

Recovering Stolen Art: Legal Understandings in the Australian Art Market⁺

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This article continues a project investigating the law applying to the civil recovery of stolen artworks, and the legal understanding of Australian art market actors such as commercial galleries and auction houses. Why examine stolen art? First, art theft appears to involve large sums internationally. An English report on the illicit art trade recently suggested insured United Kingdom ('UK') art theft may amount to £150 million annually,¹ and the literature commonly suggests there are significant connections with illegal trading in weapons and drugs.² The sheer size of the losses suggests a meaningful Australian market exists. Second, artworks are a type of personal property that appears to be poorly served by existing civil law. It is a form of property that can increase markedly in financial value over time, and

⁺ This article forms part of a project funded under the University of Melbourne Research Development Grant Scheme in 2001, and held jointly by Professor Kenneth Polk and Associate Professor Christine Alder from the University's Department of Criminology, and Andrew Kenyon from the Law School. Thanks to Nicole Bolton for invaluable assistance with conducting the interviews.

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¹ Department for Culture, Media and Sport, *Report of the Ministerial Advisory Panel on Illicit Trade* (December 2000) [21].

² Eg Lyndel V Prott, 'Cultural Heritage Law: The Perspective of the Source Nations' (2000) 5 *Art Antiquity and Law* 333, 338; Department for Culture, Media and Sport, above n 1, [15] and Annex A; Culture, Media and Sport Committee, United Kingdom Parliament, *Cultural Property: Return and Illicit Trade* (2000), and this aspect of the Committee's report is usefully commented on by David Gill and Christopher Chippindale, 'The Trade in Looted Antiquities and the Return of Cultural Property: A British Parliamentary Inquiry' (2002) 11 *International Journal of Cultural Property* 50, 53; Martin Bailey, 'The Art Theft-Drug Smuggling Link Exposed: Scotland Yard Describes What Happened to the Beit Masterpieces in the Underworld' [1997] No 66 *Art Newspaper* 1; Neil Brodie, 'The Concept of Due Diligence and the Antiquities Trade' (1999) 5 *Culture Without Context* <www.mcdonald.cam.ac.uk/IARC/cwoc/issue5/DueDiligence.htm>; Simon Mackenzie, 'Organised Crime and Common Transit Networks' (2002) No 233 *Trends & Issues in Crime and Criminal Justice* 4; John Conklin, *Art Crime* (1994) 184-5, 209.

often has significant cultural and social value.³ These features make art an interesting illustration of possible general reforms to the law on recovering stolen property.

Part one summarises our earlier research on art recovery and the reforms it suggested for the Australian law on limitation periods. We then examine, in part two, methodological questions related to the interviews underlying this article and explain its exploratory scope. Part three addresses some relevant aspects of the international context that develop from our earlier work, and part four reports on the legal understandings and practices of some Australian art market actors. The limited fieldwork described in this article suggests three conclusions. First, there appears to be little art market knowledge of the legal position about recovering stolen art.⁴ Second, there appears to be substantial art market support for a publicly available database or register of artworks that have been stolen previously in Australia. However, there is very little knowledge of the existing international listing services for art thefts. Third, current art market practices create difficulties when trying to investigate the legal title of art vendors, and buyers appear to face significant hurdles in meeting English or United States ('US') standards of good faith and due diligence. These practices, however, would not prevent the use of theft listing services. All this supports our earlier reform suggestions, and suggests current art market practices could well accommodate the development of listing services to encourage due diligence.

Limitation Periods: Comparative Approaches

We previously have discussed the role of limitation periods in Australian, English and US law in connection with stolen art.⁵ A thief of artwork gets no title to the property and can pass no title to a third party.⁶ Thus, a dispossessed owner retains title and may be able to sue

³ Tensions over the values to be accorded to art and heritage items can be seen in the terminological debates about cultural property or cultural heritage: see, for example, Lyndel Prott and Patrick O'Keefe, "'Cultural Heritage" or "Cultural Property"?' (1992) 1 *International Journal of Cultural Property* 307.

⁴ While individual market actors may draw understandable comfort from the existence of insurance against property thefts, such insurance is far from universally held or applicable in its coverage.

⁵ Andrew T Kenyon and Simon Mackenzie, 'Recovering Stolen Art – Australian, English and US Law on Limitations of Action' (2002) 30 *University of Western Australia Law Review* 235.

⁶ Title remains with the original owner, except in rare cases where sale of goods legislation applied; eg, where the owner has by conduct represented that a third

a later possessor of the property for recovery under the torts of conversion or detinue. But statutory limitation periods can bar civil claims to recover such stolen property, just as they can affect civil claims in general.⁷ In exploring the effect of limitations periods on civil recovery of artworks, our earlier work highlighted ways in which the applicable Australian law is unusual when compared to England and the US.

