A proposal to improve the protection of New Zealand's movable cultural heritage by means of a statutory trust

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The Department of Internal Affairs is currently drafting a Protection of Movable Cultural Heritage Bill to replace the Antiquities Act 1975. The Bill results from a four year review of the Act which considered the implications of Article II of the Treaty of Waitangi on Maori cultural property, the need to take part in the international protection of cultural property, and the adequacy of protection afforded by the Act. The focus of this paper is on the recovery of illegally exported cultural property. The first part introduces the reasons for the review of the Act and the second part outlines the private international law and public law aspects of the recovery of illegally exported cultural objects. It will be shown that, although the Bill will enable New Zealand to take part in the major international public law regime relating to illicit movement, there are limits to its effectiveness and the Bill does not improve the likelihood of recovering cultural objects from art importing countries absent international co-operation. It will also be shown that a consequence of the Bill's better recognition of the Treaty is that it weakens the chance of recovering illegally exported Maori cultural objects discovered after its enactment. The third part of the paper proposes a solution to these problems. It recommends the creation of a statutory trust in further recognition of the public interest in cultural property and as a more effective means of recovering illegally exported objects by action in overseas courts. The final part considers some of the civil law, private international law and public law aspects of recovering objects by means of the proposed trust.

I INTRODUCTION

The principle of protecting important cultural heritage objects by controlling their export is well established internationally. One hundred and forty one[1] countries have legislation preventing the illicit removal and trade of their movable cultural heritage. However, an issue for these countries is the adequacy of their legal safeguards in light of the continuing illicit movement of cultural objects. This issue is of major importance in Europe. In 1989, an estimated 60,000 works of art were stolen in the European Community, representing 90 per cent of world art thefts,[2] and the British National Security Adviser on Museums has assessed art theft to be the second biggest

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1 L V Prott & P J O'Keefe *Law and the Cultural Heritage Volume 3 Movement* (Butterworths, London & Edinburgh, 1989) 453.

2 *The Daily Telegraph*, London, UK, 16 October 1990, 17.

international crime after drug trafficking.[3] The issue is also of importance to countries in Asia and Central America, whose cultural heritage continues to be depleted by clandestine excavations carried out by organised dealers and tourists. An international regime for the protection of cultural property has evolved over the last 250 years in response to the problem of continuing illicit trade. An important element of international protection is the repatriation of illegally exported cultural objects. Mutual assistance in returning such objects is provided for in the 1970 UNESCO Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property. The Convention is regarded as the most important agreement relating to the international protection of cultural property. However, the fact that most art importing countries have not taken part in the Convention and the fact that the 71[4] states party to it have implemented its requirements to varying degrees has caused difficulties for exporting states claiming the return of illegally exported objects from importing countries.

The issues introduced above also apply to New Zealand, which has faced, and continues to face the depletion of its cultural heritage. The major period of loss was during New Zealand's early colonial era as a result of scholars, traders, colonists, missionaries and military and naval personnel sending or taking cultural objects to Europe. This was the common experience of many colonial states including other Pacific Island countries.[5] As Prott and O'Keefe have noted:[6]

> At a time when European States generally were insisting on the importance of trade and were receiving the creative works of other cultures, the colonists that had settled overseas found themselves responsible for a different trading problem: the rapid dwindling of the artefacts of their indigenous populations.

New Zealand's response to the problem was the passing of the Maori Antiquities Act 1901. Although the Act predated the adoption of export controls in many European states and in the Commonwealth, members in the Legislative Council were concerned

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3 P J O'Keefe "Briefing paper for proposed scheme for the protection of the cultural heritage within the Commonwealth" 1989, Department of Internal Affairs.

4 UNESCO Document CL/3256, Conventions Unit, January 1992.

5 The large collection of Pacific objects in the British Museum evidences the ease with which these objects were acquired prior to any protective legislation. The Museum has around 300,000 ethnographic objects, nearly 50,000 of which are from Oceania. It has the largest collection of Maori material in Britain (around 2,500 objects). Its earliest Maori material is from Cook's voyages. One of its most important Maori collections was presented by Sir George Grey and was formed during his first duty as New Zealand Governor between 1845-1854. Subsequent contributions were made by military and naval officers and their descendants, scholars, missionaries, early settlers and Royal visitors: D C Starzecka "The British Museum & Its Maori Collections" *Taonga Maori Conference Report* (Department of Internal Affairs, Wellington, 1991) 46-49.

6 Above n 1, 458.

that New Zealand was legislating 20 years too late.[7] Also, although export restrictions were extended and improved by the passing of the Historic Articles Act 1962[8] and by the current legislation, the Antiquities Act 1975,[9] restrictions have remained little known and difficult to administer and enforce and New Zealand has continued to lose significant cultural objects through illegal export.

Accordingly, the Department of Internal Affairs has undertaken a review of the Antiquities Act. In addition to enforcement and administrative difficulties, the three major concerns considered during the review were:[10]

(1) That legislation dealing with Maori cultural property needs to take greater account of the Treaty of Waitangi.[11]

(2) That the regime under the Antiquities Act impedes the prospect of recovering illegally exported objects because it does not provide for automatic forfeiture to the Crown on illegal export and does not contain sufficient measures to allow New Zealand to accede to the UNESCO Convention. The Act's deficiencies in this regard were identified after the *Ortiz* case in which New Zealand's claim for the return of five illegally exported pataka (storehouse) panels failed in the House

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7 Two members referred to shutting the stable door after the horse had been stolen and Hon W T Jennings, citing a Maori proverb said "What is the use of the body when the man's head is cut off?": NZPD, vol 119, 350, 11 October 1901.

8 The Act was passed to widen the range of cultural property protected by controlling the export of written material over 90 years old relating to New Zealand of "historical, scientific, or national value or importance". It followed the establishment of National Archives in 1957 and the Historic Places Trust in 1954 and was recognition that NewZealand's historical record needed the further protection of export control: NZPD, vol 332, 2512, 7 November1962.

9 The Antiquities Act 1975 was passed to address two main areas of concern: first, to further extend the range of cultural property protected and second, to provide additional safeguards for Maori cultural property by monitoring the movement of privately owned artefacts within New Zealand and recording the custody of newly found artefacts. The Act's major innovation related to Maori artefacts, newly found since its enactment. For the first time, the principle was introduced whereby cultural property of this type should not belong to the individual finder, but to all New Zealanders. The Act accordingly declares that any artefact found in New Zealand after its commencement is prima facie the property of the Crown, subject to actual or traditional ownership being established on application to the Maori Land Court.

10 *Protection of Movable Cultural Property Bill - Issues Paper* (January 1990, Department of Internal Affairs, Wellington).

11 In its finding on the Manukau claim the Waitangi Tribunal referred to discoveries of Maori artefacts in the course of development. It found that the Treaty conferred a benefit on Maori owning or entitled to own their taonga that was not conferred by the Antiquities Act. The Tribunal considered that greater publicity should be given to the Act; and that custody of artefacts should not be entrusted to approved finders, but that applications should be made to the Maori Land Court to have them entrusted to proper representatives or custodians for owner tribes: Waitangi Tribunal *Finding of the Waitangi Tribunal on the Manukau Claim* (Department of Justice, Wellington, 1985).

of Lords.[12] The issue next arose in 1988 when a 1903 Foden steam traction engine was exported to the United Kingdom without permission. The engine was one of only two Foden engines in New Zealand and the only one capable of being restored. No action was taken to recover the engine on the basis of the decision in *Ortiz*. In 1989, the Poverty Bay Club was prosecuted for exporting without permission a letter written by Captain Cook in 1776 to his second-in-command, Captain Charles Clerke.[13] Again, no action was taken in the English courts for recovery of the letter.

(3) That the Act does not adequately protect movable cultural property within New Zealand.[14]

The review has resulted in the drafting of a Protection of Movable Cultural Heritage Bill. The Department believes that the Bill remedies the problems with the Antiquities Act, where this has been possible.[15] Although there are a range of issues arising in connection with the Bill worthy of analysis, this paper will focus on one issue only, namely whether the Bill will increase repatriation prospects. This requires examining the Bill's proposals in relation to recovering illegally exported objects in the light of issues raised for New Zealand by the *Ortiz* case.

