

The Protected Objects Act in New Zealand: Too Little, Too Late?

Piers Davies* and Paul Myburgh**

Abstract: The Protected Objects Amendment Act (POA) was passed by the New Zealand Parliament in 2006, so New Zealand could fulfil its obligations under the UNESCO Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property 1970 and the UNIDROIT Convention on Stolen or Illegally Exported Cultural Objects 1995. This represents a significant delay after the drafting of these two conventions. This article explores why New Zealand has taken so long to give domestic effect to these conventions and examines the manner in which they have been given domestic legal effect in the POA. The article also focuses on issues of Māori cultural property, the practical implementation of the POA, and the cultural heritage climate in New Zealand.

INTRODUCTION

The Protected Objects Amendment Act (POA) was passed by the New Zealand Parliament in August 2006 so that New Zealand could fulfil its obligations under the UNESCO Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property 1970 (UNESCO Convention) and the UNIDROIT Convention on Stolen or Illegally Exported Cultural Objects 1995 (UNIDROIT Convention). This is a significant delay after the

*Wackrow, Williams & Davies, New Zealand. Email: piers@wwandd.co.nz

**The University of Auckland, New Zealand. Email: p.myburgh@auckland.ac.nz

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drafting of these two conventions. The reasons for this, and the manner in which the conventions have been given domestic effect in New Zealand law, are matters of considerable interest.

To understand why New Zealand has taken so long to ratify the conventions, it is necessary to examine briefly the historical and geographical background. New Zealand has a population of more than 4 million. Its occupation by human beings is recent. The first settlers, Māori tribes from further north in the Pacific, appeared between 1200 and 1300 c.e. European settlement did not take place in significant numbers until the British Crown negotiated the Treaty of Waitangi with several Northern Māori subtribes (*hapū*) on February 6, 1840, after which it was signed by most, but not all, Māori tribes and subtribes elsewhere in New Zealand. Since the mid-1980s the Treaty of Waitangi has been considered the country's founding document by the educated elite of judges, legislators, and bureaucrats.¹ We deal with the significance of the Treaty of Waitangi and its effect on the POA in a later section of this article.

New Zealand was an enthusiastic British colony for many years, supporting the British Empire and sending troops to a succession of colonial and international wars. In 1947 it reluctantly accepted independence.² This conservatism, based partly on caution (almost timidity) and partly on a strong sense of loyalty, is one of the main elements of New Zealand's foreign policy.

The other element is an enthusiasm for multilateral solutions and treaties. This began with support for the League of Nations from 1936 onward³ and intensified with a strong commitment from 1945 onward to the founding of the United Nations.⁴ New Zealand later adopted a strong antinuclear stance, which brought it into disfavor with France in the 1970s and the United States beginning in 1984. This element arose out of idealism and the fact that New Zealand is a string of islands with the population spread around the edges of the country. The capital city Wellington and the largest city Auckland, together with two out of the remaining three main cities, have significant ports. New Zealand has always been heavily dependent on external trade. New Zealanders are aware of international dimensions, and there is no attraction in isolationist policies.

Although New Zealanders are comparatively well off, with a significant tax base for the size of the nation, New Zealand has not funded its representation in international affairs to the degree that its interests would seem to merit. There are limitations on the potential representation by the Ministry of Foreign Affairs and Trade, with a tendency to concentrate on issues vital to New Zealand's trade and economic interests. Consequently, New Zealand tends to be represented at World Trade Organization negotiating sessions but more intermittently when it comes to cultural heritage treaties. For example, although New Zealand attended the final meeting on the UNESCO Convention on the Protection of the Underwater Cultural Heritage 2001 and enthusiastically supported the convention, it was not represented at all the governmental expert meetings leading up to the convention.

NEW ZEALAND'S INVOLVEMENT WITH THE UNESCO AND UNIDROIT CONVENTIONS

The UNESCO and UNIDROIT Conventions are not merely of theoretical interest to New Zealand. Although New Zealand's cultural heritage is comparatively small, it has suffered from the export of cultural material ever since Captain Cook established contact in 1769.⁵ This included the export of preserved, tattooed Māori heads (toi moko) for 30 or 40 years from the late eighteenth century onward. These were often traded for muskets, adding a much deadlier dimension to intertribal warfare. This was followed by a period of trading in the skulls and bones of Māori and Moriori (the indigenous inhabitants of the Chatham Islands). These bones (koiwi tangata) were sought for scientific studying by museums, especially in England and Europe, commencing in the 1840s, because intelligence was then thought to be determined by skull size.⁶ This trade, although repugnant, was not contrary to the applicable British laws; but it was contrary to Māori customary law (tikanga), and in many instances the skeletons were illegally taken by deception or by theft. In addition, many Māori treasures, including carvings, ornaments, cloaks, and weapons, were obtained, sometimes under dubious circumstances, and exported to museums and private collections overseas.

By the early twentieth century, there was a realization that New Zealand was disposing of its Māori heritage. This led to the enactment of the Māori Antiquities Act in 1901, followed by the more general Historic Articles and Antiquities Acts in 1962 and 1975, respectively. By increasing the protection against the illegal removal and export of antiquities and artifacts, these statutes represented a first step in responding to the issues raised in the UNESCO Convention.

Antiquities Act 1975

This act covered any antiquity, which was broadly defined in section 2 as including any chattel of "national, historical, scientific or artistic importance; and relates to the European discovery, settlement, or development of New Zealand and, is or appears to be, more than 60 years old." Also included were any ship, boat, or aircraft or part thereof that had been wrecked for more than 60 years and that was of "national, historical, scientific or artistic value or importance." Artifacts were defined as

any chattel, carving, object or thing which relates to the history, art, culture, traditions, or economy of the Māori or other pre-European inhabitants of New Zealand and which appears to have been manufactured or modified in New Zealand by any such inhabitant or brought to New Zealand by an ancestor of any such inhabitant or used by any such inhabitant prior to 1902.

The penalties were not particularly substantial in 1975, and quickly became ludicrous with the surging inflation of the 1970s and 1980s.⁷

The Ortiz Case and its Aftermath

A key weakness of the Antiquities Act (and its predecessors) was that it did not provide the means to recover cultural treasures that had been stolen or illegally exported. This weakness was fully exposed in the case of *Attorney-General of New Zealand v. Ortiz*.⁸ Five storehouse (pātaka) panels, masterpieces of Māori carving, were recovered from a swamp in New Zealand and reappeared some years later in the United Kingdom. They were removed from New Zealand without the New Zealand government's permission. The New Zealand government instructed its attorney-general to recover the panels but was unsuccessful in the House of Lords. The resulting intergovernmental protests and discussions led to the Commonwealth Scheme for the Protection of the Material Cultural Heritage.⁹

However, the outcome of the *Ortiz* case did not speed up the process of New Zealand's ratification of the UNESCO Convention. Instead, this languished on the to-do list for another 20 years.

