

2010-2011-2012

THE PARLIAMENT OF THE COMMONWEALTH OF AUSTRALIA

HOUSE OF REPRESENTATIVES

PROTECTION OF CULTURAL OBJECTS ON LOAN BILL 2012

EXPLANATORY MEMORANDUM

(Circulated by authority of the Minister for Regional Australia, Regional Development,
Local Government, the Minister for the Arts, the Honourable Simon Crean MP)

PROTECTION OF CULTURAL OBJECTS ON LOAN BILL 2012

OUTLINE

The Protection of Cultural Objects on Loan Bill 2012 (the Bill) provides for the establishment of a scheme to provide protection for cultural objects on loan. While the objects are in Australia the legislation limits the circumstances in which lenders, exhibition facilitators, exhibiting institutions and people working for them can lose ownership, physical possession, custody or control of the objects because of:

- legal proceedings in Australian or foreign courts;
- the exercise of certain powers (such as powers of seizure) under Commonwealth, State and Territory laws; or
- the operation of such laws.

This scheme will operate as an approval based scheme. Objects normally in a foreign country, will be protected if they are imported into Australia on loan for temporary public exhibition under arrangements involving institutions approved by the Minister. Certain institutions will be able to apply to the Minister for approval and the Minister may approve the institution for a specified period of not more than 60 months. Objects of any description will be protected from the time of their importation into Australia to their export, to a maximum of two years. Objects on loan for a period of longer than two years will not be protected unless exceptional circumstances exist.

The legislation addresses a significant obstacle that Australia's major cultural institutions (such as museums, galleries and libraries) face in securing the loan of foreign objects and aligns Australia with an emerging international standard to provide protection for cultural objects on loan. Under existing Commonwealth legislation, protection for objects on loan only applies in specific and limited circumstances under the *Protection of Movable Cultural Heritage Act 1986*. The absence of more comprehensive legislation has made it increasingly difficult for those institutions to secure foreign loans.

Loans of cultural objects, such as paintings, prints, sculptures, textiles and manuscripts, are essential for Australia's major museums and galleries to consistently deliver first-class exhibition programs. They are also a key way in which institutions can provide Australians with access to a comprehensive range of objects that may not be represented in Australian collections. This is particularly the case for major international works of art which have increased significantly in value. Those works can be underrepresented in Australia's public collections as they rarely come on the international art market and when they do they can be prohibitively expensive such that Australian institutions may not be able to compete for their purchase.

Exhibitions involving international loans play an important role in the life of Australia's collecting institutions and they are a popular drawcard with the public. The inability to secure loans of foreign cultural objects limits the academic, educational and economic potential of exhibitions and puts at risk the substantial cultural, social and economic benefits that major international exhibitions deliver.

The scheme established by this Bill will address the current barriers that are inhibiting foreign lenders from agreeing to loans by providing a level of protection that would have the effect of encouraging foreign lenders to loan objects to Australia's major collecting institutions for temporary public exhibition.

Financial impact statement

The Protection of Cultural Objects on Loan Bill 2012 is not expected to have an impact on Commonwealth expenditure.

Statement of Compatibility with Human Rights

This Bill is compatible with the human rights and freedoms recognised or declared in the international instruments listed in section 3 of the *Human Rights (Parliamentary Scrutiny) Act 2011*.

Overview of the Bill

The Bill establishes a scheme to provide protection for cultural objects on loan. While the objects are in Australia the legislation limits the circumstances in which lenders, exhibition facilitators, exhibiting institutions and people working for them can lose ownership, physical possession, custody or control of the objects because of:

- legal proceedings in Australian or foreign courts;
- the exercise of certain powers (such as powers of seizure) under Commonwealth, State and Territory laws; or
- the operation of such laws.

The Bill pursues the objective of enhancing cultural life in Australia and promoting the right to enjoy and benefit from culture by increasing access to objects brought into Australia under loan arrangements for temporary public exhibition.

Human rights implications

The Bill engages the following human rights:

Right to enjoy and benefit from culture

The Bill engages the right to enjoy and benefit from culture, including the right to take part in cultural life.

Article 15(1)(a) of the International Covenant on Economic, Social and Cultural Rights (ICESCR) recognises the right of everyone to take part in cultural life. Article 15(2) states that the steps to be taken by parties to the ICESCR to achieve the full realisation of the right shall include those necessary for the conservation, the development and the diffusion of science and culture. Article 15(4) states that parties to the ICESCR recognise the benefits to be derived from the encouragement and development of international contacts and co-operation in the scientific and cultural fields.

To the extent that the right to enjoy and benefit from culture is engaged, this right is promoted by the Bill. The Bill will enhance cultural life in Australia by addressing a significant obstacle Australia's major museums and galleries face in securing the loan of foreign cultural objects.

To that end, the scheme established by the Bill overcomes the limitation in existing Commonwealth legislation which provides protection for objects on loan from overseas only in specific and limited circumstances. The absence of more comprehensive

legislation has made it increasingly difficult for institutions to secure loans as they are not able to provide assurances to lenders that objects will be returned at the end of the loan period.

The Bill supports cultural exchange and international co-operation. Loans of cultural objects, such as artworks and artefacts, are an important element of cultural diplomacy and can strengthen bilateral and multilateral relations. They are also an important way for cultural institutions to provide Australians with access to a comprehensive range of cultural objects that are not represented in Australian collections.

Right to an effective remedy

The Bill engages the right to an effective legal remedy.

Article 2(3) of the International Covenant on Civil and Political Rights (ICCPR) imposes an obligation on countries to provide effective remedies for the victims of human rights violations. Article 6 of the International Convention on the Elimination of All Forms of Racial Discrimination (ICERD) imposes an obligation on countries to provide everyone in their jurisdiction with effective protection and remedies against any acts of racial discrimination which violate human rights as well as the right to seek just and adequate reparation or satisfaction for any damage suffered as a result of such discrimination.

The Bill pursues the legitimate objective of encouraging the loan of objects from overseas for temporary public exhibition in Australia. To the extent that the Bill limits the right to an effective legal remedy, those limitations are reasonable, necessary and proportionate and the limitations are not arbitrary.