II RECOVERY PROSPECTS UNDER THE PMCH BILL

There are two ways of recovering illegally exported cultural objects: domestic legislation can attempt to ensure successful litigation for recovery in an overseas jurisdiction by securing title to objects prior to export; or recovery can be achieved through international co-operation.

A Recovery through Litigation

The first part of this section outlines the problems facing a plaintiff seeking to recover an illegally exported cultural heritage object in a foreign jurisdiction. When the plaintiff is a foreign state whose export legislation has been infringed, the court will need to consider on what basis the state is claiming title to the object in question. The *Ortiz* case illustrates the difficulties involved when the state has to rely on title gained by forfeiture on illegal export. After these difficulties have been outlined, the current

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12 *Attorney-General of New Zealand* v *Ortiz and others* [1984] AC 1.

13 *Department of Internal Affairs* v *The Poverty Bay Club Inc* [1989] DCR 481.

14 The review considered whether measures for the preservation of cultural objects should be incorporated with export control provisions; whether Government should be prepared to purchase objects for which export permission had been refused; and whether provisions should be included to prevent wilful damage to cultural objects on religious, medical, psychological or cultural grounds and to prevent deliberate defacement of cultural property.

15 The Department and its Treaty of Waitangi Steering Committee found it impossible to develop measures to protect objects against wilful destruction without encroaching on Maori custom and tradition.

position under the Antiquities Act and the nature and effectiveness of the PMCH Bill's proposed reforms in this area will be considered.

1 Ortiz - the issue of title

In 1982 and 1983 New Zealand attempted to recover a set of illegally exported pataka panels which had surfaced in London and were offered by the defendant Ortiz for auction. The Attorney-General of New Zealand sought a declaration that the carvings belonged to the New Zealand Government. The Court ordered two preliminary matters to be determined: first, whether the Crown had become owner and was entitled to possession of the carvings under the enactments in the Historic Articles Act 1962 and the Customs Acts 1913 and 1966 relating to forfeiture; and second, whether in any event the provisions of these Acts were unenforceable in England because the court had no jurisdiction to consider Government's claim.[16]

The House of Lords decided the first issue against the Government, agreeing with the unanimous view of the Court of Appeal that the Crown did not have title to the carvings. Section 12(2) of the Historic Articles Act[17] read in conjunction with forfeiture provisions in the Customs Acts[18] only rendered the carvings liable to forfeiture on seizure and did not provide for automatic forfeiture on unlawful export.

In addition Lord Denning MR, in the Court of Appeal, said that if forfeiture under the Historic Articles Act was automatic, it would come into effect on the export of the article from New Zealand.[19] In his view, an article was exported as soon as it left the territorial limits of New Zealand.[20] Accordingly, the legislation would be extra-territorial as it would be affecting property outside New Zealand. He construed the Act

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16 According to *Dicey and Morris on the Conflict of Laws* (11 ed, Stevens & Sons Ltd, London, 1987) 100-101, English courts have no jurisdiction to entertain an action for the enforcement, either directly or indirectly, of a penal, revenue or other public law of a foreign State.

17 Section 12(2) provided:

> An historic article knowingly exported or attempted to be exported in breach of this Act shall be forfeited to Her Majesty and, subject to the provisions of this Act, the provisions of the Customs Act 1913 relating to forfeited goods shall apply to any such article in the same manner as they apply to goods forfeited under the Customs Act 1913.

18 Both the 1913 Customs Act and the 1966 Act which succeeded it provided that forfeiture was not automatic when the forfeiting event or act took place but only occurred on the goods being seized.

19 Above n 12, 19.

20 Commentators have suggested that Lord Denning MR was wrong on this point because s 69 of the Customs Act 1966, which he did not refer to, provides that the time of exportation of goods is deemed to be the time at which the exporting ship leaves the limits of her last port of call in New Zealand, or at which the exporting aircraft departs from the last Customs airport at which it landed immediately before proceeding to a country outside New Zealand.

on the presumption that the New Zealand legislature would not intend to infringe international law.[21]

2 *Title under the Antiquities Act*

Under the Antiquities Act 1975, New Zealand's claim to title of illegally exported antiquities and Maori artefacts known about before the Act came into force would be based on the forfeiture provision in section 10,[22] which is similarly worded to section 12(2) of the Historic Articles Act. Seizure remains a requirement for forfeiture under the Customs Act 1966.[23] Accordingly, any claim by the Crown for ownership of an illegally exported object based on forfeiture without seizure having occurred would fail.

However, given that the Act provides that newly found Maori artefacts are prima facie owned by the Crown upon discovery, if the facts of *Ortiz* had arisen under the Antiquities Act, the case may have been decided differently by Lord Denning MR. The Crown would have obtained prima facie ownership of the carvings on their being dug up. Title would have been perfected in New Zealand *prior* to forfeiture on illegal export so the issue of the legislation being seen as extra-territorial would not have arisen. Ackner LJ may have also decided the case differently as he said:[24]

> [C]ounsel for the Attorney-General cannot validly contend that he is suing to enforce a proprietary title and not to enforce a statute. In order to make good his title in these proceedings, he has to rely on the Historic Articles Act 1962, since he cannot rely on any previous possession or other root of title.

If the Crown had obtained ownership under the Antiquities Act, it would be asking the court to recognise a proprietary title and to enforce the law from which that title derived, rather than to enforce the statute's forfeiture provisions. The authors of *Dicey and Morris on the Conflict of Laws* state that English courts will recognise a governmental act affecting any private proprietary right in any movable thing if the act was valid and effective by the law of the country where the thing was situated (*lex situs*) at the moment when the act takes effect.[25] This principle is partly based on the "act of

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21 Above n 12, 19.

22 Section 10(1) provides:

> Subject to the provisions of this Act, any antiquity exported or attempted to be exported in breach of this Act shall be forfeited to the Crown and the provisions of the Customs Act 1966 (other than section 287) relating to forfeited goods shall apply to any such article in the same manner as they apply to goods forfeited under the Customs Act 1966.

23 Section 274 of the Customs Act states that when the Customs Act or any other Act provides that goods are forfeited, and the goods are seized in accordance with the Customs act or with the Act under which the forfeiture has accrued, the forfeiture shall relate back to the date of the act or event from which the forfeiture accrued. In *Ortiz*, the House of Lords held that s 274 implies that forfeiture only takes effect on seizure: above n 12, 48.

24 Above n 12, 32.

25 Above n 16, 969.

state" doctrine, in which English courts will not judge the acts of a foreign government affecting property within its territory, provided they are not contrary to public policy.[26] *Bumper Developments Corporation* v *Commissioner of Police of the Metropolis and others*[27] provides a recent precedent for the recognition by a foreign court of statutory title to cultural property. Bumper Developments Corporation had purchased a 12th century bronze sculpture in good faith and was attempting to recover it following its seizure by the police. The sculpture had been illegally excavated from a temple in India and the requirements of the Indian Treasure-trove Act 1878 had not been complied with. The Court of Appeal held that the title to the sculpture gained by local law and triggered by unlawful dealing, was superior to that of the plaintiff.

3 *Title under the PMCH Bill*

The Department proposes to resolve the issue of title raised in *Ortiz* by defining "export" to ensure that the Crown gains title to an illegally exported object within the territorial limits of its jurisdiction. The Bill will also provide for automatic forfeiture without relying on the Customs Act. The Department intends to base the export and forfeiture provisions in the Bill on those in the Australian Protection of Movable Cultural Heritage Act which were designed by Prott and O'Keefe to avoid the court's interpretation in *Ortiz* of forfeiture as meaning "liable to forfeiture", and to define export intra-territorially.[28]

While such a definition might improve the Crown's claim to title of illegally exported objects, its implications in respect of the Bill's proposals on the ownership of newly found Maori cultural property need to now be considered.

The Bill proposes to replace the provision in the Antiquities Act vesting title in newly found Maori cultural objects in the Crown by acknowledging that ownership of such objects is with the iwi relating to those objects. It establishes a five member board (the Maori Group/*Te Roopu Wananga Taonga*) to determine the appropriate iwi to have ownership, and the Maori Land Court will decide disputes arising between iwi where objects are found on land subject to changing tribal occupation over time or on

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26 Above n 16, 970-974.

27 [1990] 1 WLR 1362.