Summary of Initiatives Taken Between 1975 and 2006

In the three decades after 1975 there were several serious attempts to strengthen the protection afforded by the Antiquities Act and/or to give domestic effect to the UNESCO Convention. The first initiative was the Protection of Movable Cultural Heritage Bill, which began life as a Department of Internal Affairs issues paper in 1990 and was scheduled to be introduced as a government bill by the National government in 1996.¹⁰ Instead, a private member's bill, the Taonga Māori Protection Bill, was introduced by Tau Henare in 1996. After several lengthy delays in 1999, the Māori Affairs Select Committee finally concluded, on a bipartisan basis, that the focus of this bill was too narrow and recommended that it be incorporated into the Department of Internal Affairs' broader Protection of Movable Cultural Heritage proposal. In the same year, however, Tau Henare lost his seat in the general election, and his bill consequently lapsed. In 2003 in its second term, the Labour government introduced a proposal for an Antiquities Amendment Bill, which eventually became the Protected Objects Amendment Bill 2005.

The competing cultural heritage and private ownership issues involved in the Antiquities Act touch on some core values of New Zealand society and were therefore always going to be controversial. Consequently, both major political parties were loathe to grasp this particular nettle.¹¹ There was also a strong desire to make sure that any replacement legislation got it right. This was made more difficult by a proliferation of overlapping legislative initiatives with different focuses: The Protection of Movable Cultural Heritage proposal specifically sought to regulate export of cultural property more effectively after the *Ortiz* decision; the Taonga Māori Protection proposal focused exclusively on Māori cultural property; and neither

measure covered other general cultural heritage issues dealt with, albeit in a seriously outdated fashion, in the Antiquities Act.

As well as these legislative initiatives, there was also the draft scheme for protecting cultural heritage within the Commonwealth, which, as discussed earlier, eventually became the Commonwealth Scheme for the Protection of the Material Cultural Heritage at Mauritius in November 1993. In addition, in 1993 Jonathan Keate published an important law reform proposal to improve the protection of New Zealand's movable cultural heritage.¹² So the failure to resolve this issue was caused by a lack of political will rather than a lack of initiatives.

Departmental Restructuring 1990 to 2000

Another element that probably contributed to the delay in implementing the UNESCO Convention was the 1991 restructuring of the functions of the Department of Internal Affairs. This was part of the enthusiasm of both the Labour government and the National government in the late 1980s and early 1990s to restructure government departments from large administrative departments into smaller ministries, which developed and advised on policy. The Labour government first proposed a free-standing entity focusing on arts and culture under the umbrella of the existing Department of Internal Affairs in 1987, to provide a "clearer and more coherent system." This idea was taken up by the incoming National government in 1991. However, the State Services Commission advised on fiscal policy grounds that the new Ministry of Cultural Affairs should be a stand-alone entity. This resulted in some Department of Internal Affairs arts and cultural portfolios and staff moving across to the Ministry of Cultural Affairs, whereas others were transferred to other ministries or remained with the Department of Internal Affairs. The administration of the Antiquities Act remained with the department, apparently because it was categorized as a heritage issue, along with war graves and national monuments, rather than as a contemporary arts and culture issue. There it languished, until it was transferred across to the enlarged Ministry for Culture and Heritage (MCH) in 2000. This piecemeal approach to reapportioning portfolios meant that the Department of Internal Affairs "lost a co-ordinating role for its traditional responsibilities in a manner that was bound to increase staff overheads."¹³ In general, the removal of the culture and arts budget from the Department of Internal Affairs led to a loss of emphasis and a decrease of spending on heritage issues. In particular, the Antiquities Act review process stagnated and attracted criticism.¹⁴

Now that all heritage matters are brought together in the MCH, there is a more comprehensive overview of, and greater policy emphasis on, heritage issues, as well as more adequate funding for heritage initiatives. This undoubtedly contributed to how the work on the Protected Objects Bill moved ahead steadily between 2000 and 2006. It also means that a solid foundation has been created for future heritage work.

Historic Places Acts

Evolving alongside the Antiquities Act were the Historic Places Acts. The Historic Places Act 1980 and its successor, the Historic Places Act 1993, put much more emphasis on preservation of archaeological sites. The object of the 1993 act is to promote the identification, protection, preservation, and conservation of the historical and cultural heritage in New Zealand. Although the Historic Places Act regime complemented the Antiquities Act 1975 to a certain degree, each had a different emphasis and focus.

THE PROTECTED OBJECTS ACT

Adopting Conventions

Like other Anglo-Common Law countries, New Zealand can only give effect to a convention by passing the necessary legislation through parliament. There are a number of ways to do this. One direct way is to adopt the convention text as a schedule to a new act and to give it the force of law.¹⁵ Another, more indirect method of giving domestic effect to international instruments is to paraphrase the intentions and requirements of the convention in New Zealand legislation.¹⁶

In the drafting of the POA, a halfway house method of domestic implementation was adopted, in which the English texts of the UNESCO and UNIDROIT Conventions were inserted by the Protected Objects Amendment Act 2006 into the Antiquities Act 1975 as schedules 2 and 3 of the new Protected Objects Act; but the convention texts themselves were not given the force of law in New Zealand. Instead, the key articles of the UNESCO and UNIDROIT Conventions were restated and paraphrased in the sections of the POA, with cross-references to the relevant convention articles in the schedules. This was thought necessary to standardize and integrate the texts of both conventions into a single statute and provide for clear domestic rules, but it may ironically give rise to some uncertainty of interpretation. As discussed in the following text, there are a few significant differences between the convention articles and the sections of the POA that give domestic effect to them. The starting point for a judge interpreting the POA is to apply the sections of the POA rather than the convention texts set out in the schedules. However, in the event of a conflict of interpretation between a section of the POA and the convention text, a court should arguably favor the convention text, given that one of the objects of the act is to enable New Zealand's participation in the UNESCO and UNIDROIT Conventions.¹⁷ This inevitably generates uncertainty. For example, should a court give precedence to section 10E(4) of the POA, which provides that no compensation is payable for the restitution of a stolen protected foreign object, or to article 4(1) of the UNIDROIT Convention in schedule 3 of the POA, which provides that compensation is payable to bona fide pos-

sessors of stolen protected foreign objects? For this reason, it would have been better to have given the convention texts themselves the force of law, and to have provided a statutory memorandum clearly explaining how the two convention texts should be interpreted and integrated.

Parallel Conventions

Given that 114 states are party to the UNESCO Convention, but only 29 states are party to both the UNESCO and UNIDROIT Conventions, it is of particular interest that New Zealand opted to give domestic effect to both conventions at the same time. This approach accords with UNESCO's official recommendations.¹⁸ The official New Zealand government position is that it was necessary to adopt both conventions because they complement each other:¹⁹

The UNESCO convention provides a broad framework for cooperation in this field, while the UNIDROIT convention was developed to provide for more concrete remedies. Taken together, these treaties address many of the legal problems that otherwise bedevil attempts to recover cultural heritage objects.

However, parallel accession to the UNESCO and UNIDROIT Conventions is not as straightforward as this official statement might suggest, and UNESCO provides no detailed or practical official guidance on how to do so. To date, Nigeria and New Zealand are the only two Common Law jurisdictions party to both conventions, and New Zealand has preceded Nigeria in enacting domestic legislation. Other Common Law countries have exhibited a distinct lack of enthusiasm toward the UNIDROIT Convention, mainly because of concerns over the prohibition on reservations to the convention, the broad interpretation of cultural property, the lengthy limitation periods on return of illicit cultural objects, and the overriding of domestic and private international law rules protecting the rights of bona fide purchasers for value.²⁰ There was little public debate as to whether New Zealand should accede to the UNIDROIT Convention. It may have been thought that it is in New Zealand's interests, as an export rather than market nation in the illicit trade of cultural property, to accede to the UNIDROIT Convention, in the hope that this may facilitate the return of New Zealand cultural property that has already found its way overseas, mainly to museums and collections in the United Kingdom, Europe, and the United States. However, the reality is that not one of these states, and few other market nations, has ratified the UNIDROIT Convention. This renders the prospect of recovery of illicitly exported New Zealand cultural property somewhat remote.