The Bill provides a temporary limitation on the right of a person to commence action through the Australian legal system, or to enforce a judgement or order of a federal court or a court of a State, Territory or foreign country, while an object which is protected under Part 2 of the Bill is in Australia's jurisdiction. This could potentially include persons or groups who may consider they have experienced a loss of cultural property as a result of human rights violations in the past. Circumstances where that may have occurred could include if cultural objects were removed during civil war, conflict or were compulsorily acquired by the state.

This limitation will not apply to significant Australian cultural heritage material defined as Class A objects under the *Protection of Movable Cultural Heritage Act 1986* (PMCH Act). The exclusion of Class A objects from the application of the legislation recognises that Aboriginal and Torres Strait Islander cultural material in that category is particularly sensitive and culturally important. Material in that category includes human remains, bark and log coffins, secret sacred ritual material, rock art and dendroglyphs (carved trees).

The degree of limitation on other objects is considered proportionate to the objective of the Bill as the limitation on the ability to take action while the object is in Australia is

necessary to achieve the stated objective of enhancing access to cultural objects. The limitation on the ability to take action through the Australian legal system, for the limited period of the loan, has been balanced against the public interest of the significant social, economic and cultural benefits that can be delivered as a result of Australian institutions being able to secure loans.

Additionally, to balance these measures, the Bill includes provisions enabling regulations to be made in relation to borrowing institutions consulting with persons or groups who may have an interest in proposed loans as well as requirements to publish certain information on proposed loans prior to their importation into Australia (clause 21 refers).

Paragraph 21(3)(a) provides that regulations may be made for the purposes of requiring consultation by borrowing institutions with members of communities, or organisations representing them, about proposed loans of objects relating to those communities. This is relevant to proposed loans of objects that may be of particular interest to certain persons or groups within the community, including persons or groups who may consider they have experienced a loss of cultural property as a result of human rights violations in the past. Requiring consultation prior to importation provides a mechanism for the identification of any issues in relation to a proposed loan as well as opportunities for members of communities to raise any concerns about the proposed loan.

This provision will also enable specific consultation requirements to be developed in relation to proposed loans of Aboriginal and Torres Strait Islander objects. Those requirements will provide opportunities for Indigenous people who may have an interest in objects proposed for loan to learn about and be actively engaged in discussions on proposed loans prior to their importation into Australia.

In addition, paragraph 21(3)(c) provides that regulations may be made requiring borrowing institutions to publish information about objects proposed to be lent to them. The publication of information about an object that will be protected under Part 2 of the Bill, prior to its importation into Australia, will enable any person to raise questions about the object's history and ownership. This is an important transparency mechanism and provides information to assist persons who may be victims of human rights violations to locate objects they believe were stolen, looted or otherwise unlawfully taken.

The Bill does not affect the right to bring a claim in the jurisdiction where the object is usually kept.

The Bill does not affect the ability of persons or groups to make claims in relation to objects which are already in collections in Australia as the Bill does not apply to those objects.

Right to self-determination

The Bill engages the right to self-determination, particularly the right to pursue cultural development.

Article 1 of the International Covenant on Civil and Political Rights (ICCPR) and Article 1 of the International Covenant on Economic, Social and Cultural Rights (ICESCR) recognise a person's right to self-determination and by virtue of that right their freedom to pursue their economic, social and cultural development.

As stated in the section on the right to an effective remedy, the Bill provides a temporary limitation on the right of a person to commence action through the Australian legal system (clause 9), or to enforce a judgement or order of a federal court or a court of a State, Territory or foreign country (clause 10), while an object protected under Part 2 of the Bill is in Australia's jurisdiction.

In recognition that some Aboriginal and Torres Strait Islander material is particularly sensitive and culturally important, the Bill will not apply to significant Australian heritage objects that are identified as Class A objects under the PMCH Act. Aboriginal and Torres Strait Islander material in that category includes human remains, bark and log coffins, secret sacred ritual material, rock art and dendroglyphs.

The inclusion of other Aboriginal and Torres Strait Islander objects in this Bill has been made to encourage foreign lenders who hold such objects in their collections to consider lending those objects to Australian institutions for temporary public exhibition. This will increase awareness of those objects in foreign collections and provide an opportunity for members of Aboriginal and Torres Strait Islander communities to see and connect with objects from their cultural heritage that may not otherwise be loaned to Australian institutions. If Aboriginal and Torres Strait Islander objects were excluded from the Bill, lenders may not consent to loan those objects to Australian institutions and their presence in foreign collections may remain unknown.

The Bill also includes provisions enabling regulations to be made requiring borrowing institutions to consult with groups who may have an interest in proposed loans as well as requiring that borrowing institutions publish certain information on proposed loans prior to their importation into Australia (clause 21 refers). That will enable specific consultation requirements to be developed in relation to proposed loans of Aboriginal and Torres Strait Islander objects. These safeguards provide an opportunity for persons and groups who may have an interest in an object which is the subject of a proposed loan to raise concerns about its history and ownership prior to a decision being made on the importation of the object. The publication provisions are an important transparency mechanism and provide information to assist persons who may be trying to locate objects they believe may have been stolen, looted or otherwise unlawfully taken.

Right to a fair hearing

The Bill engages the right to a fair hearing, particularly the right to a fair and public hearing before a competent court. Article 14(1) of the International Covenant on Civil and Political Rights (ICCPR) provides that all persons shall be equal before the courts and tribunals and that in the determination of any criminal or civil proceedings that everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law.

The Bill provides a temporary limitation on the right of a person to commence legal proceedings through the Australian legal system (clause 9), or to enforce a judgement or order of a federal court or a court of a State, Territory or foreign country (clause 10), while an object which is protected under Part 2 of the Bill is in Australia's jurisdiction. Some persons may consider that the Bill affects their right to a fair hearing because it will limit their ability to commence proceedings or enforce judgements relating to objects protected under Part 2 of the Bill while they are in Australia.