28 Section 9(1) of the Australian Act provides:

> Where a person exports an Australian protected object otherwise than in accordance with a permit or certificate, the object is forfeited.

and further s 38(a)

> Where a protected object is forfeited by or under this Act - all title and interest in the object is vested in the Commonwealth without further proceedings.
>
> Vesting of title is triggered by unlawful export and export is defined in s 9(4) to occur when an object has been placed on board a ship or aircraft with the intention that it be taken out of Australia by that vessel or aircraft or delivered to the Australian Postal Corporation with the intention that it be posted.

tribal boundaries, which *Te Roopu* is unable to resolve.[29] However, if newly found Maori cultural objects were illegally exported, the new definition of export would vest title in the Crown by means of automatic forfeiture. As outlined above, dicta in *Ortiz*, and the *Bumper* case suggest that a claim for recovery based on title secured prior to export would be more likely to succeed.

4 Conclusion on issue of title

Acknowledging that ownership of newly found Maori cultural objects is with iwi Maori is obviously more acceptable and appropriate on policy grounds but will weaken the protection afforded to these objects by decreasing the likelihood of their recovery through litigation. Although it may be unlikely that iwi would be able to finance an overseas court case, the vesting of title in the Crown on export would deny iwi standing to have their title recognised. Also, as will be seen from the following analysis of the second issue in *Ortiz*, vesting of title by automatic forfeiture on export, even occurring within the territorial limits of New Zealand, may not be enforceable in an overseas court.

B Ortiz - The Issue of Jurisdiction and Sovereignty

The second issue in *Ortiz* of whether the New Zealand Acts were unenforceable in England because the court had no jurisdiction to consider the Government's claim was considered by Lord Denning MR and Ackner LJ in the Court of Appeal but not by the House of Lords. Lord Denning MR asked whether the court would have jurisdiction to enforce a claim by a foreign state for the return of a forfeited object, on the assumption that forfeiture was automatic. He said there was no doubt that English courts had no jurisdiction to enforce the penal or revenue laws of a foreign state, and agreed with Dicey and Morris that the rule extended to "other public laws".[30] He considered that "other public laws" were *ejusdem generis* with "penal" or "revenue" laws and said:[31]

> Then what is the genus? Or, in English, what is the general concept which embraces "penal" and "revenue" laws and others like them? It is to be found, I think, by going back to the classification of acts taken in international law. One class comprises those acts which are done by a sovereign jure imperii, that is, by virtue of his sovereign authority. The others are those which are done by him jure gestionis, that is, which obtain their validity by virtue of his performance of them... .
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> Applied to our present problem, the class of laws which will be enforced are those laws which are an exercise by the sovereign government of its sovereign authority over property within its territory... . But other laws will not be enforced. By international law every sovereign State has no sovereignty beyond its own frontiers. The courts of other countries will not allow it to go beyond the bounds. They will not

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29 Cabinet Treaty of Waitangi Committee meeting 17 September 1991 (TOW (91) M 16/1).

30 Above n 12, 20.

31 Above n 12, 20-21.

> enforce any of its laws which purport to exercise sovereignty beyond the limits of its authority.

His Lordship then proposed a test for what is meant by an "exercise of sovereign authority" and said to determine this one must ascertain (i) which is the relevant act; (ii) whether the act is of a sovereign or non-sovereign character; and (iii) whether it was exercised within the territorial limits of the sovereign state, which is legitimate; or beyond, which is not.

Applying his test to legislation providing for automatic forfeiture on illegal export, Lord Denning MR concluded:[32]

> I am of the opinion that if any country should have legislation prohibiting the export of works of art and providing for the automatic forfeiture of them to the state should they be exported, then that falls into the category of "public laws" which will not be enforced by the courts of the country to which it is exported or any other country: because it is an act done in the exercise of sovereign authority which will not be enforced outside its own territory.

His conclusion must be read in light of his view that export occurred as soon as an object left the territorial limits of the jurisdiction.

Ackner LJ found it unnecessary to consider whether there was a third category of other public laws which were unenforceable as he found that automatic forfeiture on illegal export was a penal law. He stated that in determining whether the foreign enactment was penal the court must determine: (1) the substance of the right sought to be enforced; and (2) whether its enforcement would, either indirectly or directly, involve the execution of the penal law of another state.[33] In his view, the court was being asked to enforce a public right - the preservation of historic articles in New Zealand - and the vindication of that public right was sought through forfeiture without compensation. Ackner LJ rejected the Attorney-General's argument, which had found favour with Staughton J in the lower court,[34] that forfeiture was merely a by-product of the main purpose of the Act which was to preserve historic articles within New Zealand. He said that forfeiture was often a far more serious penalty than the fine for illegal export. In this case the carvings were alleged to be worth around £300,000 and the maximum fine for illegal export was £200. He held that the enforcement of the public right to have the article confiscated and delivered to the Attorney-General would involve the court enforcing a penal measure for New Zealand for which it had no jurisdiction.

The House of Lords stated that the views of the Court of Appeal on the principle of non-enforceability of penal or other public laws were obiter and that it, having not heard argument on this aspect, would not conclude on the correctness of the views expressed.[35] In 1987, the authors of *Dicey and Morris on the Conflict of Laws*

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32 Above n 12, 24.
33 Above n 12, 32.
34 *Attorney-General of New Zealand* v *Ortiz and others* [1982] 3 All ER 432, 447.
35 Above n 12, 46.

considered that the question of whether the non-enforceability principle extended to laws of a "political" or "public" character remained open in English law.[36] However, the question has been considered more recently by Australian and New Zealand courts in the *Spycatcher* cases, and the status of the rule after these cases will now be examined.

C *Subsequent Developments on the Non-enforceability of Foreign Penal and Public Laws*

1 *Spycatcher No 1*

In Australia the Attorney-General for the United Kingdom sought an injunction restraining publication of *Spycatcher* (the memoirs of a former member of the British security service), alleging that the book contained information and confidential knowledge acquired by the author during his employment. Relief was sought on the basis that the proposed publication amounted to a breach of fiduciary duty, a breach of an equitable duty of confidence, or alternatively a breach of a contractual obligation of confidence. Each alleged breach was of a duty or obligation owed to the United Kingdom Government. The Supreme Court of New South Wales refused an injunction to stop publication. The Court of Appeal by a majority (Kirby P and McHugh JA, Street CJ dissenting) dismissed an appeal by the Attorney-General.[37]

Kirby P and Street CJ accepted that the genus of unenforceability of foreign laws extended beyond penal and revenue laws to include public laws. Kirby P favoured this view because like Lord Denning MR, he regarded the categories of "penal" and "revenue" laws as mere examples of a wider class - a class of those public laws representing the public power and authority of the foreign sovereign state. He said that for the purpose of the applicability of the non-enforceability rule, the court had to classify the nature of the action sought to be enforced. He held that the Attorney-General was attempting indirectly to achieve in Australia what the Official Secrets Act 1911 (UK) was designed to enforce in the United Kingdom, namely a prohibition with penal sanctions against revealing information gained in the secret service. In its nature this was an assertion by a foreign state of the public law and policy of that state, and therefore unenforceable.

Street CJ agreed that foreign penal laws were but one category of foreign public laws. He held that the claim by the United Kingdom Government was a claim indirectly to enforce the penal sanctions in the Official Secrets Act 1911 (UK), and that it also lay within the broader category of a public law of a foreign state (the United Kingdom Government's prerogative right to enforce confidentiality against secret service employees in the interests of national security). However, he did not accept that Dicey and Morris's principle of non-enforceability was absolute. He said:[38]

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36 Above n 16, 108.

37 *Attorney-General (United Kingdom)* v *Heineman Publishers Australia Pty Ltd and Another* (1987) 75 ALR 353.

38 Above n 37, 387.

> It needs to be recognised that modern problems of international crime - for example drug law enforcement and in the laundering of criminal proceeds - cross all national boundaries and are rendering it increasingly necessary to qualify the absolutism in Dicey and Morris's stated principle to the limited extent that I suggest. In the field of foreign penal and public law enforcement, the key to the door of its courts lies in the hands of the local sovereign.

Accordingly he held that the Australian Government's positive support of the United Kingdom Government's claim in its own national interest was the "key to the door" and its willingness to unlock its courts negated any affront to its sovereignty.