Analysis of the Protected Objects Amendment Act

The title and dating of the POA are unorthodox in the sense that one would have expected the POA either to be categorized as an amendment to the Antiquities Act

1975 or to be styled as a new act, the Protected Objects Act 2006. Instead, although the MCH elected to jettison what was presumably thought to be the overly narrow and old-fashioned nomenclature of antiquities in favor of protected objects, it insists that the Protected Objects Act 1975 is not a new act but merely an amendment to the Antiquities Act 1975.²¹

However, every substantive section of the original act has been amended, major provisions have been inserted, and three new schedules have been added to the POA, two of which comprise the UNESCO and UNIDROIT Convention texts. The conventions are not implemented retrospectively in the POA but only took effect on May 1, 2007. The extent of these changes is so significant that the POA can only be described as a cut-and-paste version of the original, quite literally so in the case of the hard copy version of the consolidated Antiquities Act/Protected Objects Act 1975. Eventually, this problem with the hard copy version will be resolved when it is reprinted, but a date has yet to be scheduled by the Parliamentary Counsel Office. There have been some lapses in the application of cut and paste. For example, the definitions of antiquity and artifact only apply up to October 31, 2006, because they are repealed from November 1, 2006, by the Protected Objects Amendment Act 2006. However, section 2(1)(e) of the POA still refers to “antiquities more than 100 years old, such as inscriptions, coins and engraved seals.”

The peculiarity of the title and dating of the POA also creates practical difficulties in simply finding the statute. People who are unaware of the unusual legislative drafting process and are seeking the new act in the two most logical places, either as an amendment to the Antiquities Act 1975 or the Protected Objects Act 2006, will seek in vain.²² Thus it would probably have been simpler and better to start afresh with a completely new act.

The general provisions implementing the UNESCO and UNIDROIT Conventions in the new part I of the POA focus on the protection of three key categories of objects: protected New Zealand objects, unlawfully exported foreign objects, and stolen protected foreign objects.

The definition of “protected New Zealand object” in section 2 of the POA broadly follows the definitions of cultural property in the conventions. A protected New Zealand object is an object that forms part of the movable cultural heritage of New Zealand that is of importance to New Zealand, or to a part of New Zealand, for aesthetic, archaeological, architectural, artistic, cultural, historical, literary, scientific, social, spiritual, technological, or traditional reasons; and falls into one or more of the extensive categories of protected objects set out in schedule 4 of the POA. These categories include art objects, documentary heritage objects, science, technology, industry, economy and transport objects, and social history objects that are at least 50 years old and are not represented by at least two comparable examples permanently held in New Zealand public collections. They also include archaeological and historical objects of non-New Zealand origin relating to New Zealand. The possibility of a conflict between the laws of the jurisdiction of origin

and New Zealand law is avoided by the requirement that they must have been in New Zealand for at least 50 years and are, or have been, in a public collection. This category includes objects of Polynesian creation or modification brought to New Zealand before 1800, or created or modified by the former Polynesian inhabitants of the Kermadec Islands before 1800.

A further category of note is that of *ngā taonga tūturu*, which replaces the definition of Māori artifacts under the old Antiquities Act. *Ngā taonga tūturu* are defined as objects more than 50 years old that relate to Māori culture, history, and society and that were, or appear to have been, imported into New Zealand by Māori, manufactured or modified in New Zealand by Māori, or used by Māori. Given the importance of Māori cultural heritage to New Zealand, all *taonga tūturu* (regardless of how many representative examples of this type of *taonga tūturu* there may be in permanent public collections) are designated as protected New Zealand objects in schedule 4 of the POA.

Further categories include taxonomically significant New Zealand natural science specimens (such as fossils, meteorites, and kauri gum) and early numismatic and philatelic objects. This category specifically includes the 1772 *Resolution and Adventure Medal*²³; the Pattern Waitangi Crown²⁴; New Zealand bank notes produced before 1933; examples of the New Zealand Cross, Victoria Cross,²⁵ George Cross; and associated medals awarded to New Zealanders or relating to New Zealand. The final category consists of any objects, assemblages, scientific samples, and organic remains derived from a New Zealand archaeological site, as defined by the Historic Places Act 1993. The Historic Places Act defines a New Zealand archaeological site as

any place in New Zealand that—

- (a) Either—
 - (i) Was associated with human activity that occurred before 1900; or
 - (ii) Is the site of the wreck of any vessel where that wreck occurred before 1900; and
- (b) Is or may be able through investigation by archaeological methods to provide evidence relating to the history of New Zealand.

This reliance on the Historic Places Act definition is unfortunate, because the definition is deficient in a number of respects. The express limitation of archaeological sites to places in New Zealand limits the protection of the Historic Places Act, and hence also the POA, in respect of underwater cultural heritage to wreck sites in inland waters and the territorial sea. This excludes shipwreck sites in the New Zealand contiguous zone, Exclusive Economic Zone, or continental shelf, which, although likely to be limited in number, may be historically significant. The use of a fixed cutoff date of 1900 for protected archaeological sites is arbitrary and increasingly likely to give rise to anomalies. It is also inconsistent with the other categories of protected New Zealand objects, which are afforded that status once they are 50 years old. It seems distinctly odd that archaeological objects should

receive a lesser level of protection. And, as discussed earlier, because the Historic Places Act definition focuses specifically on the geographical site rather than the relevant cultural property originating from the site, it does not offer comprehensive protection. The POA seeks to overcome this problem by protecting objects “derived from” a New Zealand archaeological site. However, experience with the Historic Places Act suggests that it is notoriously difficult to establish the provenance of historical objects, particularly those taken from historic shipwrecks. It is therefore unfortunate that the POA does not include any provision for the burden of proof in the event of a dispute regarding the provenance of objects that may have been derived from an archaeological site.

Section 5 of the POA prohibits the export or attempted export of protected New Zealand objects from New Zealand, unless prior approval has been obtained from the chief executive of the MCH. Exporters must demonstrate to the satisfaction of the chief executive that they have undisputed title to the relevant object. Unfortunately, however, the POA does not require more detailed evidence of how such ownership was acquired. The chief executive must have granted a certificate of permission for the export, and the export must comply with any terms or conditions imposed.²⁶ The chief executive may also exempt categories of protected New Zealand objects from the export prohibition, if sufficient examples of these categories are already held in public ownership in New Zealand.