To the extent the Bill limits the right to a fair hearing, particularly the right to real and effective access to a court for civil claims, that limitation is reasonable, necessary and proportionate. The Bill merely limits court action and the enforcement of judgements or orders while an object is in Australia and does not prevent claims from being started or action being taken to enforce judgements once the object is exported out of Australia. The protection provided by the legislation in this respect is only temporary.

Other than the limited exceptions for some protected persons for an object (subclauses 9(3) and 10(3)), the Bill does not discriminate against particular groups of people in limiting the commencement of legal proceedings or the enforcement of judgements and applies equally to all persons within Australia. In addition, the clauses in the Bill which provide protection from suit and protection from enforcement of judgements (namely, clauses 9 and 10) are not designed to alter the jurisdiction of Australia's courts. The relevant clauses are not addressed to the courts themselves and do not detract from the power of courts to control their own processes nor does the Bill seek to change the character or constitution of the courts or their nature as judicial organs. The limitation on the ability to take action through the Australian legal system for the limited period of the loan, has been balanced against the public interest of the significant social, economic and cultural benefits that can be delivered as a result of Australian institutions being able to secure loans.

Conclusion

This Bill promotes the right to enjoy and benefit from culture by increasing access to objects brought into Australia under a loan arrangement for temporary public exhibition. The Bill is compatible with human rights because it advances the protection of human rights and to the extent that it may also limit human rights, those limitations are reasonable, necessary and proportionate.

NOTES ON CLAUSES

Part 1 - Preliminary

Clause 1 – Short title

The Bill, when enacted, should be cited as the *Protection of Cultural Objects on Loan Act 2012*.

Clause 2 – Commencement

This clause provides for the commencement of the Bill.

- Item 1 of the table in subclause 2(1) provides that clause 1 (Short title) and clause 2 (Commencement) and any other clause of the Bill not provided for are to commence on Royal Assent.
- Item 2 of the table provides that clauses 3 to 21 (the remaining clauses of the Bill) are to commence on a single day to be fixed by Proclamation. If the provisions do not commence within the period of 6 months beginning on the day the Bill receives the Royal Assent, they commence on the day after the end of that period.

Clause 3 – Objects of this Act

This clause sets out the main purpose of the Bill, which is to encourage lenders to loan objects for temporary public exhibition in Australia. Such loans are to be made under arrangements involving certain institutions.

The Bill achieves its objective by limiting the circumstances in which ownership or physical possession, custody or control of the objects can be affected while they are in Australia.

Clause 4 – Simplified outline

This clause provides a simplified outline of the Bill. It has been included to aid understanding of the relevant clauses. It explains that the Bill deals with objects that are normally in a foreign country but which are imported into Australia under a loan arrangement for temporary public exhibition. The object must be imported under arrangements made by an institution that has been approved by the Minister.

Part 2 limits the circumstances in which specified persons involved in a loan can lose ownership or physical possession, custody or control of the objects.

Part 3 deals with the approval (and the end of such approval) of institutions by the Minister.

Part 4 deals with miscellaneous matters.

Clause 5 - Definitions

Clause 5 sets out definitions of key terms used in the Bill. Some of the more significant definitions are:

- “borrowing institution” is an organisation in Australia that collects and publicly exhibits objects that are of interest for archaeological, artistic, ethnological, historical, literary, scientific or technological reasons. It must also be either established by a law of the Commonwealth, a State or a Territory (except for those laws prescribed in the regulations) or be prescribed in the regulations. A borrowing institution could include, but is not limited to, a Commonwealth, State or Territory art gallery, museum, library or archive and it may be a legal person or not.
- “exhibiting institution” is a borrowing institution that has made arrangements for the temporary public exhibition of an object in Australia. This term is used to explain a borrowing institution’s relationship with an object.
- “exhibition facilitator” for an object is a person who has a temporary loan arrangement for the object with a lender of the object and also has a temporary loan arrangement for the object with an exhibiting institution for the object or the parent of such an institution. An exhibition facilitator is not a lender of the object, an exhibiting institution for the object or the parent of such an institution. An exhibition facilitator is a person who carries on a business (whether or not for profit) of making arrangements for temporary public exhibition in Australia of objects from collections outside of Australia. Exhibition facilitator has been defined because institutions do not always make the arrangements for all the temporary public exhibitions that they hold. From time to time an institution may be involved in a loan arrangement that has been organised by another party; an exhibition facilitator.
- “lender” of an object is either an individual not ordinarily resident in Australia; a corporation incorporated by or under a law of a foreign country; or a body politic of a foreign country (or part of a foreign country). The term has been defined in this manner as the Bill only applies to objects that are normally in a foreign country. The definition makes it clear that a lender must be a party to the temporary loan arrangement through which the object will be imported into Australia and it sets out the other parties that must be subject to the temporary loan arrangement. The definition also makes it clear that the lender of an object would reasonably be expected to have physical possession, custody or control of the object outside of Australia for the period of the loan. A lender could include but is not limited to an individual not ordinarily resident in Australia, a national gallery or museum in a foreign country or a foreign corporation.
- “parent” is a term that is specific to a borrowing institution that is not a person. It means, if the institution is a Department of State, or part of such a department, of the Commonwealth, a State or a Territory – the Commonwealth, State or Territory (as appropriate); or if the operations of the institution are a distinct part of the operations of a body corporate – that body. For example, if a Commonwealth borrowing institution is not a separate legal entity but part of a Department of State then the Commonwealth would be its parent. An example in relation to a body corporate would be if there was an institution that operated as a separately branded art gallery within a larger body corporate, the parent of the gallery would be the body corporate.

- “protected person” for an object is a person who is involved in the loan of the object or is engaged to do certain things in relation to an object while it is in Australia. The term has been defined to include:
 - the lender of the object or an officer, employee or agent of a lender of the object who accompanies the object for some or all of the time it is on loan; or
 - an exhibition facilitator for the object or an exhibiting institution for the object or the parent of such an institution or an officer, employee, agent or delegate of such an institution or the parent of such an institution, or
 - a person (or an officer, employee, agent or delegate of the person) engaged by a lender of the object, an exhibition facilitator for the object or an exhibiting institution for the object or the parent of such an institution to do certain things as specified in that definition.