2 *Spycatcher No 2*

On appeal, the High Court of Australia[39] confirmed that Australian courts had no jurisdiction to enforce foreign penal or public laws. The High Court first described the connection between the non-enforceability rule and the related international law principle that courts will not judge the validity of acts of a foreign sovereign done within its own territory, acknowledging that to do so could interfere with international relations which are an executive responsibility. In considering whether the non-enforceability rule extended to foreign public laws, the Court said:[40]

> The expression "public laws" has no accepted meaning in our law. Nevertheless Dr Mann ... appears to equate "public laws" and "public rights", an expression which he treats as synonymous with "prerogative rights". The transition from "laws" to "rights" sits somewhat uncomfortably with the long-standing formulation of the rule in its application to "penal laws". It would be more apt to refer to "public interests" or even better, "governmental interests" to signify that the rule applies to claims enforcing the interests of a foreign sovereign which arise from the exercise of certain powers peculiar to government.

The High Court said the Attorney-General's claim arose out of and was secured by an exercise of the prerogative of the Crown - the exercise being the maintenance of national security. It was therefore a governmental interest, rendered unenforceable by international law.[41]

3 *New Zealand Spycatcher cases*

Differing view points on the absoluteness of the non-enforceability rule also arose in New Zealand courts. Davison CJ in the High Court[42] said Dicey and Morris's principle of non-enforceability applied in New Zealand. Applying Lord Denning MR's test in *Ortiz* for foreign public laws (classifying the relevant act, then asking whether it was of

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39 *Attorney-General (United Kingdom)* v *Heineman Publishers Australia Pty Ltd [No 2]* (1988) 62 ALJR 344.

40 Above n 39, 348.

41 Above n 39, 350.

42 *Attorney-General for the United Kingdom* v *Wellington Newspapers* [1988] 1 NZLR 129.

sovereign character) he concluded that the right sought to be enforced was a public law right (the United Kingdom Government imposed its obligation of confidentiality on secret service employees by informing them of and insisting on their compliance with the Official Secrets Act) and that the power being used to enforce it was a sovereign power (to ensure the security of the United Kingdom). As such New Zealand courts were not permitted to enforce the right.[43]

In the Court of Appeal Cooke P took the view that the action was not barred by the rule of non-enforceability of foreign penal or public laws because it was not *merely* an attempt to enforce a United Kingdom criminal or penal law in the form of the Official Secrets Act. He said:[44]

> Certainly the duty of confidentiality was reinforced by the declarations signed by Wright under the Act and he would have been liable to prosecution in England. But the origins of the duty are more fundamental. It must subsist apart from the 1911 statute and its amendments, just as in New Zealand a corresponding duty must subsist apart from the New Zealand Security Intelligence Service Act 1969 and its amendments. The duty is implicit in the relationship.

Cooke P said that as this duty of confidentiality would be enforced extra-territorially if the employer was a person or body other than the state, it would be anachronistic for the court to deny itself jurisdiction to safeguard the security of a friendly foreign state and to deny extra-territorial enforcement. He favoured the approach of Street CJ discussed above - that the local sovereign could unlock the doors of its courts for a foreign government by providing evidence in support of the foreign government's claim.[45]

4 *Status of the non-enforceability rule after Spycatcher*

The *Spycatcher* cases affirm Dicey and Morris's and Lord Denning's view that the non-enforceability rule extends beyond "penal" and "revenue" laws to include "other public laws", which can be understood as claims to enforce the interests of a foreign sovereign arising from the exercise of powers peculiar to government. However, opinion did differ on the absoluteness of the rule. Cooke P and Street CJ were prepared for courts to be influenced by the local sovereign who could "unlock their doors" and allow them to enforce foreign governmental claims, in certain circumstances, and Street CJ gave the example of drug trafficking as a serious international crime warranting relaxation of the rule. As noted,[46] illicit trade in cultural objects is a serious international crime which could be seen as worthy, with the local sovereign's support, of an exception to the non-enforceability rule. However, the High Court of Australia in *Spycatcher No 2* strongly disagreed with Street CJ's views on this issue. It said:[47]

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43 Above n 42, 151.
44 Above n 42, 173.
45 Above n 42, 174.
46 Above n 3.
47 Above n 37, 351.

> [T]he notion that effective access to the courts should depend on a decision of the Executive is as unacceptable as the related notion that the enforceability of a claim should depend on an Executive decision that the claim should be able to succeed.

Prott has suggested that the High Court in *Spycatcher No 2* confused the possible rule against enforcing foreign public laws with the question of public policy, and that the Court's examples of laws governing the relationship between the State and members of its security forces, which would not be enforced because of the risk of the Court being embarrassed, are far removed from laws protecting cultural heritage objects against illegal export.[48] The differences of opinion on the absoluteness of the rule in Australian and New Zealand courts in the *Spycatcher* cases has further confused the issue and the enforceability of foreign public laws is not clear. However, other countries may well refuse to enforce confiscatory export laws in future if they accept the High Court of Australia's analysis. It is likely that the High Court would see forfeiture as an exercise of a power peculiar to government and hence an unenforceable public law.

The above analysis of the issues of title and jurisdiction and sovereignty shows that the prospects of recovering illegally exported objects under the PMCH Bill by means of litigation in overseas courts are not good. There is therefore a need to enhance recovery prospects by means of international co-operation. The next part of this paper outlines the existing and proposed international regimes relating to recovery of illegally exported cultural objects, to demonstrate the limitations of public law measures in this area and to reinforce the need for on-going protective domestic legislation in respect of illegal export.

D Recovery through International Co-operation

On the issue of non-enforceability of foreign governmental interests, the High Court of Australia in *Spycatcher No 2* concluded its judgment with the words:[49]

> So far as friendly states are concerned, the remedy, if one is thought to be desirable, is to be found in the introduction of legislation.

This view echoes Lord Denning's concluding remark in *Ortiz* (also supported by Kirby P in *Spycatcher No 1*): that international co-operation was the best means of resolving these issues and that "there should be an international convention on the matter where individual countries can agree and pass the necessary legislation".[50]

The Departments of Internal Affairs and Justice have accepted that this issue cannot be resolved by unilateral action, and the Court of Appeal's dicta in *Ortiz* on non-enforceability provided the impetus for New Zealand to develop measures in the PMCH Bill to accede to the UNESCO Convention. The failure of Government's claim in *Ortiz*

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48 L V Prott "Problems of Private International Law for the Protection of the Cultural Heritage" (1989) 217 *Recueil des Cours* 215-318, 295.

49 Above n 39, 350.

50 Above n 12, 24.

also led to New Zealand taking a high profile in seeking international co-operation in protecting cultural property in the Commonwealth.

1 The UNESCO Convention

The Convention is the only universal regime concerned with illicit movement of cultural heritage objects. It requires state parties to adopt measures: (a) to prevent museums within their territories from acquiring cultural property which has been illegally exported; (b) to prohibit the import of cultural property stolen from a museum or a public institution after entry into force of the convention; (c) at the request of the state of origin, to help recover and return any such cultural property stolen and imported.[51]

Prott and O'Keefe[52] have said that prima facie the effect of the Convention is that state parties are required to regard as unlawful the import of *all* goods illegally exported from the exporting state because they are obliged to regard such exports as illicit. The Convention has been interpreted as being of more limited scope however, because of its emphasis on museums. It was said, obiter, in *Kingdom of Spain* v *Christie, Manson and Woods Ltd*[53] that the Convention did not provide for the return of pictures which had merely been illicitly exported and imported, as opposed to stolen from an institution.

2 Proposed regimes

(a) UNIDROIT

The Institute for the Unification of Private Law (UNIDROIT), has prepared a draft "Convention on Stolen or Illegally Exported Cultural Objects". The draft aims to address deficiencies in the operation of the UNESCO Convention, particularly in relation to article 7(b)(ii) which provides for the restitution of illegally exported or stolen objects if held by an innocent purchaser, and requires the requesting state to pay compensation to such a purchaser or to a person who has valid title. This article was incompatible with several states' national laws concerning bona fide purchasers. The principal aim of the Convention is to establish uniform rules for the restitution of stolen objects to the dispossessed person and the return of illegally exported objects to the state whose export laws were contravened. In relation to illegally exported objects, the draft provides that the state of export may request a court in the country of import to order the item's return. Compensation is payable to the possessor unless he or she knew or ought to have known that the object was illegally exported.[54] The draft is to be

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51 Final Report: *Regional Workshop on the Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property* (Jomtien, Thailand, 24-28 February 1992) Annex 4.3, 3.