The chief executive’s discretion to allow export of New Zealand-protected objects is fettered in three main respects. First, section 7A provides that permanent export is never permitted where the chief executive determines that a protected New Zealand object is, among other things, “substantially physically authentic” and is of “such significance to New Zealand or part of New Zealand that its export from New Zealand would substantially diminish New Zealand’s cultural heritage.” Second, the chief executive must consult two or more expert examiners in deciding whether to allow export of protected New Zealand objects. Although the expert examiners only provide the chief executive with advice and recommendations, these will presumably be determinative of the result in most cases—a decision by the chief executive that flies in the face of all expert advice is considerably more vulnerable to appeal to the Minister for Culture and Heritage or to judicial review. The act states that the chief executive must provide reasons for the decision to allow or prohibit export. Although it is unclear from the act whether the expert examiners’ reports will also be made available to the exporter as a matter of course, it is suggested that, in the interests of a transparent process, they ought to be. In any event the reports will be available to exporters under the Official Information Act 1982. Expert examiners are protected under the POA from being held personally liable for any recommendations made in good faith. Third, any registered objects of national significance cannot be permanently exported. The Nationally Significant Objects Register must include all protected New Zealand objects that the chief executive has determined may not be exported and may include other significant cultural heritage objects submitted by their owners for inclusion in the

register.²⁷ The register is unavailable for public inspection, presumably because this would facilitate theft and fraud.

Anyone exporting, or attempting to export, protected New Zealand objects without the chief executive's permission and "without reasonable excuse" commits an offence under section 5(2) of the POA and may incur a maximum fine of NZ\$100,000 or 5 years of imprisonment, or both (or NZ\$200,000, where the offence is committed by a body corporate). These punishments represent a significant increase on the Antiquities Act regime.

However, although section 5(2) of the POA purports to give domestic effect to article 3 of the UNESCO Convention, it does not go as far as article 3, which states that the "*import, export or transfer of ownership of cultural property effected contrary to the provisions adopted under this Convention by the States Parties thereto, shall be illicit.*" Although unlawful import of protected foreign objects is covered elsewhere in the POA, unlawful transfer of ownership of protected objects is not. It may have been thought unnecessary to include a prohibition on illicit transfers of ownership within New Zealand, because these would already be covered by existing New Zealand criminal law. However, this would only seem to be true of cases of theft of protected New Zealand objects. Section 5 of the POA does not explicitly render illegal, void, or voidable, transfers of ownership in New Zealand that contravene the domestic cultural property laws of other state parties to the convention.²⁸ The POA also arguably does not meet the obligation, set out in article 13(a) of the UNESCO Convention, to "prevent by all appropriate means transfers of ownership of cultural property likely to promote the illicit import or export of such property." Although New Zealand courts may decide that some ownership transfers are void, on the ground that they are contrary to public policy or are illegal contracts under the Illegal Contracts Act 1979, this will not necessarily always be the case. It is disappointing that article 3 of the convention was not implemented more fully and faithfully in section 5 of the POA. Arguably, if the validity of a transfer of ownership of a protected New Zealand object is brought into question because completion of the contract would breach the comparable cultural heritage laws of other states, or are likely to promote illicit import or export, New Zealand courts should apply the provisions of the UNESCO Convention and regard such ownership transfers as illicit, rather than confining themselves to the arguably narrower ambit of section 5 of the POA.

The second main category of objects protected under the act is that of unlawfully exported protected foreign objects. The definition of protected foreign objects in section 2 of the POA mirrors the definition of cultural property in the UNESCO and UNIDROIT Conventions. Section 10A of the POA provides that a foreign protected object that has been unlawfully exported may not be imported into New Zealand. There may be some thorny issues surrounding the interpretation of unlawfully exported. Is this to be tested against the yardstick of the domestic laws of the state of origin, or the conventions? Does unlawful export include only strictly illegal exports, or also exports that are merely prohibited, contrary to

the rules or public policy? Apparently deliberately, to allow for the blending of the two convention texts, the POA eschews both the broader terminology of the UNESCO Convention (“effected contrary to the provisions adopted under this Convention”) and the narrower terminology of the UNIDROIT Convention (“illegally exported”). Provided unlawfully exported is broadly interpreted, this provision should give effect to New Zealand’s international obligations in respect of imports of illicit cultural property under articles 3 and 7 of the UNESCO Convention, and articles 5 and 6 of the UNIDROIT Convention.

Section 10B provides that a reciprocating state (defined as a State Party to the UNIDROIT Convention, or a State Party to the UNESCO Convention that provides for reciprocal treatment of unlawfully exported New Zealand cultural property equivalent to the protection afforded by articles 5 and 6 of the UNIDROIT Convention) may bring a claim in the New Zealand courts against the possessor of the object within the standard 3- and 50-year limitation periods provided by article 5(5) of the UNIDROIT Convention.²⁹ The court must order the return of the unlawfully exported protected foreign object if the claimant establishes that the removal of the object from the claimant’s territory impairs one of the interests set out in article 5(3) of the UNIDROIT Convention.

Section 10C provides that the possessor of the object is entitled to fair and reasonable compensation from the reciprocating state if the object was acquired after it was unlawfully exported and the possessor did not know, and could not reasonably be expected to have known, at the time it was acquired that it was unlawfully exported. This provision, which mirrors article 6 of the UNIDROIT Convention, makes a significant inroad into the normal application of the *nemo dat* rule in New Zealand law.

The third main category covered by the act is that of stolen protected foreign objects. Section 10D deals with objects stolen from the inventories of foreign cultural institutions (defined as museums, religious or secular public monuments, or similar institutions in states parties to the UNESCO Convention) and imported into New Zealand. Section 10D, which is loosely based on article 7(b)(ii) of the UNESCO Convention, provides that the reciprocating state must apply to the chief executive for recovery of the stolen object. If the claim is established, the chief executive must ask the New Zealand Customs Service to seize the object under the Customs and Excise Act 1996 and transfer it to the MCH. The MCH then returns it if the reciprocating state pays just compensation to anyone who has valid title or is an innocent purchaser and covers all costs relating to the return and delivery of the stolen object. This process is not expressly made subject to any limitation periods. Because this is a political process involving executive forfeiture and administrative return, rather than a court claim based on a cause of action, it is presumably not subject to the Limitation Act 1950. The section effectively allows the chief executive to order the seizure of property in New Zealand on the basis of an *ex parte* application brought on the part of the reciprocating state, and does not allow the possessor to object to the seizure or put its side of the case. There

also does not appear to be a right of appeal against the chief executive's order. Where the status of an allegedly stolen object is disputed by the possessor, the chief executive's order may presumably be challenged by an application for administrative review, or on the basis that it constitutes an unlawful seizure under the New Zealand Bill of Rights Act 1990.

Section 10E, which is based on articles 3 and 4 of the UNIDROIT Convention, provides for restitution claims against the possessors of stolen foreign protected objects. Such claims may be brought in the New Zealand courts within the standard 3- and 50-year limitation periods in article 3(3) of the UNIDROIT Convention. However, these limitation periods do not apply where the stolen object formed an integral part of an identified monument or archaeological site in the claimant state, is part of a foreign collection, or was made by a member or members of a tribal or indigenous community for traditional or ritual use by the community and is to be returned to them. In a departure from the UNIDROIT Convention, section 10E(4) provides that no compensation is payable for the restitution of a stolen protected foreign object, unless the object has been stolen from a foreign cultural institution, which is dealt with under section 10D(2)(b).