Clause 6 – This Act binds the Crown

Clause 6 explains that the Act binds the Crown in each of its capacities. That is, it binds the Crown in right of the Commonwealth, of each of the States, of the Australian Capital Territory, of the Northern Territory and of Norfolk Island.

Clause 7 – Extension to external Territories

Clause 7 makes it clear that the operation of the Bill will extend to every external territory of Australia. As the Bill does not extend beyond Australia’s external territories, it will not prevent action being taken outside Australian territory, such as under the law of the state where the object on loan is usually located or under the law of a third state while the cultural object is in transit to or from Australia.

Part 2 – Protection

Clause 8 – Application of this Part

Clause 8 deals with the circumstances when Part 2, which relates to protection, will apply to an object and when that protection will cease.

Subclause 8(1)

Subclause 8(1) sets out the circumstances that must be met for protection to apply.

Paragraph 8(1)(a)

Paragraph 8(1)(a) provides that Part 2 will only apply to an object that is imported into Australia on loan under a temporary loan arrangement between a lender and either or both an:

- exhibiting institution or its parent (sub-paragraph 8(1)(a)(i));
- exhibition facilitator that has an arrangement for the object with an exhibiting institution or their parent (sub-paragraph 8(1)(a)(ii)).

Part 2 will apply if an object is imported into Australia for temporary public exhibition involving a single exhibiting institution as well as if it is imported for a temporary public exhibition involving multiple exhibiting institutions.

Examples of some of the temporary loan arrangements captured by this paragraph are set out below.

- The object is imported under a temporary loan arrangement between the lender and an exhibiting institution for temporary public exhibition. The object then moves to another venue for temporary public exhibition as part of that same loan arrangement.
- The object is imported under a temporary loan arrangement between the lender and an exhibiting institution for temporary public exhibition. The object then moves to another exhibiting institution for temporary public exhibition under a separate temporary loan arrangement between the lender and the second exhibiting institution. For the second exhibition, the objects would already have been imported into Australia and would merely be moved from the first exhibiting institution to the second exhibiting institution.
- The object is imported under a temporary loan arrangement involving the lender, an exhibition facilitator and an exhibiting institution. The object then moves to another exhibiting institution for temporary public exhibition under a separate temporary loan arrangement between the lender, an exhibition facilitator and a second exhibiting institution. This situation could also occur where there are two parts to the temporary loan arrangements, for example, if there is a temporary loan arrangement between the lender and exhibition facilitator and then another temporary loan arrangement between the exhibition facilitator and exhibiting institution. For the second exhibiting institution the objects would already have been imported into Australia and would merely be moved from the first exhibiting institution to the second one.

The effect of paragraph 8(1)(a) is to limit the application of Part 2 of the Bill to objects that normally reside in a foreign country and that are part of a temporary loan arrangement. Providing protection to objects that are normally in foreign countries responds to the obstacle that Australia's major collecting institutions have faced in securing loans of foreign objects. Loans of those objects for temporary public exhibition are essential to the ability of Australia's major institutions to provide access to a broad range of cultural objects and to deliver their exhibition programs. This impact is most significant on the ability of Australia's institutions to deliver major international exhibitions, which in turn deliver significant social, economic and cultural benefits to the local economies and communities where the institutions are located.

The effect of sub-paragraph 8(1)(a)(ii) is that objects which are part of an exhibition organised by an exhibition facilitator for the object will also be covered by Part 2 of the Bill where the exhibition facilitator has an arrangement with either an exhibiting institution or the parent of such an institution. This provision has been included in recognition of the fact that institutions do not necessarily directly organise all of the exhibitions that they host. From time to time, an institution may host an exhibition that

has been organised by an exhibition facilitator. In that circumstance, the loan arrangements can vary. For example, there may be a loan agreement between the lender and the exhibition facilitator and the exhibition facilitator may then have another separate agreement with the exhibiting institution. Alternatively, there may be a loan agreement involving all three parties to the loan; the lender, the exhibition facilitator and the exhibiting institution.

Paragraph 8(1)(b)

Paragraph 8(1)(b) provides that Part 2 will only apply to an object if the object is imported only or mainly for the purpose of temporary public exhibition. Unless exceptional circumstances exist, Part 2 will cease to apply to an object at the end of a period of two years (subclause 8(2) refers). This means that Part 2 will not apply to objects on long term loan.

This provision ensures that Part 2 of the Bill can still apply to an object even if part of the reason for its importation is for a purpose other than temporary public exhibition. Examples where this may occur would be if an object is imported and undergoes conservation treatment prior to being placed on temporary public exhibition. Another example would be if an object needs to be stored following importation as it will not immediately be placed on public exhibition. The need to temporarily store objects can arise with touring exhibitions, where objects may arrive in Australia following the end of an exhibition in another country but where the Australian institution is not ready for the immediate exhibition of the object.

Paragraph 8(1)(c)

Paragraph 8(1)(c) makes it clear that for Part 2 of the Bill to apply to an object the institution must be approved under Part 3 of the Bill at the time when the object is imported into Australia.

Paragraph 8(1)(d)

Paragraph 8(1)(d) deals with the extent to which the Bill is supported by the Constitution. It means that the operative provisions in Part 2 will apply only in the circumstances where their application is within the constitutional power of the Commonwealth Parliament. The inclusion of this provision means that the legislation should be read as only applying to the circumstances in which the Commonwealth has constitutional power. For Part 2 to apply, one or more of the following circumstances must exist:

- the loan is in the course of trade or commerce between Australia and a foreign country;
- the lender of the object is a foreign corporation within the meaning of paragraph 51(xx) of the Constitution;
- the institution, the parent of the institution or the exhibition facilitator is a corporation to which paragraph 51(xx) of the Constitution applies or a corporation established by a law of the Commonwealth or a Territory;
- the parent of the institution or the exhibition facilitator is the Commonwealth or a Territory;

- the public exhibition of the object is to occur, is occurring or has occurred in a Territory;
- the public exhibition of the object is to occur, is occurring or has occurred in a place acquired by the Commonwealth for public purposes within the meaning of paragraph 52(i) of the Constitution;
- Part 2 is appropriate and adapted to giving effect to Australia's obligations under an agreement that is between Australia and one or more foreign countries or international organisations and that is relevant to the loan of the object by the lender.