52 Above n 1, 734.

53 [1986] 3 All ER 28.

54 Justice Department briefing paper on draft convention, and "Preliminary Draft Convention on Stolen or Illegally Exported Cultural Objects with explanatory

discussed further by governmental experts in late 1993. Its scope is wider than the UNESCO Convention as it is not limited to objects stolen from museums.

(b) The European Community - internal market

A further development, in relation to the removal of border controls between Member States of the European Economic Community is that the Council of the European Communities has adopted a Directive on the return of "national treasures" unlawfully exported between countries within the Community.[55] A related Regulation, controlling unauthorized exports of a wider category of cultural objects to non-EC countries was approved by EC Ministers in December 1992.[56] Like the UNIDROIT and UNESCO regimes, states claiming return of objects under the Directive are required to compensate bona fide purchasers, and like the UNIDROIT draft convention, it is not restricted to thefts from museums.

(c) The draft scheme for the protection of cultural heritage within the Commonwealth

The need for such a scheme was first raised by New Zealand's Minister of Justice at the Commonwealth Law Ministers meeting in Sri Lanka in 1983. However, the British have continually opposed the scheme and it received little attention at the 1990 Law Ministers meeting in Christchurch. In a paper to a meeting of senior officials of Commonwealth law ministries in March 1992, the Department of Justice said:

> [A]n effective regime for the protection of cultural property is not compatible with the principle of non-enforceability. If there is to be mutual assistance in the return of items of cultural property, the law needs to better reflect the realities of an interdependent world. There would accordingly seem to be advantages in promoting agreement within the Commonwealth to legislation which would clarify the ability of the courts to adjudicate on matters relating to the unlawful export of cultural property where a claim is brought by the country of export.

The essence of the Department's proposal is for each Commonwealth country to waive the rule of non-enforceability of foreign penal or public laws in relation to illegally exported cultural objects; to provide that the exporting country's statutory title (gained by forfeiture on export or triggered by unlawful dealing) will be regarded as superior to any otherwise valid title in the country of import, and consequently to provide for compensation to be payable by the requesting country to a bona fide purchaser. The legislation would apply to all items of cultural property subject to

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report" UNIDROIT 1990 Study LXX - Doc 19. For a commentary on the draft see L V Prott "The Preliminary Draft UNIDROIT Convention on Stolen or Illegally Exported Cultural Objects" (1992) 41 Int'l & Comp LQ 160.

55 Council Directive 93/7/EEC of 15 March 1993 on the return of cultural objects unlawfully removed from the territory of a Member State. Official Journal of the European Community (27 March 1993, No. L74/74-79).

56 Council Regulation (EEC) No 3911/92 of 9 December 1992 on the export of cultural goods. Official Journal of the European Community (31 December 1992, No. L395/1-5).

export control in the country of export. It is hoped that the Commonwealth scheme will be further developed at the 1993 Law Ministers meeting in Mauritius.

3 Comment on effectiveness of recovery through international co-operation

Undeniably, international co-operation is the ideal means of achieving the return of illegally exported cultural objects but there are considerable limits to its effectiveness. State parties to the UNESCO Convention have implemented it in very different ways and its scope is open to interpretation, for example, Australia prohibits the import of all objects whose export was prohibited, whereas the United States only prohibits the import of a certain category of stolen cultural property and reserves the right to control exports. Also, major art importing states such as the United Kingdom, France and Japan, and transit states such as Switzerland are not parties to the convention. The British Government has remained opposed to formalising mutual assistance in this area as it regards the issue as one that can be addressed through diplomatic channels; and while the EC Directive should ensure that it and other major art importing states will have to assist recovery within the Community, it seems unlikely that Britain will ratify the UNESCO Convention. The Department of Justice proposal for Commonwealth countries to legislate is an ideal solution to the problem of non-enforceability of foreign laws but seems highly unlikely to get British support. The conclusion must be that if future illegal exports surface in the United Kingdom, which has been the primary destination for known illegal exports from New Zealand, we are unlikely to be able to rely on any co-operation whatsoever.

III PROPOSED STATUTORY TRUST FOR THE PROTECTION OF MOVABLE CULTURAL HERITAGE

In light of the conclusion on the limits of international co-operation the PMCH Bill clearly needs to provide for the option of private litigation for recovery of illegally exported objects. However, as has been outlined, there is only a minimal chance of recovering illegally exported objects through litigation based on a claim of title gained by automatic forfeiture and the Bill is deficient in respect of recovery prospects for newly discovered Maori cultural property. A return to prima facie Crown ownership of newly found Maori artefacts as under the current Act would ensure that such objects could be recovered but would not be consistent with article II of the Treaty of Waitangi. Instead, the Bill should provide that newly found Maori cultural objects are prima facie owned by Maori subject to tribal owners being identified by *Te Roopu*. This would ensure that Maori had title to newly found objects in the event that *Te Roopu's* determination of ownership and custody was pre-empted by illegal export. However, there is an alternative which would increase recovery prospects not only for newly found objects, but for all types of cultural property. The alternative is based on trust law which provides a means of redefining the relationship between ownership, export and recovery of cultural objects in a way that both enhances recovery and is consistent with the Treaty.

Accordingly, the next part of the paper proposes the establishment of a statutory trust to provide a mechanism by which title to illegally exported objects is secured independent of and prior to export, rather than relying on automatic forfeiture on illegal

export. It suggests that Non-Western and particularly Maori attitudes to cultural objects support the establishment of the trust, and that the legislature's increasing recognition of the public interest in cultural objects in the successive protective Acts is further justification for the proposal. Two options will then be outlined - a general trust vesting the beneficial ownership of cultural objects subject to export control in all New Zealanders; or alternatively a trust for non-Maori objects and a number of iwi trusts. The private international law, public law and civil law aspects of recovering trust property will then be considered, as well as some of the practical issues involved in recovery.

A Non-Western Attitudes to Ownership of Cultural Heritage Objects

Prott and O'Keefe have proposed that in terms of "ownership" cultural heritage objects as a class warrant different treatment than property generally. Part of their justification comes from examining Western and non-Western attitudes to ownership. As they have noted:[57]

> European-based legal systems deal with items of the cultural heritage under a system of "ownership". The term "ownership" is used to cover what might loosely be called a bundle of rights, in particular the right to possess, to control, to exploit and to alienate. The concept of ownership is not constant: the nature of these rights varies not only between legal systems but also within a given system over time.

Whereas in other cultures:[58]

> The relationship of a person or community to an object may be called "ownership" in the Western intellectual tradition, but ... the original relationship may not at all resemble the commercial relationship identified in Western legal systems. Yet the bond may be even firmer and more respected than that of "ownership" where, for example, it is a spiritual rather than a commercial relationship.

This is certainly true of Maori cultural property. In an address to overseas curators of Maori objects Mead said:[59]

> A characteristic of most taonga is that they are passed down like heirlooms from one generation to the next. The more generations involved in the handing down the greater the mana (prestige) of the object. Antiquity is valued because it implies association with the ancestors who form the foundation of Maori identity... . One aspect of antiquity is the linking back in time to the founding ancestors of the iwi (tribe) and linking forward to the descendants alive today. This means that the living descendants are trustees of the taonga by right of whakapapa or genealogical descent and this includes the youth of the tribe.

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57 Above n 1, 235.

58 Above n 1, 917.

59 H M Mead "The nature of taonga" *Taonga Maori Conference Report* (Department of Internal Affairs, Wellington, 1991) 166.

> One of the reasons why there is a highly spiritual aspect to some taonga is because they represent an ancestor.... For the living relatives the taonga is more than a representation of their ancestor; the figure is their ancestor and woe betide anyone who acts indifferently to their tipuna (ancestor). It became a commonplace phenomenon during Te Maori to see Maori elders and many of the young guides embracing their ancestors, or bringing green leaves to place at their feet, or speaking to them. This sort of behaviour towards taonga whakairo indicates an entirely different attitude to art objects than is common in western countries.