Section 10F confirms that sections 10A to E are not retrospective. They only apply to protected foreign objects that are unlawfully exported or stolen on or after May 1, 2007.

There are obvious overlaps between sections 10A–C and D–E. Thus, for example, a protected object stolen from a foreign museum and illegally imported into New Zealand is both an unlawfully exported foreign protected object (sections 10A–C) and a stolen foreign protected object (sections 10D–E). This mirrors the acknowledged overlaps between chapters II and III of the UNIDROIT Convention.³⁰

However, it is not immediately clear why it is necessary to provide a separate but overlapping regime in section 10D for the administrative seizure of objects stolen from foreign cultural institutions (based on article 7(b)(ii) of the UNESCO Convention), in addition to the general regime in section 10E for restitution of stolen protected foreign objects through the courts (based on articles 3 and 4 of the UNIDROIT Convention). It is understood that powers of administrative seizure were thought necessary as an immediate or interim measure, pending judicial proceedings. Section 10(4) of the POA does provide that any protected foreign objects seized by Customs must be transferred to and held by the MCH, until "any proceedings related to that object" under the POA or the Customs and Excise Act 1996 are completed. This presumably includes claims for recovery of objects stolen from foreign museums made to the chief executive by reciprocating states under section 10D, restitution claims brought by the lawful owner through the New Zealand courts under section 10E, and civil and criminal proceedings brought under the Customs and Excise Act. However, these parallel administrative and judicial processes relating to stolen protected foreign objects appear unnecessarily complex, and give rise to the specter of a multiplicity of conflicting claims, with inevitable delays and uncertainty before stolen protected foreign objects can be returned.

It would probably have been cleaner to apply the more sophisticated UNIDROIT Convention model of judicial restitution to all cases of unlawfully exported and stolen protected foreign objects.

There are a few other inconsistencies in the drafting of section 10 of the act. For example, in section 10C(1) the terminology of “fair and reasonable compensation” used in article 6(1) of the UNIDROIT Convention is adopted, but the parallel wording of article 4(1) of the UNIDROIT Convention is not adopted in respect of sections 10D and E. As previously mentioned, the formulation of “just compensation” from article 7(b)(ii) of the UNESCO Convention is used instead.³¹ Furthermore, the UNESCO Convention definition of “foreign cultural institutions,” which does not include archaeological sites, is adopted in section 10D; but the UNIDROIT Convention wording of “identified monument or archaeological site” is used in section 10E. This may give rise to the decidedly odd result that, although overlapping section 10D and 10E claims for seizure or restitution are available for objects stolen from foreign museums, the former remedy is unavailable for objects stolen from foreign archaeological sites. Also, as discussed earlier, whether compensation is available on restitution of stolen objects depends on whether they fall under sections 10D or 10E, which seems rather arbitrary.

MĀORI ISSUES

Unlike the United States and Canada, where many separate treaties were negotiated between the governments and the indigenous tribes or nations, New Zealand only has one treaty between the Crown and Māori: The Treaty of Waitangi (Te Tiriti o Waitangi). The Treaty of Waitangi itself is comparatively short and is in both English and Māori. Unfortunately, there are key differences between the two texts, which have continued to provide misunderstanding and dispute. Where cultural property is concerned, the Māori language version of article the second guaranteed “the unqualified exercise of their chieftainship over their lands, over their villages and all their treasures” (taonga).³² The English language version is not identical. The Māori wording has provided the basis for recent Waitangi Tribunal hearings (Wai 262) over Māori claims to intellectual property, cultural items, and treasures.

The Treaty of Waitangi was not signed by all the major tribes (iwi), although it was carried from one end of New Zealand to the other. Important iwi, like Tuhoe, refused to sign. Many who did quickly became unhappy about how it was being implemented by the Crown. Hone Heke, the first signatory, ended up in military conflict with the British within 5 years.

The Treaty of Waitangi was increasingly ignored, especially once New Zealand came under settler control, and was filed away in the National Archives where it suffered damage from water and rats. More than a century later the Labour government set up the Waitangi Tribunal to deal with Māori grievances after 1975.³³

Under Chief Judge Edward Durie, the tribunal began to hear and report in the early 1980s on several major Treaty of Waitangi claims. In 1985 the tribunal's membership was increased and it was allowed to hear historic grievances back to 1840.³⁴ At the same time the government started inserting references to compliance with the Treaty of Waitangi or its principles into major New Zealand legislation. In 1987 a landmark New Zealand Court of Appeal decision, *New Zealand Māori Council v. Attorney-General*,³⁵ held that the references to the principles of the Treaty of Waitangi were to be taken seriously and that the New Zealand government had inherited a partnership with the Māori people as a result of the Treaty.

The Court of Appeal's judgment suspended the vigorous debate between those who argued that the Treaty of Waitangi was a nullity, those who argued that the Treaty of Waitangi had been a fraud to cheat the Māori tribes, and those who argued that the New Zealand government had a duty to honor the Treaty. Professor David Williams argues that the approach of the government and the courts during the 1980s resulted in the creation of a beneficial myth: that the Treaty of Waitangi's preamble and articles are an explicit immigration contract in which Māori welcomed those who wished to settle in New Zealand.³⁶

During the aforementioned Wai 262 hearings, the question of the New Zealand government's Treaty obligations to repatriate Māori taonga was raised. Jane Kominik, the deputy chief executive and policy group manager of the MCH, gave evidence to the Waitangi Tribunal that the New Zealand government could do more but was reluctant to do so, because this would trigger claims in respect of cultural property in New Zealand that had come from other peoples.³⁷ This points to an interesting issue: although Māori press to repatriate their treasures, New Zealand museums are holding the treasures of other peoples, largely those of countries in and around the Pacific.³⁸

Although the POA has replaced "antiquity" with the Māori words "taonga tū-turu,"³⁹ and makes use of several other Māori concepts, it still displays a fundamentally Eurocentric approach, with the emphasis on individual ownership and property, whereas such concepts are unknown or inappropriate in the context of taonga held by traditional indigenous societies. The POA also does not address intellectual property issues, which can have major implications for Māori.⁴⁰

Although the POA represents a significant improvement over the 1975 Act and has introduced more commensurate penalties, from a Māori standpoint it really is mostly a case of too little too late. Indeed, similar comments were made more than a century earlier during the passing of the Māori Antiquities Act 1901.⁴¹ The enactment of the POA could also be described as bolting the door of the storehouse after the food has been taken. Many treasures have already been dispersed to museums or private collections overseas. Arapata Hakaiwi of the Museum of New Zealand, Te Papa Tongarewa, in Wellington has said that the British Museum alone is holding approximately 3,000 Māori items.⁴²

The immediate effect of the enactment of the POA on the Auckland art market seems to have been to inflate the auction prices for items that are still available.

For example, a pre-European canoe prow found in Taranaki in the 1920s recently sold for NZ\$61,592. This underlines the fact that the POA is not retrospective and does not apply to taonga found before 1976. This was raised by the Hauraki claimants as a fundamental flaw in the POA in the recent Waitangi Tribunal hearing relating to the Tauranga Moana Inquiry. The Crown witnesses in that inquiry responded with the argument that the legislation should not be retrospective.⁴³

Other important criticisms of the POA made by the Hauraki claimants and Ngāti Kahungunu include the following:⁴⁴

- Ownership of discovered taonga
- Procedure for determining ownership
- Custody/care of taonga pending ownership
- Illegal export of taonga.