Paragraph 8(1)(e)

Paragraph 8(1)(e) specifies that Part 2 will apply to an object so long as importation of that object does not contravene a law of the Commonwealth, that gives effect to an international agreement, and that law is prescribed by regulation for the purpose of the paragraph. This provision will enable Australia to comply with its international treaty obligations by prescribing relevant legislation by regulation.

Paragraph 8(1)(f)

Paragraph 8(1)(f) specifies that the Part will apply so long as the object is not a Class A object as defined under the *Protection of Movable Cultural Heritage Act 1986* (PMCH Act) when the object is imported. The exclusion of Class A objects from the application of the Bill recognises that those objects have already been identified as significant Australian heritage objects and for that reason, it is considered appropriate that they will continue to be regulated by the PMCH Act. It also recognises that the Aboriginal and Torres Strait Islander cultural material in that category is particularly sensitive and culturally important. It includes human remains, bark and log coffins, secret sacred ritual material, rock art and dendroglyphs (carved trees). Non-Indigenous Class A objects are excluded from the application of the legislation and include each piece of Ned Kelly's armour and specified Victoria Cross medals.

Paragraph 8(1)(g)

Paragraph 8(1)(g) allows an institution to give a written notice to the Minister specifying objects to which Part 2 of the Bill is not to apply. Such a notice must be made before the object is imported, in the form approved by the Minister, and cannot have been withdrawn before the object is imported. This provision has been included as there may be circumstances where an institution determines that they do not need Part 2 of the Bill to apply to certain objects. By opting-out of the application of Part 2 of the Bill for certain objects, the institution will not be required to meet any of the associated administrative requirements for objects that are protected under the scheme, such as the publication or consultation requirements which are proposed to be specified by regulation (paragraph 21(3) refers).

Subclause 8(2)

Subclause 8(2) sets out the circumstances in which Part 2 will cease to apply to the object.

Paragraph 8(2)(a)

Paragraph 8(2)(a) provides that Part 2 of the Bill will cease to apply to the object either at the end of 24 months, starting on the day the object is imported into Australia, or upon the export of the object from Australia. The Part will cease to apply upon whichever event occurs first. This means that if an object is not exported within 24 months of its importation into Australia, Part 2 will automatically cease to have effect at that time. The application of Part 2 has been limited in this way as the purpose of the scheme is to protect objects on loan for temporary public exhibition and most of those arrangements are for periods of less than 24 months.

Paragraph 8(2)(b)

Paragraph 8(2)(b) enables the Minister to declare, by notice published on the Department's website, that Part 2 will cease to apply to an object at a time that is worked out in accordance with the declaration and that is at least 24 months after the day the object was imported into Australia. Such a declaration must be made before the end of 24 months, starting on the day the object is imported into Australia, or before the export of the object from Australia. This provision is included to allow the possibility of an extension to the period of protection in exceptional circumstances (see paragraph 8(3)(b)).

Subclause 8(3)

Subclause 8(3) provides that the Minister may make a declaration for the purposes of paragraph 8(2)(b) only upon application by the exhibiting institution and only if the Minister is satisfied that exceptional circumstances justify making the declaration.

An example of where the Minister might make such a declaration would be if the exhibiting institution made an application to the Minister that there was a requirement for conservation work to be undertaken to repair damage that had occurred to an object during the loan period, where the time required for that work to be undertaken would result in the object being in Australia for more than 24 months and the Minister was satisfied that the conservation work was an exceptional circumstance that justified making the declaration. Another example may be if the object(s) were part of an exhibition that was touring to multiple venues in Australia and the cumulative period of time the object(s) would be in Australia was to exceed 24 months.

Subclauses 8(4)

A declaration made by the Minister under subclause 8(3) is administrative in effect and therefore is not a legislative instrument under section 5 of the *Legislative Instruments Act 2003*. Subclause 8(4) confirms this and is included to assist readers.

Subclause 8(5)

Subclause 8(5) explains that an object is neither imported into Australia nor exported from Australia merely because it is moved between an external Territory and either a State or an internal Territory.

Clause 9 – Protection from suit

This clause sets out the circumstances when an object will be protected from suit. In order to provide comprehensive protection for objects while they are on temporary loan, the Bill includes provisions that limit suit claims.

Clause 9 provides that proceedings for an action *in personam* (subclause 9(1) refers) relating to the object cannot be started against a protected person (clause 5 defines ‘protected person’), and proceedings for an action *in rem* (subclause 9(2) refers) relating to the object cannot be started.

Subclause 9(1)

Subclause 9(1) prevents proceedings for an action *in personam* relating to the object being started against protected persons for the object. This means that proceedings will not be able to be brought against protected persons involved in the loan of the object, such as the lender of the object, the exhibition facilitator for the object, an exhibiting institution for the object or other persons who fall within the definition of protected person (clause 5 refers).

Subclause 9(2)

Subclause 9(2) prevents proceedings for an action *in rem* being started in relation to the object. This provision prevents action being brought against a person where the purpose of the action is to determine title or to affect interests in specific property. An example of an action *in rem* would be if a creditor were to bring proceedings to try to claim an actual object due to the lender having unpaid debts they wished to pursue. These types of claims can be difficult for institutions to identify when negotiating loans, and for this reason it may not be feasible for the borrowing institution to fully investigate all such possible situations.

Subclause 9(3)

Subclause 9(3) provides an exception to the circumstances preventing the commencement of proceedings in subclauses 9(1) and 9(2) by permitting a protected person for the object to start proceedings against another protected person for the object. This has been included to enable action to resolve claims, such as the resolution of a contractual dispute. The Bill includes an example of an exhibiting institution starting an action against a person it has engaged to transport the object.