As stated above, in recognition of the Treaty of Waitangi the PMCH Bill acknowledges that ownership of newly found Maori cultural objects is communal, and that iwi authorities should be involved in decision making about the export of objects relating to their iwi.[60] These values are also reflected in the definition of the category of Maori cultural objects subject to export control - "taonga tuku iho". The emphasis is on objects which have been passed from generation to generation.[61] Mead's comments illustrate that Maori may never have "owned" cultural objects in the Western sense. Guardianship, custodianship or trusteeship may be more appropriate concepts.

B The Public Interest in Cultural Objects

It is suggested that recognition of the community interest in cultural objects in New Zealand need not be restricted to Maori objects. Prott and O'Keefe[62] have noted the community interest in cultural objects recognised by copyright, which after protecting the individual creator's rights for 50 years, gives the public full access to the work; and the French concept of "moral rights" which give artists' rights to protect their works against modification (with a corresponding benefit to the public in the integrity of the works being protected). They state that community interest, already recognised in these fields, is becoming increasingly recognised in cultural heritage law.

The development of New Zealand cultural heritage legislation illustrates this trend, first in respect of Maori cultural property and then in respect of New Zealand cultural property generally. The debates on the Maori Antiquities Bill evidence a concern not to unduly interfere with the market and to balance the national interest in cultural heritage objects against private property rights. Hon J Carroll, MP, said the major object of the Bill was to stop the loss of indigenous artefacts to overseas institutions and collectors

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60 Export restrictions on Maori cultural property will only apply to a certain category of objects - "taonga tuku iho" (see below n 61). Applications will be considered by *Te Roopu* who will be obliged to consult appropriate iwi authorities, where the object's provenance is known. *Te Roopu* will advise the Secretary for Internal Affairs of its decisions on export. The Secretary would need the agreement of the Ministers of Internal and Maori Affairs in order to reverse *Te Roopu's* decision (TOW (91) M 16/1).

61 "Taonga tuku iho" is "any object created or modified or recognised by Maori which:
(a) is of cultural, spiritual, historical, aesthetic and heritage significance and value to Maori and;
(b) (i) has been handed down a descent line of not less than 2 generations; or
(ii) is not less than 50 years old."

62 *Times Literary Supplement*, London, UK, 25 July 1986, 811.

and give effect to the national interest in "conserving to this land what properly belongs to it."[63] Government was given first right to purchase objects sought to be exported to allow the development of a national collection of Maori cultural objects for the benefit of present and future generations of New Zealanders. Export restrictions only applied to "ancient" Maori antiquities so that the rights of contemporary carvers to sell their works to tourists in a thriving souvenir market were not interfered with. Likewise, the legislature did not want to interfere with ownership of collections of objects in private hands. While always aware of the tension between individual property rights and those of current and future generations, Parliament has proved increasingly willing to impact on individual property rights with the passing of each new protective Act. This is evidenced by the extension of export controls to cover a broader range of cultural property; removal of the right to export objects if no satisfactory offer of purchase was made; administrative restrictions on trade and disposal of Maori artefacts in New Zealand; and prima facie Crown ownership of freshly discovered Maori artefacts in order that such objects can belong to *all* New Zealanders.

C Proposal - One General Trust

It is proposed that the PMCH Bill should further recognise the community interest in cultural heritage objects by making all objects subject to export control the corpus of a statutory charitable trust. Current private owners would be divested of their present beneficial ownership, and would be left with bare legal ownership, holding the cultural objects in trust for the beneficial owners - current and future generations of New Zealanders. It would be a breach of trust to export an object without permission. This would not diminish legal ownership because the objects would be subject to export restrictions under the PMCH Bill in any case. Accordingly, compensation for the loss of beneficial ownership would not be required. As the trust would be charitable, if objects were exported and found overseas, the Attorney-General would have standing to sue for their recovery.

D Iwi Trusts

Alternatively, if Maori did not consider it appropriate that the beneficial ownership of existing "taonga tuku iho" should be with all New Zealanders, the beneficial ownership of "taonga tuku iho" of known provenance could be with the appropriate iwi. The Bill could provide that iwi authorities could sue for recovery of such objects illegally exported and found overseas. Where provenance is unknown, the beneficial ownership could be with Maori generally. The statutory body *Te Roopu* could be authorised to sue for the recovery of objects of unknown provenance.

Newly found Maori cultural objects within the definition of "taonga tuku iho" would not need to be included as subject matter of the iwi trusts if the Bill specifies that they are prima facie owned by Maori on discovery and thereafter owned by iwi as determined by *Te Roopu*.

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63 NZPD, vol 119, 217, 4 October 1901.

E *The Nature of the Proposed Trust*

Although Britain has trusts which arise automatically by the operation of statute (Administration of Estates Act 1925, Law of Property Act 1925), the proposed imposition of a trust affecting objects in private ownership would be the first of such a nature for New Zealand.[64] If the trust conforms with the principles of charitable trust law it would be more likely to be politically acceptable, and such principles are well suited to purpose trusts designed to protect public interests.[65]

The purpose of the statutory trust would be to protect movable cultural heritage objects against illegal export for the benefit of current and future generations of New Zealanders. This would come under the fourth head of accepted charitable purposes of "purposes beneficial to the community" and Pettit has stated that the test for this category is essentially one of direct or indirect benefit to the public generally or an appreciably important section of it.[66] Heritage related purposes accepted as beneficial to the community include: preservation of objects of historic interest for public inspection including a collection of armour, antiques and articles of virtu;[67] a trust for the preservation of native wildlife[68]; a trust to preserve two ancient cottages.[69]

A charitable trust to enhance the protection of New Zealand's movable cultural heritage can clearly be seen as beneficial to the public generally. In *Ortiz* Ackner LJ described the Historic Articles Act as concerning "a public right, the preservation of historic articles within New Zealand".[70] As noted above, the legislature has also consistently acknowledged the public interest in protecting cultural property. Although the Department has never tested public support for export controls, the Historic Places Trust tested and found support for its measures in a 1987 survey. Those surveyed were asked to respond to a series of statements, some of which concerned state intervention affecting privately owned historic places.[71] Protection of cultural heritage objects involves similar values and is equally worthy of public support. The national interest in Maori cultural objects has recently been recognised and exploited by the advertising industry. A television commercial for the Bank of New Zealand, which tends to screen during rugby tests when patriotic feelings are running high, depicts a carving standing

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64 *Halsbury's Laws of England* (4ed, Butterworths, London, 1980) vol 48, Trusts, para 523, p 285. *New Zealand Commentary on Halsbury's Laws of England* (4ed, Butterworths, Wellington, 1985) Binder G, Trusts, para 523, p 63.

65 See E B Weiss "The Planetary Trust: Conservation & Intergenerational Equity" (1984) 11 Ecology Law Quarterly 495, in which the usefulness of charitable trust principles for the protection of the natural environment and the cultural heritage is outlined.

66 P H Pettit *Equity and the Law of Trusts* (6ed, Butterworths, London, 1989) 224, 232.

67 Above n 66, 525 (*Re Spence, Barclay's Bank Ltd* v *Stockton on Tees Corporation* [1938] Ch 96; [1937] 3 All ER 684).

68 *Attorney-General (NSW)* v *Sawtell* [1978] 2 NSWLR 200.

69 Above n 66, 226.

70 Above n 12, 33.

71 Department of Internal Affairs "Response to comments on issues paper on Protection of Movable Cultural Property Bill" *Archifacts*, October 1990.

in a lake[72] and asks "What is it that makes you a NewZealander?" Similarly, Maori can be easily be seen as having an interest in non-Maori heritage objects relating to the European settlement of New Zealand.

F Remedies for Breach of Trust

In cases of breach of trust arising through illegal export by legal owners or otherwise, beneficial ownership of the illegally exported object would already be either with all New Zealanders, or with iwi or Maori generally. On the object being identified overseas, a decision on its importance would have to be made to assess whether litigation would be worthwhile.[73] Litigation would be a last resort option absent international co-operation or willingness on the part of the possessor of the object to return it.