It is unlikely that a large amount of finely carved buried taonga awaits discovery in New Zealand. There may be masterpieces that were buried in times of danger, as in the *Ortiz* case, but most of these taonga have already been discovered. More commonplace items like adzes are more likely to be found. These are handled in accordance with section 11 of the POA. Section 11 of the POA approaches the issue of ownership of discovered taonga by making the Crown the prima facie owner.⁴⁵ Some iwi have tried to circumvent this provision by asking archaeologists working in their areas to sign memoranda in which they agree to pass all objects found during surveys into the custody of the iwi. This is unlikely to be legally effective, but it may present de facto advantages if archaeologists comply. The New Zealand Archaeological Association has warned against signing such memoranda.⁴⁶ The procedure for determining ownership of taonga has been simplified, but there are still real concerns over the speed with which ownership issues will be handled, the information provided by the Crown about taonga, and the resources of the MCH to deal with these issues.⁴⁷

It has been commented that Māori skepticism of heritage assessment processes is not misplaced—although indigenous heritage is respected and valued in principle, the practice is often deficient.⁴⁸ Several of the above mentioned criticisms levelled at the POA applied equally to the Antiquities Act 1975,⁴⁹ and the forms used under the Antiquities Act were subject to similar criticism.⁵⁰

Another question is whether the Māori Land Court is the appropriate body to determine ownership of taonga. The Māori Land Court is a specialist court of record, but its status is more equivalent to a District Court rather than the High Court or an appellate court. The Māori Land Court was supposed to determine ownership issues under section 12 of the Antiquities Act 1975, but in practice virtually no ownership orders were made. Custody was granted instead.⁵¹ We have found little express criticism of the choice of the Māori Land Court to determine such matters,⁵² but a major concern is whether the Māori Land Court's resources will be sufficient to perform its role properly.⁵³ Inadequate resourcing has fre-

quently hampered the work of the Waitangi Tribunal and claimants appearing before it. Discussions with legal practitioners working in the area indicate that although there is no real concern about the Māori Land Court determining ownership issues, there is considerable disquiet about the aforementioned issues raised by the Hauraki claimants and Ngāti Kahungunu.

Governmental deference to the Treaty of Waitangi may have already peaked, with increased tensions regarding a number of critical Treaty of Waitangi issues. This is evident in the handling of the foreshore and seabed issue: The government precipitately enacted retrospective legislation, the Foreshore and Seabed Act 2004, to defeat the outcome of a New Zealand Court of Appeal decision that could have allowed Māori to make claims based on customary rights to the foreshore and seabed.⁵⁴ Balanced against this is the government's recent flurry of claims settlements, including the Central North Island Forests Land (Treelords) settlement. Māori are increasingly recognizing the importance of their traditional cultural values.⁵⁵

COMPATIBILITY WITH THE 2001 UNESCO CONVENTION ON UNDERWATER CULTURAL HERITAGE

Although New Zealand attended the November 2001 meeting of UNESCO and enthusiastically supported the adoption of the convention on the Protection of the Underwater Cultural Heritage, there has subsequently not been a great deal of progress in examining the convention and deciding whether New Zealand should adopt it.⁵⁶ Such debate as there is, has been limited to people particularly involved in this area.

Obviously, there would have to be compatibility between the POA and any legislation bringing into effect the 2001 UNESCO Convention. However, we do not consider this particularly difficult because there would need to be a complete revision of several other statutes in any event.

The indications are that there is no particular governmental enthusiasm for embarking on this project as a matter of priority. The MCH has not included it in its current legislative program. This situation could well change upon the 2001 convention being ratified by the necessary 20 countries and coming into effect. The New Zealand government is most likely to be encouraged if Australia ratifies the convention.

PRACTICE

Compliance Forms

The MCH has published forms for compliance with the POA, including the Application to Export and the Application for Inclusion on the Nationally Significant Objects Register.⁵⁷

These forms are expressed in clear language with a minimum of legalisms. However, they are most definitely monocultural and are written solely in English. There is no use of the Māori language even where that would clearly be more appropriate. There is no specific recognition of Māori tribal organizations, trusts, or committees; yet such entities are expected to register to be collectors of Taonga Tūturu. Even the concept of being a collector is quite alien to Māori and is likely to cause discomfort. We hope that the forms will be seen as a work in progress and that before too long they will reflect bicultural realities.

There are also some potential gaps in the system. For example, a registered collector can give or bequeath a protected object to a relative who is not required to be a registered collector.⁵⁸ This means that a protected object could disappear completely.

Web Site

The web site of the MCH, <http://www.mch.govt.nz/>, is an excellent user-friendly and informative resource. Included among the materials are the helpful Guidelines for Taonga Tūturu.

Discovery and Export of Taonga Tūturu

Announcements have been appearing in the Public Notices column of the main English-language daily newspapers advertising the discovery of taonga tūturu. These appear in the larger circulation newspapers, like the *New Zealand Herald* as well as in more localized regional newspapers, like the *Southland Times*. Notifications are also listed on the MCH web site.

To publicize the finds among Māori networks, the MCH contacts the New Zealand Historic Places Trust, local authorities, and Te Puni Kōkiri (Ministry of Māori Development) and asks for suggestions on who to contact and how the notification should be made. The MCH tries to cast its net as widely as possible and also reaches out to those in the immediate locality. For example, if a find comes to light near a marae, the MCH talks to the elders of that marae. In some cases, the MCH is guided by protocols already established as a result of the Treaty of Waitangi claims process; but the MCH will not rely exclusively on these protocols, because there are sometimes issues of overlapping claims, and other iwi or hapū may be interested and want to get involved. Although the notices should arguably be in Māori and English, the reality is that hardly anyone reads public notices apart from the occasional lawyer. It is far more important that the MCH follows its current procedures and its determination to track down all affected iwi and hapū. During the first 12 months after the POA came into force, 24 separate notifications were made of discoveries throughout New Zealand, varying from adzes to anchor stones and canoe prows.

Although there are unlikely to be difficulties for museums wishing to temporarily export taonga tūturu overseas for exhibitions, the permanent export of taonga tūturu is likely to be more restricted. The MCH approved one taonga tūturu for permanent export during the first 12 months after the POA came into force.

Museums and the Nationally Significant Objects Register

Apart from the four major museums in Auckland, Wellington, Christchurch, and Dunedin, there are numerous other provincial and local museums, as well as private museums and historic homes. All are potential holders of valuable items.

It is unclear whether museums will eventually register their most important treasures on the Nationally Significant Objects Register. At present the register consists of items for which an export permit was refused. The assumption may be that items are safe if they are in a museum, but the theft of the Kelly Tarlton shipwreck treasures, for example, shows that this is not always the case.⁵⁹

Responses From Archaeologists

Archaeologists have responded promptly to the legislation changes, have identified issues and problems, especially in relation to the finding of artifacts, and have developed guidelines through the New Zealand Archaeology Professional Development Cell.⁶⁰ The New Zealand Historic Places Trust is also developing a National Research Framework to act as a guide for undertaking archaeology in New Zealand.⁶¹

CONCLUSION

The POA represents a marked improvement over the Antiquities Act 1975, and the enactment of a modern cultural heritage regime in New Zealand is a cause for celebration. Remaining difficulties and uncertainties surrounding the parallel implementation of the UNESCO and UNIDROIT Conventions will hopefully be resolved by the courts. Our view is that the POA will for the most part be effective at a practical level in protecting what cultural heritage remains in New Zealand. However, the inordinate delay in enacting the legislation was inexcusable. For much of Māori cultural heritage, the POA is indeed too little, too late. Many taonga have been lost to New Zealand and may never be recovered.