Subclause 9(3) sets out the circumstances in which a person who is a protected person for the object, because of a particular paragraph of the definition of protected person (clause 5 refers), can start proceedings against another person who is also a protected person for the object because of that paragraph or a later paragraph.

This hierarchy of protected persons recognises the fact that some protected persons have a higher claim than others to start proceedings and has been included to protect the lender. At times, people lower in the hierarchy will have physical possession of the object and could elect to retain custody of the object. Without this exception the lender

(or a person higher in the hierarchy) would be unable to start an action to reclaim the object.

The hierarchy is demonstrated in the example in the Bill, where the exhibiting institution is able to start action against the transport contractor but the transport contractor cannot start action against the exhibiting institution because it is in a lower paragraph in the definition of protected person (see clause 5).

Subclause 9(4)

Subclause 9(4) provides an exception to the circumstances preventing the commencement of proceedings in subclauses 9(1) and 9(2) by permitting proceedings under the *Proceeds of Crime Act 2002* or proceedings prescribed by regulation. The *Proceeds of Crime Act 2002* establishes a scheme to trace, restrain and confiscate the proceeds of crime against Commonwealth law and, in some cases, confiscate proceeds of crime against foreign laws or State laws. Proceedings under the *Proceeds of Crime Act 2002* have been exempted from the Bill in recognition of Australia's international obligations in relation to proceeds of crime and because the Bill is not intended to provide protection for criminal action.

An exception is also provided for proceedings prescribed by regulation. The ability to prescribe proceedings by regulation has been included as it provides a mechanism to enable proceedings to be excluded following the commencement of the Bill. This exception also recognises the possibility of the enactment of future laws to which the Commonwealth may not want subclause 9(1) and (2) to apply.

Subclause 9(5)

Subclause 9(5) explains that clause 9 applies to the starting of proceedings in a federal court or a court of a State or Territory by claim, cross-claim or otherwise. Preventing action being commenced in federal, State and Territory courts enables the object to be protected from point to point, including across jurisdictional boundaries, following importation into Australia. It is not uncommon for objects on loan to be transported across jurisdictional boundaries. This occurs when objects tour to multiple venues, however, it can also occur if an object arrives in one city and is transported to another city for exhibition. An example would be a shipment of paintings arriving at Sydney international airport and being transported by air or road to an exhibition being held in Canberra.

Clause 10 – Protection from enforcement of judgements and orders

This clause sets out the circumstances in which an object will be protected from the enforcement of judgements and orders.

Subclause 10(1)

Subclause 10(1) provides that an act cannot be done in relation to the object to enforce a judgement or order of a federal court or a court of a State, Territory or foreign country that is a judgement or order:

- *in personam*, that is, against a protected person for the object; or

- *in rem*, that is, relating to the object itself.

The effect of subclause 10(1) is that a judgement or order of a federal court or a court of a State or Territory or foreign country that relates to an object cannot be enforced against the object. Preventing the enforcement of such judgements or orders enables the object to be protected from point to point, including across jurisdictional boundaries, following importation into Australia.

An example of the effect of this provision is where a judgement or order has been given by a State court in relation to an object. The judgement or order would not be able to be enforced against the object so long as Part 2 of the Bill applied to the object.

Subclause 10(2)

Subclause 10(2) sets out exceptions to the prevention on enforcement of actions in subclause 10(1) for some foreign judgements and awards. By this provision, enforcement action is not prevented under:

- Part 2 of the *Foreign Judgments Act 1991* to enforce a judgement of a superior court of a country in relation to which that Part extends or an inferior court to which that Part extends;
- Part 7 of the *Trans-Tasman Proceedings Act 2010* to enforce a judgement of a court of New Zealand; or
- Part II of the *International Arbitration Act 1974*.

These exceptions have been included in the Bill to ensure that Australia is not in breach of its international obligations or reciprocal arrangements that it has with other countries for recognition and enforcement of judgements.

The *Foreign Judgments Act 1991* recognises reciprocal arrangements that Australia has with other countries for the recognition and enforcement of judgements. The *Foreign Judgments Act 1991* only currently allows for the registration of judgements in Australia from courts that are prescribed in the *Foreign Judgments Regulations 1992* for a fixed monetary sum.

The *Trans-Tasman Proceedings Act 2010* is underpinned by a bilateral treaty, the *Agreement between the Government of Australia and the Government of New Zealand on Trans-Tasman Court Proceedings and Regulatory Enforcement*. Once the Act commences, it will provide for New Zealand judgements and orders to be registered and enforced in Australia.

Part 2 of the *International Arbitration Act 1974* relates to the enforcement of foreign awards under the Convention on the Recognition and Enforcement of Foreign Arbitral Awards. Australia is a contracting state for that Convention.

Subclause 10(3)

Subclause 10(3) sets out the circumstances in which the enforcement of a judgement or order in favour of a protected person for the object is not prevented. This exception

aligns with the exception which allows protected persons to start proceedings subject to a hierarchy (subclause 9(3) refers). As with subclause 9(3), there is a hierarchy in relation to the enforcement of judgements and orders favouring protected persons. The hierarchy means that a judgement or order in favour of a protected person for the object will only be able to be enforced against a protected person for the object if that protected person is in the same paragraph as them in the definition of protected person or a later paragraph.

Subclause 10(4)

Subclause 10(4) sets out exceptions relating to the enforcement of certain other judgements and orders. As with clause 9, an exception is provided for an order made under the *Proceeds of Crime Act 2002*. Orders made under that act have been exempted as Australia has international obligations in relation to proceeds of crime.

An exception is also provided for a judgement or order made in proceedings prescribed by regulation for the purposes of the subsection. The ability to prescribe proceedings by regulation has been included as a mechanism to enable proceedings to be excluded following the commencement of the scheme. This exception recognises the possibility of the enactment of future laws to which the Commonwealth may not want subclause 10(1) and (2) to apply. An example where this provision may be utilised would be if Australia became a party to a new international agreement relevant to the enforcement of judgements and orders and then enacted legislation to give effect to its obligations under the agreement.