1 Trusts and the conflict of laws

The PMCH Bill would not need to rely on forfeiture on illegal export in order to gain title as the beneficial ownership would be vested in New Zealanders by means of the statutory trust, before export. The rule about non-enforceability of foreign penal laws would not apply as the Crown would be asking the foreign court to recognise and enforce the trust, rather than to enforce confiscation on export. The next question is whether the statutory trust would be considered a "public law" and here the relationship between Dicey and Morris's non-enforceability rule and the related private international law rule about governmental acts affecting property comes into play.[74] The statutory trust could be seen as an exercise of power peculiar to government and hence a "governmental interest" on the High Court of Australia's analysis in *Spycatcher No 2*. It would be an exercise of sovereign authority within New Zealand territory however and should therefore be recognised as valid and effective, provided it was not considered contrary to the public policy of the foreign state. The public policy proviso relates to decrees which violate human rights or are discriminatory[75] and would not apply to the statutory trust given the international prevalence of export restrictions. A related question is the extent to which the expropriation of owners' beneficial ownership without compensation would be recognised in a foreign court. Cheshire and North[76] cite *Luther* v *Sagor*[77] as authority for the principle that English courts will recognise that ownership of property is conclusively determined by the terms of the foreign expropriatory decree, if the property is within the jurisdiction of the sovereign at the time of expropriation, even if later brought to England. This principle has been

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72 The object bears a strong resemblance to "Uenuku" a well known carving from the "Te Maori" exhibition.

73 Departmental files indicate that the *Ortiz* litigation cost the Government around $550,000.

74 See text at n 25.

75 Above n 16, 974.

76 *Cheshire and North: Private International Law* (11ed, Butterworths, London, 1987).

77 [1921] 3 KB 532, 548.

followed more recently by the House of Lords.[78] In any case, these questions may not be greatly important as the Attorney-General would not be asking the court to enforce a claim based on a "governmental interest"; nor to enforce an expropriatory law (since the objective of the law - to divest owners of their beneficial ownership - would have already occurred in New Zealand). Instead, the Attorney-General would be claiming an equitable remedy for breach of trust. Accordingly, the next issue is how far an equitable owner can follow or trace property which is in the hands of another.

2 *Tracing in equity*

Pettit has stated that:[79]

> The general principle [of tracing in equity as] laid down in *Re Diplock's Estate* is that whenever there is an initial fiduciary relationship, the beneficial owner of an equitable proprietary interest in property can trace it into the hands of anyone holding the property, except a bona-fide purchaser for value without notice, whose title is, as usual inviolable.

Under the proposed trust, legal owners of cultural objects will be trustees for the beneficial owners and in a position to affect by their actions the beneficial owners' interests, so the relationship will be fiduciary.[80] As the trust would be charitable, the Attorney-General would have standing to seek the return of the object on behalf of the beneficial owners. As noted above, in the case of iwi trusts, the Bill would have to authorise iwi authorities and *Te Roopu* in appropriate cases to pursue recovery claims. The claimant would have to prove the object was trust property, ie that it was included in the definitions in the Heritage Control List,[81] that it had been exported without permission, and that it had been in New Zealand after the enactment of the PMCH Bill. Identification of cultural objects, as opposed to trust funds, should be relatively straightforward, although O'Keefe has noted that much of the evidence in several recovery cases has involved identification.[82] Once an object was located overseas, it could be in the hands of the legal owner who exported it, or a stranger to the trust. The most straightforward case would be a suit for recovery from an owner exporter. Such a person would be a fiduciary and the Attorney-General, the iwi authority or *Te Roopu* would be seeking the return of the object on behalf of its beneficial owners as a remedy

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78 *Williams and Humbert Ltd* v *W and H Trade Marks (Jersey) Ltd* [1986] AC 368.

79 Above n 66, 453.

80 Although there may now be some doubt as to whether a fiduciary relationship is required in order to trace trust property, in *Guerin* v *The Queen* (1984) 13 DLR (4th) 321 Dickson J made it clear that where by statute one party had an obligation to act for the benefit of another, and that obligation involved a discretionary power, the party thus empowered became a fiduciary.

81 The PMCH Bill defines cultural property subject to export control in a Heritage Control List. The list describes 10 categories of objects and uses criteria such as age, rarity, and financial value. It is based on similar lists in Australian and Canadian legislation.

82 Above n 3, 8.

for the breach of trust. The position with respect to strangers to the trust is discussed below.

3 Recognition and enforcement of foreign trusts

Cheshire and North, Dicey and Morris and Pettit have all noted that there is little case law and writing relating to choice of law rules about trusts, and an obvious issue for the proposed trust is the extent to which it would be recognised in non-trust countries. Dicey and Morris have stated that the uncertainty has been reduced in England at least by the enactment of the Recognition of Trusts Act 1987, which has given effect to the 1984 "Convention on the Law Applicable to Trusts and on their Recognition" (The Hague Convention). The Convention also provides hope for future recognition of the trust in "non-trust" states.

4 The Hague Convention

Hayton has noted that the Convention is not intended to introduce the trust concept to "non-trust" states. Instead it is intended to establish common conflict of laws principles on the law applicable to trusts and such principles are to be applied by "trust" and "non-trust" states alike.[83] Accordingly the Convention extends to the recognition of trusts, to spell out the effects of recognising a trust for lawyers in non-trust states.

Dicey and Morris's rule relating to trusts and the conflict of laws is a summary of the essence of the Convention and the authors submit that the rule also states the effect of the limited authority that exists as to the position at common law:[84]

> The validity, construction, effects and administration of a trust are governed by the law chosen by the settlor, or in the absence of any such choice, by the law with which the trust is most closely connected.

Article 2 of the Convention sets out the characteristics which an institution must show in order to be within its scope: a transfer of assets, a settlor, a trustee and beneficiaries. The article also provides that the assets can be devoted to a specified purpose, so charitable trusts are included. Although the scope of the Convention may appear to be the classic private express trust, the Explanatory Report[85] states that article 2 was not intended to be definitive. The UK Recognition of Trusts Act extends the Convention's provision to trusts created by statute in the United Kingdom. It would certainly be arguable that the statutory trust proposed has the required characteristics. However, it may be necessary for the PMCH Bill to provide that the government will initially expropriate all cultural property subject to export control in order for the

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83 D Hayton "The Hague Convention on the Law Applicable to Trusts and on their Recognition" (1987) 36 Int'l & Comp LQ 260.

84 *Dicey & Morris on the Conflict of Laws* (4th Cumulative Supplement to the 11th edition, Stevens & Sons Ltd, London, 1991) 251, 252.

85 A E von Overbeck "Explanatory Report" in "Proceedings of the Fifteenth Session by the Permanent Bureau of the Hague Conference 1985".

government to be the settlor. Legal owners could then be declared trustees and New Zealanders or iwi or Maori the beneficiaries.

Article 6 of the Convention states that a trust shall be governed by the law chosen by the settlor which must be express or be implied in the instrument creating it. The PMCH Bill could therefore expressly state the governing law to be New Zealand trust law.

The most important article of the Convention in terms of recovery under the proposed trust is Article 11 which relates to recognition. Paragraph 3(d) of Article 11 provides that recognition, as a minimum implies:

> [T]hat the trust assets may be recovered when the trustee, in breach of trust ... has alienated trust assets. However, the rights and obligations of any third party holder of the assets shall remain subject to the law determined by the choice of law rules of the forum.

The consequences of this restriction of the beneficiary's right to trace trust property into the hands of donees or purchasers must now be considered.