More work must be done to address the justifiable concerns that Māori have about the treatment of taonga tūturu under the POA, and the implementation of the act. In particular, the forms under the POA should be seen very much as a work in progress. These should be revised in the light of practical experience, and steps should be taken to make them less monocultural.

The MCH holds the most significant key to the POA's success. The practical administration of the act is ultimately what counts. In this regard, the MCH seems

to be positive, open, and receptive to ideas. This bodes well for the future protection of cultural heritage in New Zealand.

ENDNOTES

1. Williams, "Myths," para. 2.
2. The Statute of Westminster, 1931; 22 George V, c. 4 (U.K.)
3. McNeish, *Dance of the Peacocks*, 102.
4. Chase, "Peter Fraser at San Francisco."
5. The first recorded sale was to Joseph Banks in March 1770. Banks paid for the bartered head with "a pair of old drawers of very white linen.' . . . And so the trade began, with a white man's recycled underwear." See Te Awēkotuku, *Mau Moko*, 48.
6. See "Skulls and Bones," reporting an interview with Te Papa Museum repatriation manager, Te Herekīkie Herewini.
7. See generally Paterson, "Protecting *Taonga*," 114–19; sections 5, 11, 13, and 15 of the Antiquities Act 1975.
8. [1984] Appeal Cases 1, [1983] 2 All England Law Reports 93 (House of Lords). The House of Lords refused to give extraterritorial effect to the forfeiture provision in the Historic Articles Act 1962 (N.Z.), on the basis of the established conflict of laws and international law principle that a forum state will not enforce a claim brought by a foreign sovereign, directly or indirectly, to enforce the penal, revenue, "or other public" laws of a foreign state. Their Lordships also interpreted the wording of the statute as simply generating the possibility of forfeiture to the Crown, rather than automatic forfeiture on export or attempted export. The unfortunate result of this decision was to limit the effectiveness of the New Zealand statute to instances where cultural property was intercepted and forfeited to the Crown before it left New Zealand.
9. See O'Keefe, "Protection of the Material Cultural Heritage," 147ff; and O'Keefe, "Mauritius Scheme," 295ff. An adverse consequence of the *Ortiz* case was that the New Zealand government made no further attempts to recover illicitly exported New Zealand cultural property. In the later *Poverty Bay Club* case, for example, the emphasis was on prosecution rather than on the recovery of the relevant cultural property (the Captain Cook Instruction) from the United Kingdom, because "English courts will not uphold the statutes of another country" (see Kominik, "Protecting our Past," 39).
10. The proposed Protection of Movable Cultural Heritage Bill does not appear to have ever been formally introduced in Parliament. For a highly critical analysis of the 1990 issues paper, see Tunks, McRae, and Wild, "Protection of Movable Cultural Property Bill," 50ff. Tunks, McRae, and Wild describe the issues paper as "the Antiquities Act 1975 in designer clothing (with a few nips and tucks)." See also Butts, "The Antiquities Act Review," 48. But compare Kominik and Cooper, "Letters to the Editor," 88, in response to criticism by Tunks, McRae, and Wild.
11. See New Zealand Parliamentary Debates, Second Reading, *Taonga Māori Protection Bill*, May 1, 1996, Vol. 554, 12245, Hon John Luxton (Minister for Māori Affairs):

However, when we start to look at it in some greater depth we find the reasons that Governments have been rather tardy and reluctant to get too involved in the detail of this area. It is a very difficult area in which to promote legislation; one where ownership rights are indeterminate, even in today's society.
12. Keate, "Proposal," 97ff.
13. Bassett, *The Mother of All Departments*, 250–51. Bassett also notes at 250 that there were "varying degrees of enthusiasm" for the new ministry, and that "[p]arochialism amongst the staff of existing agencies was most noticeable."
14. See Butts, "The Antiquities Act Review," 49, who also describes the review process as "secretive."
15. For example, the Maritime Transport Act 1994 incorporates the English text of the International Convention on Salvage, 1989, as a verbatim schedule and provides that the "provisions of

the Convention shall have the force of law in New Zealand.” See section 216 and schedule 6 of the Maritime Transport Act 1994.

16. For example, the domestic implementation of the Convention on Limitation of Liability for Maritime Claims 1976 in part 7 of the Maritime Transport Act 1994 diverges from the convention text in significant respects. See *Tasman Orient Line CV v. Alliance Group Ltd (The “Tasman Pioneer”)* [2003] 2 Lloyd’s Reports 713; [2004] 1 New Zealand Law Reports 650 per Williams J at para 30: “Parliament in this country adopted a ‘peculiar and unsatisfactory technique’ of paraphrasing the London convention rather than merely enacting it.”

17. Section 1(A)(e) of the Protected Objects Act 1975; cf. *Sellers v. Maritime Safety Inspector* [1999] 2 New Zealand Law Reports 44, 59–62 (CA): Legislation is to be interpreted consistently with New Zealand’s international law obligations.

18. See <http://erc.unesco.org/cp/convention.asp?KO=13039&language=E> and <http://www.unidroit.org/english/implement/i-95.pdf>; *UNESCO Information Note: CLT-2005/Conf/803/2*, Paris, June 16, 2005: <http://unesdoc.unesco.org/images/0013/001399/139969E.pdf> (accessed May 15, 2008): “Both Conventions should ideally be considered for ratification and for those States that have not yet joined either, this should be done at the same time. . . .”

19. New Zealand Parliamentary Debates, Second Reading, Protected Objects Amendment Bill 2006, May 10, 2006, Vol. 631, 2962, Hon Mahara Okeroa (Associate Minister for Arts, Culture and Heritage).

20. See, for example, the Report of the Illicit Trade Advisory Panel (ITAP) to the UK Government, discussed in Gaimster, “Recent UK Measures,” 93.

21. See <http://www.mch.govt.nz/protected-objects/faq.html> (accessed May 15, 2008). See also Siddle, “Protected Objects Amendment Bill,” 36, who argues that the changes brought about by the POA “will not affect the majority of collectors and traders” and that the amendments “are primarily about improving the operation of the Act, by improving the clarity of definitions around protected objects.”

22. Only the consolidated text of the Protected Objects Act 1975 is available under “Statutes” at <http://www.legislation.govt.nz/> (accessed May 15, 2008).

23. A bronze medal struck in England in 1772 and distributed to Māori when the *Resolution* and *Adventure* visited New Zealand in 1773 on Cook’s second voyage. Cook noted in his journal of July 1772:

[T]heir Lordships [of the Admiralty] also caus’d to be struck a number of Medals, on the one side the Kings head and on the other the two Sloops & the time they were at first intended to sail from England, these Medals are to be distributed to the Natives of, and left upon New Discovered countries as testimonies of being the first discoveries.