Clause 11 – Protection from seizure under statutory powers

This clause sets out the protection that an object will have from seizure under certain statutory powers.

Subclause 11(1)

Subclause 11(1) provides that an object cannot be seized under a law of the Commonwealth, a State or a Territory. Protection is provided against action under State and Territory legislation as well as Commonwealth legislation in order to ensure that there is comprehensive protection from seizure for objects on loan. This provision will enable the object to be protected from point to point, including across jurisdictional boundaries, following importation into Australia.

Subclause 11(2)

Subclause 11(2) sets out the exceptions to the protection from seizure in subclause 11(1). It does not prevent seizure under:

- Part IAA of the *Crimes Act 1914*; or
- Part 3-5 of the *Proceeds of Crime Act 2002*; or
- a law of the Commonwealth, a State or a Territory that gives a police officer (however described) a power of seizure and does not give that power to anyone other than a police officer; or
- a law of the Commonwealth, a State or a Territory prescribed by regulation for the purposes of this subsection.

The exceptions have been included to recognise that there may be circumstances where it is appropriate that police officers retain the ability to seize an object. Seizure is also not prevented if the action is undertaken under a law of the Commonwealth, a State or a Territory that gives a police officer a power of seizure and does not give that power to anyone other than a police officer. An example of where seizure in this circumstance may be required would be if an object was used in a crime, or was otherwise required to be held as evidence of a crime committed during the period of the loan and needed to be seized by a police officer and held as evidence. Another example (although highly unlikely) of where this provision would be relevant is if an object on loan was used in a homicide or serious assault, and where the infliction of injury or cause of death are crucial points of proof and the object is required in court as evidence in criminal proceedings.

Clause 12 – Protection from forfeiture

Clause 12 sets out the protection from forfeiture that will be provided to objects. It provides that an object cannot be forfeited because of a law of the Commonwealth, a State or a Territory, except in the limited circumstances set out in subclause 12(2).

Subclause 12(1)

Subclause 12(1) prevents forfeiture under State and Territory legislation as well as Commonwealth legislation. This enables the object to be protected from forfeiture from point to point, including across jurisdictional boundaries, following importation into Australia.

Subclause 12(2)

Exceptions to the protection from forfeiture are set out in subclause 12(2). They are consistent with the other protection clauses in the Bill (clauses 10 and 11) which do not prevent action being taken under the *Proceeds of Crime Act 2002*. It is also consistent with clause 11 by not preventing action being taken under the *Crimes Act 1914*.

Clause 13 – Protection from heritage laws and things done under them

Clause 13 sets out the protection from heritage laws (clause 5 defines ‘heritage law’) and things done under them. Heritage laws are defined as encompassing laws of the Commonwealth, a State or a Territory that relate to heritage, whether or not the law relates to:

- heritage of a particular community (such as Aboriginal or Torres Strait Islander heritage); or
- heritage of a particular kind (such as objects associated with historic shipwrecks, records of government or archival material).

Subclause 13(1)

Subclause 13(1) explains that heritage laws cannot affect a protected person for an object where their activities relate to the object for the purpose of:

- giving effect to a temporary loan arrangement for the object (paragraph 13(1)(a));
- or

- meeting the person's obligations to another protected person who is party to a temporary loan arrangement for the object (paragraph 13(1)(b)).

Subclause 13(2)

Subclause 13(2) provides that nothing done under a heritage law affects:

- ownership of the object; or
- physical possession, custody or control of the object by a protected person; or
- a right of a protected person to physical possession, custody or control of the object.

This provision captures the broad range of actions, additional to those actions specifically identified in clauses 9, 10, 11 and 12, that may be undertaken under statute. The Bill limits those actions in order to provide comprehensive protection to objects on temporary loan. Examples of some of the actions that exist in heritage laws, and which would be limited by this provision, include the issuing of declarations in relation to an object, the giving of directions in relation to an object or prohibitions on certain actions in relation to an object.

The Bill limits action under laws that fall within the definition of heritage laws as those are the laws which would be of most relevance to objects imported into Australia for temporary public exhibition. This provision is most likely to be of relevance to objects of an Australian origin which have entered into foreign collections and which are subsequently proposed to be imported into Australia on loan for temporary public exhibition.

To balance this, the Bill also provides that regulations may be made for the purposes of enabling consultation by borrowing institutions with communities or organisations (clause 21 refers). These consultation requirements would be relevant to proposed loans of Aboriginal or Torres Strait Islander objects or loans of archival material

Subclause 13(3)

Subclause 13(3) provides an exception for heritage laws that are prescribed by regulation.

Subclause 13(4)

Subclause 13(4) explains that clause 13 does not limit any other section in Part 2, and is not limited by any other section of Part 2.

Clause 14 – Relationship with other laws

Clause 14 sets out the relationship between the Bill and other laws. To achieve its objective the Bill limits the circumstances in which action can be taken under certain laws. Clause 14 provides that Part 2 applies to the exclusion of certain Commonwealth laws, whether made before or after the commencement of the Bill, and any rule of common law or equity, including, for example, a rule of private international law.

Part 3 – Approval of institutions

Division 1 - Approval

Clause 15 – Approval

Clause 15 explains that borrowing institutions must make an application to the Minister for approval and it sets out factors relevant to the Minister in exercising his or her power to approve the institution.

The scheme will operate as an approval based scheme. The operation of the scheme will mean that objects, normally in a foreign country, will be protected if they are imported into Australia on loan for temporary public exhibition under arrangements involving institutions approved by the Minister.

Decisions made by the Minister under clause 15 are reviewable by the Administrative Appeals Tribunal (AAT) (see clause 18).

Subclause 15(1)

Subclause 15(1) makes it clear that the process for approval will operate on an application basis. The Minister may only approve a borrowing institution upon receipt of an application from a borrowing institution or their parent. The Minister may approve the institution by notice given to the institution and published on the Department's website.