5 *Recovery from third parties*

(a) *The bona fide purchaser for value*

The main question that would arise in respect of bona fide purchasers of illegally exported objects is whether the foreign court would recognise the statutory title of the beneficial owners over that of the bona fide purchaser. Hayton has considered the impact of the safeguard given to third parties in paragraph 3(d) of Article 11 of the Convention. He cites *Winkworth* v *Christie's Ltd*[86] as authority for the conflicts rule that whether or not a third party obtains good title in a property transfer is governed by the *lex situs* (the law of the state where the property was situated when the transfer occurred).[87] As the majority of civil law systems protect bona fide purchasers to a greater extent than common law systems, if the *lex situs* was the law of a non-trust state, the right to trace may be meaningless, unless the purchaser's actual knowledge of breach of trust made it possible to take advantage of rules of the *lex situs* concerning fraud.[88] Knowledge of a breach of trust provides an important means of attacking the purchaser's bona fides however. If the purchaser was to defend the Attorney-General's or the iwi authority's claim the actual object should be recoverable if it could be shown that the purchaser had notice of the trust, or of the fact that the object was subject to export control, or if the court accepted that the beneficial owners' statutory title to the

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86 [1980] 1 Ch 496.
87 Above n 83, 275.
88 Above n 83, 276.

object was better than the bona fide purchaser's.[89] On the question of notice, Morris has suggested that courts and the international community are beginning to explore the meaning of "minimally decent conduct" in cultural property transactions.[90] The UNIDROIT, Commonwealth and EC regimes each place an onus on purchasers to protect themselves against acquiring illegally exported objects by making appropriate enquiries, and the case of *Autocephalous Greek-Orthodox Church of Cyprus and Republic of Cyprus* v *Goldberg & Feldman Fine Arts Inc*[91] indicates that buyers of foreign cultural heritage objects are unlikely to be regarded as bona fide if they do not enquire as to whether the export requirements of the appropriate foreign country were complied with. On this issue Noland J said:[92]

> [T]he court concludes that Goldberg is not a good faith purchaser under Swiss law. This is so because suspicious circumstances surrounded the sale of the mosaics which should have caused an honest and reasonably prudent purchaser ... to doubt whether the seller had the capacity to convey property rights, and because she failed to conduct a reasonable inquiry to resolve that doubt.

It seems that there may be a more onerous duty on purchasers of cultural objects to make appropriate enquiries than there is on purchasers in ordinary commercial transactions. In light of the fact that many countries adopt an objective test and consider whether a reasonable purchaser would have purchased, the bone fide purchaser may be the exception rather than the rule where foreign cultural objects are concerned.

If the purchaser's bona fides cannot be successfully challenged another option is to offer compensation in return for the object. The requirement to compensate bona fide purchasers is a universal principle in the UNESCO, UNIDROIT, EC and Commonwealth protection regimes, and the Crown or iwi would have to be prepared to incur this further cost in the event that an illegally exported object was acquired by a bona fide purchaser. However, the PMCH Bill could provide that the Crown or iwi could recover this cost from the exporter as part of the penalty for illegal export. It may be that objects could only be recovered from non-trust countries if the Crown was prepared to pay, and the purchaser was prepared to accept compensation, given the higher level of protection enjoyed by purchasers in these countries.

(b) The third party donee of trust property - liability for "knowing receipt"

Hayton has considered the question of when equity will impose a constructive trust on donees in "knowing receipt" of trust property.[93] He has noted that a stranger holding trust property holds it as trustee subject to the terms of the original trust unless he or

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89 As the English Court of Appeal did in *Bumper* (above n 27). Bumper's title derived from a contract of sale in England and under the *nemo dat* rule Bumper acquired no better title than the seller.

90 R A Morris "Legal and ethical issues in trade in cultural property" [1990] NZLJ 40.

91 717 F Supp 1374 (S D Ind 1989).

92 Above n 91, 1376.

93 D Hayton "Personal accountability of strangers as constructive trustees" (1985) 27 Malaya LR 313.

she was a bona fide purchaser for value without notice (actual, constructive or imputed) of the original trust. The donee's legal title is subject to the prior equitable interest according to priority rules, and he or she must restore the property to the beneficiaries or personally account for its value. This principle has been incorporated in both the UNIDROIT draft Convention and the EC Directive.[94] In any claim under the statutory trust, the Attorney-General's or the iwi's interest would be in recovering the actual object, not its value. On the question of notice, Hayton has stated that a person has constructive notice of those matters which a reasonable person would have discovered on making such enquiries as ought reasonably to have been made. Therefore, in the case of a protected cultural object being given or left by will to a relative or other person overseas, that person can be seen as a constructive trustee of the trust property as he or she will either know the object was trust property or subject to export restrictions or ought to have made appropriate enquiries. Such a stranger, with at least actual knowledge of the breach of trust, could also be liable for "knowing assistance" of a breach of trust, but as the beneficial owners' interest will always be in tracing the actual object, liability under this head need not be explored further.

6 *Recovery of future illegal exports from the UK*

Although New Zealand has not acceded to the Hague Convention, the statutory trust proposed should certainly be recognised in Great Britain, where the most significant illegal exports to date have gone. The English Recognition of Trusts Act 1987 provides that where a trust is valid under the governing law, its recognition necessarily follows. As noted, recognition requires that trust property may be recovered subject to any third party's rights to it under local law. Given that the tendency in England is to protect the original owner and to construe bona fides strictly the beneficial owners should have an excellent chance of recovery under the statutory trust.

7 *Recovery from other art importing countries*

Gaillard and Trautman noted that in 1987 the Convention had been signed by Italy, the United Kingdom, Luxembourg and the Netherlands, and that the American Bar and Bankers Associations, and the College of Probate Counsel had endorsed the Convention for United States signature and ratification.[95] The Convention has since been ratified by the United Kingdom, Italy and Australia and signed by the United States, France and Canada.[96] The three ratifications have brought it into force. The statutory trust proposed is not dependent the country of import having ratified or acceded to the

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94 The EC Directive provides that, in the case of a cultural object being acquired by donation or succession, the acquirer shall not be in a more favourable position than the person from whom the object was acquired. Similarly, the UNIDROIT draft Convention imputes the conduct of the person from whom the possessor has acquired the object by inheritance or otherwise gratuitously to the possessor.

95 E Gaillard and D T Trautman "Trusts in non trust countries: conflict of laws and the Hague Convention on Trusts" (1987) 35 Am J Comp L 307-40.

96 *International Law News* Journal of the International Law Section of the Law Council of Australia (No. 16, September1992) 23.

Convention as any country familiar with trust concepts could recognise and enforce New Zealand's claim, subject to local law concerning third parties. New Zealand should have a very good chance of recovering illegal exports from the United States under the proposed statutory trust given the court's attitude to the diligence required of purchasers in *Goldberg*.[97] Also, as noted, the United States has ratified the UNESCO Convention and O'Keefe[98] has cited *United States* v *McClain* [99] as authority that a general state claim to ownership to all undiscovered artefacts together with illegal export of those artefacts constitutes their theft for the purposes of the US National Stolen Property Act. Newly found objects owned by Maori under the PMCH Act could similarly be regarded as stolen if illegally exported and imported into the United States.

In respect of recovery from non-trust countries, this would only be assured if these countries ratify or accede to the Hague Convention and Galliard and Trautman concluded their article with the hope that the United States would ratify the Convention before European interest was "dulled by delay".[100] A possible but perhaps somewhat artificial way of enhancing the likelihood of recovery from non-trust states would be for the Bill to make the state a "joint owner at law" in all cultural objects subject to export control. This might avoid non-trust states being alienated by the language of trust in the statute but might be less acceptable for "taonga tuku iho" in terms of the Treaty. In any case it is to be hoped that the surrendering of some measure of sovereignty by member states of the EEC under the EC Directive on recovery might encourage art importing and non-trust countries to look more favourably on a claim for return of an illegally exported object, by a state outside the Community.

8 Cost

If the legislature is prepared to increase the chance of recovering illegally exported cultural objects by means of the statutory trust it will also need to be prepared to fund the cost of recovering objects through litigation. The fact that the government has not been prepared to provide a fund for the purchase of objects for which export permission is denied to secure them for the public benefit is not encouraging. It seems likely however, that if important objects are lost, the government would be prepared to fund ad hoc claims, as it was in *Ortiz*, particularly if there were a better chance of success.

IV CONCLUSION

The PMCH Bill, in its present form, better recognises the principles of the Treaty of Waitangi. However, it decreases the chance of recovering newly found Maori cultural objects in litigation overseas and does not enhance the recovery of cultural objects generally, because of the unenforceability of foreign penal and other public laws. International co-operation represents an ideal solution to the problem but art importing states are unlikely to change their entrenched attitudes in a way that will greatly benefit

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97 Above n 91.
98 Above n 3, 10.
99 545 F 2d 988 (1977).
100 Above n 95, 339.

New Zealand. In further recognition of the communal interest in Maori cultural property and applying this approach to cultural property generally, the PMCH Bill should establish a statutory trust that would accord with charitable trust principles and would improve the chance of recovering illegally exported objects from overseas, without significantly diminishing legal ownership. The Bill could also establish iwi trusts in respect of "taonga tuku iho" of known provenance, if such trusts were considered more appropriate in terms of the Treaty.