24. A silver coin minted in Britain in 1935, depicting King George V on the obverse and Tāmāti Wāka Nene and Governor Hobson signing the Treaty of Waitangi on the reverse. Only three are known to exist.

25. In 2006, prior to the enactment of the POA, there was significant controversy over the planned sale of Sir Charles Upham’s Victoria Cross and Bar by his family to a British private collector. The medals were offered to the New Zealand government for NZ\$3.3 million. The government declined to purchase them, but indicated that permission under the Antiquities Act 1975 to export the medals was unlikely to be forthcoming. This impasse was eventually resolved by a deal whereby the medals were purchased by the Britain’s Imperial War Museum with assistance from a private trust, on the understanding that they will remain in New Zealand for 999 years. The medals were on public display at the Queen Elizabeth II Army Memorial Museum at Waiouru until stolen in 2007. They were subsequently recovered as a result of a \$300,000 reward offered by British medal collector Lord Michael Ashcroft and Nelson businessman Tom Sturgess.

26. See article 6 of the UNESCO Convention. Section 5 of the POA does not explicitly state that the certificate of permission must accompany the export, as required by article 6(a) and (b) of the UNESCO Convention.

27. See <http://www.mch.govt.nz/protected-objects/register.html> (accessed May 15, 2008).

28. See O'Keefe, *Commentary*, 42–45 on the academic debate regarding the meaning of the term “illicit” in the context of article 3.

29. The latter longstop period is significantly longer than the limitation periods usually provided for in New Zealand domestic law; compare with the Limitation Act 1950, sections 4 and 5, which provide for a 6-year limitation period for tort and conversion of property, after which time a bona fide possessor acquires good title to the goods.

30. See Prott, *Commentary on the UNIDROIT Convention*, 28, 52–53

31. It may be argued that this is nit-picking, in that “just compensation” is roughly equivalent to “fair and reasonable compensation”; but this issue was debated at length at UNIDROIT, and the alternative proposal of “equitable compensation” was emphatically rejected. See Prott, *Commentary on the UNIDROIT Convention*, 41–42. In this respect, section 10E does not faithfully reflect the UNIDROIT Convention.

32. As translated from “te tino rangatiratanga o o ratou wenua, o ratou kainga me o ratou taonga katoa” by Sir Hugh Kawharu, “Appendix,” 321.

33. Waitangi Tribunal Act 1975.

34. Treaty of Waitangi (Amendment) Act 1985.

35. [1987] 1 New Zealand Law Reports 641. See also Ruru, “Treaty of Waitangi Principles,” 87ff; and Baragwanath, “New Zealand Māori Council.”

36. See Williams, “Myths,” and “Law and National Identity.”

37. *New Zealand Herald*, “No Policy Set for Returning Taonga,” January 24, 2007. Available at http://www.nzherald.co.nz/section/1/story.cfm?c_id=1&objectid=10420565 (accessed on May 15, 2008); see also *New Zealand Herald*, “Government Treads Softly Around Taonga Issue,” January 25, 2007. Available at http://www.nzherald.co.nz/topic/story.cfm?c_id=350&objectid=10420778 (accessed May 15, 2008). However, the MCH does fund the repatriation office of the Museum of New Zealand, Te Papa Tongarewa, which is having increasing success.

38. For example, the Auckland War Memorial Museum has an extensive collection of cultural treasures from around the Pacific, some of which could be subject to repatriation claims, depending on the circumstances in which they were originally obtained. Those claims may very well be moral rather than legal. Certainly, the Auckland Museum has returned to iwi items obtained in questionable circumstances (Tapsell, *Pukaki*, 154–58).

39. This was welcomed by Georgina Te Heuheu in the Committee debates on the Protected Objects Amendment Bill:

[I]t is very proper that Māori phraseology has been entered into the Bill, especially in these times when we as New Zealanders are all so much more aware of the need to protect our treasures and of the importance of protecting taonga Māori, Māori treasures. These things belong to all of us as New Zealanders and they help to underpin our identity and our feeling of nationhood, one with the other.

New Zealand Parliamentary Debates, July 25, 2006, Vol. 632, 4382.

40. See the *Mataatua Declaration on Cultural and Intellectual Property Rights of Indigenous Peoples* 1993. Available at http://www.wipo.int/export/sites/www/tk/en/folklore/creative_heritage/docs/mataatua.pdf (accessed May 15, 2008).

41. Compare Tapsell quoted in Stokes, “Shutting the Gate”; and Keate, “Proposal,” 98–99; and *New Zealand Parliamentary Debates*, Vol. 119, 350, 11 October 1901.

42. See Stokes, “Shutting the Gate”; Paterson, “Protecting *Taonga*,” 114. Keate, “Proposal,” 98, puts this figure at approximately 2,500. Even with regard to taonga held in New Zealand museums, there is often dissatisfaction with where they are held and how they reached there. See Tapsell, *Pukaki*, 19, 20, 154–58; and *Closing Submissions on Behalf of Ngati Kahungunu*, paras 102, 116–19.

43. *Closing Submissions on Behalf of Hauraki Claimants*, paras 38–39. See also *Closing Submissions on Behalf of Ngati Kahungunu*, paras 105–06.

44. *Closing Submissions on Behalf of Hauraki Claimants*, paras 31–54; and *Closing Submissions on Behalf of Ngati Kahungunu*, paras 102–22.

45. See also the Waitangi Tribunal's comments in the *Hauraki Report* 2006 Vol. 3 Wai, 686, para 20.2.6.

46. NZAA *Professional Resources*. Available at <http://www.nzarchaeology.org/profes.htm> (accessed May 15, 2008).

47. *Closing Submissions on Behalf of Ngati Kahungunu*, paras 110, 110.1, and 110.2.

48. See Donaghey, "They Do Things Differently," 93, 97.

49. *Closing Submissions on Behalf of Ngati Kahungunu*, paras 97–101.

50. Butts, "The Antiquities Act Review," 49; and Legget, "Finders Keepers," 2–3.

51. Legget, "National Treasures," 8–9.

52. There was brief criticism by the Honorable Tau Henare during the debates on the POA Bill: *New Zealand Parliamentary Debates*, July 25, 2006, Vol. 632, 4384.

53. Honorable Georgina Te Heuheu in the debates on the POA Bill: *New Zealand Parliamentary Debates*, July 25, 2006, Vol. 632, 4382.

54. *Attorney General v. Ngati Apa* [2003] 3 N.Z.L.R. 643; see also Williams, "Myths."

55. See "Maori Put More Value on Culture," reporting a Nielsen survey finding that three-quarters of Māori said traditional values were really important to them, compared with less than half in 2004.

56. See generally Davies and Myburgh, "New Zealand," 209–15.

57. *Protected Objects—Forms*. Available at <http://www.mch.govt.nz/protected-objects/forms.html> (accessed May 15, 2008).

58. See the declaration part of the Application for Registration as a Collector Taonga Tūturu form and section 13(1) of the POA.

59. Ingram and Wheatley, *New Zealand Shipwrecks*, 297. See also endnote 25.

60. New Zealand Archaeology Professional Development Cell, "Guidelines"; and "Issues and Problems."

61. McGovern-Wilson, "New Zealand Historic Places Trust."

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