-eastern Australia' (2014) 88 *Antiquity* 883, 883–8.

<sup>38</sup> National Museum of Australia, *Encounters Exhibition International Loan List* (20 Sept 2015) <[http://www.nma.gov.au/\\_\\_data/assets/pdf\\_file/0008/466127/Encounters-exhibition-international-loans-web.pdf](http://www.nma.gov.au/__data/assets/pdf_file/0008/466127/Encounters-exhibition-international-loans-web.pdf)>.

<sup>39</sup> See Nicholas Thomas, 'A Case of Identity: The Artefacts of the 1770 Kamay (Botany Bay) Encounter' (2018) 49 *Australian Historical Studies* 4; Maria Nugent and Gaye Sculthorpe, 'A Shield Loaded with History: Encounters, Objects and Exhibitions' (2018) 49(1) *Australian Historical Studies* 28, 34, 36, 43.

<sup>40</sup> Yu, above n 26, 32.

<sup>41</sup> Maria Nugent, 'Encounters in country' in Gaye Sculthorpe et al., *Indigenous Australia: Enduring Civilisation – The BP Exhibition* (British Museum Press, 2015) 128.

<sup>42</sup> *Mabo v Queensland (No 2)* (1992) 175 CLR 1, 69 (Brennan J).

<sup>43</sup> Ian Coates, 'Creating Encounters' on National Museum of Australia, *Encounters Blog: a place for conversation* (18 Nov 2015) <[http://www.nma.gov.au/exhibitions/encounters/blog/posts/creating\\_encounters](http://www.nma.gov.au/exhibitions/encounters/blog/posts/creating_encounters)>.

<sup>44</sup> Valerie Attenbrow and Caroline Cartwright, 'An Aboriginal Shield collected in 1770 at Kamay Botany Bay: an indicator of pre-colonial exchange systems in south-eastern Australia' (2014) 88 *Antiquity* 883, 890–2; Neil Chambers, 'Exploring Collections from the Endeavour voyage' in Neil Chambers, *Endeavouring Banks – Exploring collections from The*



The Shield was the subject of a parliamentary motion in the Senate in October 2016 to acknowledge the Gweagal People and their descendants as the 'rightful and lawful owners' of the Shield and to support its repatriation.<sup>45</sup>

Although not in a NCI collection, the Gweagal Shield is but one example of why museums as a general principle should have discretion to dispose of collection items in appropriate circumstances through gifts and repatriations to Traditional Owners.

This submission emphasises that any amendment to the NCIs' governing laws must ensure that any conditions imposed on the institution are not so restrictive as to prevent a NCI from taking action to dispose of an item by repatriation or gift where it is appropriate and culturally competent to do so.

#### 5 *What amendments should be made to the Bill?*

Rather than propose specific drafting amendments, this submission emphasises the importance of consulting and collaborating with First Nations Peoples through First Nations-led organisations and Traditional Owners groups with authority to speak for culture and particular objects.

This submission therefore recommends that the Committee engage and consult with First Nations-led organisations and NCIs to determine whether any additional requirements or non-monetary thresholds should be included in this Bill to safeguard both tangible and intangible Indigenous cultural heritage.

Thank you for your consideration of this important issue. If I can be of any further assistance to the Committee, please contact me via [REDACTED] or [REDACTED].

Yours sincerely

Elizabeth Pearson  
BA (UTS); JD (USyd); Solicitor (New South Wales)

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*Endeavour Voyage 1768- 1771* (Paul Holberton Publishing, University of Washington Press and Newsouth Publishing, 2016) 225.

<sup>45</sup> Commonwealth, *Parliamentary Debates*, Senate, 11 October 2016, 37 (Senator Rachel Siewert).