Subclause 15(1) provides that the approval of an institution is for a specified period of not more than 60 months. Limiting the period of approval means institutions will need to make another application for approval if they wish to continue to be approved under Part 3 of the Bill after the expiry of their approval. It is appropriate to limit the period of approval as an institution's operations may be subject to change over time. Requiring them to reapply for approval enables an institution's procedures to be reassessed by the Minister. That is appropriate because the Minister needs to be satisfied that the institution has the capacity to satisfy the requirements of the legislation and regulations.

Subclause 15(2)

Subclause 15(2) sets out the matters the Minister must consider in deciding whether to approve a borrowing institution and provides that other matters may be prescribed by regulation. It also makes it clear that the Minister's decision to approve an institution is not limited to the matters specified in the Bill or prescribed by regulation.

The intention of this Bill is to address a significant obstacle that Australia's major institutions face in securing loans of foreign objects. The purpose is not to support the exhibition of stolen or illegally exported works, or works that have uncertain provenance. Given this, the matters the Minister must consider are focussed on processes associated with loan arrangements. Matters that fall within the scope of subclause 15(2) include an institution's:

- curatorial and collection management expertise;
- procedures for provenance identification of objects collected or exhibited;
- procedures used to identify objects in a foreign country that could be the subject of a loan;
- procedures for negotiating temporary loan arrangements for objects that are normally in a foreign country; and
- experience exhibiting foreign loans.

As objects brought into Australia under arrangements by an approved institution are automatically protected, the integrity of the legislation is contingent on the practices and expertise of the approved institutions. Therefore it is crucial that institutions seeking approval are able to clearly demonstrate the necessary expertise, rigour, capacity and resources to meet those demands. The inclusion of those requirements in the Bill supports Australia's continued ability to meet its international obligations under the *1970 UNESCO Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property* by ensuring approved institutions have demonstrated procedures and practices that guard against the import of illicitly obtained objects.

Subclause 15(3)

A notice made by the Minister under subclause 15(1) is administrative in effect and therefore is not a legislative instrument under section 5 of the *Legislative Instruments Act 2003*. Subclause 15(3) confirms this and is included to assist readers.

Clause 16 – Conditions of approval

Clause 16 enables the Minister to impose, vary and revoke conditions on the approval of a borrowing institution by notice given to the institution. Such a notice must be provided by the Minister in writing and it must be published on the Department's website.

An example of a condition that the Minister may impose on a borrowing institution would be if the Minister included a requirement that the borrowing institution undertake an external audit of its compliance with the provisions of the legislation and regulations, and to provide that report to the Minister.

A decision made by the Minister under clause 16 is reviewable by the AAT (see clause 18).

A notice made by the Minister under subclause 16(1) is administrative in effect and therefore is not a legislative instrument under section 5 of the *Legislative Instruments Act 2003*. Subclause 16(2) confirms this and is included to assist readers.

Division 2 –Revocation of approval

Clause 17 – Revocation of approval

Clause 17 provides that the Minister may revoke an approval of a borrowing institution by notice. Revocation may occur if the Minister is satisfied that:

- a borrowing institution has contravened a regulation involving the institution; or
- a borrowing institution has contravened any of the conditions of the approval; or
- approval should be revoked, having regard to matters considered when making a decision to approve an institution (which are described in paragraphs 15(2)(a), (b), (c), (d), (e) and (f) and any other relevant matters.

The Minister may revoke an institution’s approval if he or she is satisfied that the institution is not maintaining the same standards of conduct in relation to matters that were considered by the Minister at the time of approval. Another example would be if the Minister is satisfied that the institution has not maintained standards in relation to confirming the provenance of objects proposed for loan, or if the institution’s processes for negotiating temporary loan arrangements have changed and are not considered to be of an appropriate standard.

Part 2 of the Bill will continue to apply to objects which have already been imported into Australia under a temporary loan agreement on the date on which approval is revoked. However, objects imported into Australia after that date for temporary public exhibition under arrangements involving the institution will not be protected because the requirement in paragraph 8(1)(c) would no longer be satisfied.

A decision by the Minister under clause 17 is reviewable by the AAT (see clause 18).

A notice made by the Minister under subclause 17(1) is administrative in effect and therefore is not a legislative instrument under section 5 of the *Legislative Instruments Act 2003*. Subclause 17(2) confirms this and is included to assist readers.

Clause 18 – Review by the Administrative Appeals Tribunal

Clause 18 provides that applications may be made to the AAT for the review of a decision by the Minister to refuse to approve a borrowing institution under clause 15 or impose or vary a condition on the approval of a borrowing institution under clause 16 or revoke the approval of a borrowing institution under clause 17.

The provision of this right of review is consistent with Commonwealth policy that all administrative decisions that affect the interests of a person be open to review on the merits.

Part 4 – Miscellaneous

Clause 19 – Delegation

Clause 19 enables the Minister to delegate in writing all or any of his or her functions or powers under the Bill, with the exception of the function and power under clause 21 (Regulations), to a Senior Executive Service employee or acting Senior Executive Service employee of the Department.

Clause 20 – Compensation for acquisition of property

The Bill has been drafted so as to avoid the potential for any acquisition of property other than on just terms that would be contrary to section 51(xxxi) of the Constitution. Subclause 20(1) provides that in cases where the operation of the Bill results in an acquisition of property the Commonwealth is liable to pay a reasonable amount of compensation to the person. Subclause 20(2) allows that if the Commonwealth and the person do not agree on the amount of the compensation, the person may start proceedings in a court of competent jurisdiction for such reasonable amount of compensation as the court determines.

Clause 21 – Regulations

Clause 21 enables the Governor-General to make regulations prescribing matters required or permitted by this Bill to be prescribed, or necessary or convenient to be prescribed for carrying out or giving effect to this Bill.

It is expected that regulations may need to be made in accordance with this clause in relation to certain matters required or permitted to be prescribed under this Bill, including for example consultation and publication.

Any such regulations are legislative instruments under section 6(a) of the *Legislative Instruments Act 2003*.