Australian limitations law generally does not consider the conduct of the dispossessed owners or the current possessors of stolen artworks.⁸ The limitation period starts to run at the time of theft, and any action can be expected to be barred six years after an artwork is stolen.⁹ For recovery claims about stolen art, there are few options to delay time starting to run, or to extend the limitation period once it has commenced running. Thus, former owners of artworks can lose out to current possessors, even if the possessors bought the works in suspicious circumstances. But possessors' conduct is not entirely overlooked in Australian law because, in the rare situations where the limitation period may be delayed or extended,¹⁰ questions of good faith or due diligence could be decisive for any later claim.

The English law on limitations and stolen property once resembled Australia's legislative position.¹¹ But since 1980 there has been a significant difference. The *Limitation Act 1980* (UK) s 4 means time starts to run for property recovery claims only upon the property's first good faith conversion. That is, time will not run in favour of a thief, and possessors must establish that they obtained an item in good faith.¹² Unlike Australia, the English law obliges purchasers to investigate the title of property, including artworks. Recent English

party has authority to sell the goods. See, eg, J P Benjamin, *Benjamin's Sale of Goods* (1992).

⁷ For a discussion of limitations see, eg, Gordon McGrath, David C Price and Ian Davidson, *Limitation of Actions Handbook: New South Wales* (1998); Andrew McGee, *Limitation Periods* (3rd ed, 1998).

⁸ Kenyon and Mackenzie, above n 5, 238-42.

⁹ For more detailed discussion of the accrual of causes of action in conversion or detinue, and the effect of limitations periods on such claims, see *ibid* 236-8.

¹⁰ For example: where a theft is fraudulently concealed, see eg *Limitation of Actions Act 1958* (Vic) s 27(b), *Limitation Act 1969* (NSW) s 55 and *Limitation Act 1974* (Tas) s 32(1)(b); where the identity of the person against whom a cause of action lies is concealed either deliberately (*Limitation Act 1985* (ACT) s 31(1)(b)) or fraudulently (*Limitation Act 1969* (NSW) s 55(1)(b)); or where a material fact is discovered after the limitation period has run in South Australia and the Northern Territory, see eg *Limitation of Actions Act 1936* (SA) s 48; also see *ibid* 238-40.

¹¹ See generally *Limitation Act 1939* (UK).

¹² See Kenyon and Mackenzie, above n 5, 241.

reform proposals would see time generally start to run on the reasonable discoverability of a cause of action.¹³ The proposed 10 year long-stop limitation period, however, would not run for conversions by way of theft. Under the proposal, as under current law, time would run only from the first conversion that was shown to be in good faith.¹⁴ These English proposals are expected to be implemented.¹⁵

Most jurisdictions of the US operate under a due diligence, or reasonable discovery, requirement. Under this approach, the limitation period commences running from the date on which the owner of stolen property could have been expected to discover its location and the identity of its possessor.¹⁶ That is, much US law requires diligence from dispossessed owners. Thus, while Australian law in general ignores questions of good faith or due diligence in relation to civil recovery claims, both England and much of the US consider the actions and knowledge of either, or both, the dispossessed owner and the current possessor.

Our earlier examination of the varying approaches led us to suggest that Australian law could reconsider limitation periods for property recovery claims. The analysis suggested imposing duties of diligence on both parties. We concluded that Australian law should encourage all art market actors to be diligent in their dealings with works that may have been stolen, and apply obligations on each party, probably by drawing on the recent English reform proposals.¹⁷ Such reforms to limitations law would converge with common suggestions that focus

¹³ Law Commission for England and Wales, *Limitations of Actions*, Report 270 (2001). There would be a variety of additional requirements to the discoverability of the action, but these are not important for the purposes of this article.

¹⁴ *Ibid* [4.67], Draft Bill cl 14(3), (5); and see generally Kenyon and Mackenzie, above n 5, 243.

¹⁵ See Law Commission for England and Wales (2002/2003) No 58 *Law Under Review* <www.lawcom.gov.uk/>.

¹⁶ Eg *O'Keeffe v Snyder*, 83 NJ 478 (1980). Alternative US approaches such as California's 'actual discovery' legislative provision and New York's 'demand and refusal' rule were considered in Kenyon and Mackenzie, above n 5, 246-8.

¹⁷ These English proposals would extend recent Australian reform proposals for limitation periods, which recommended versions of a reasonable discoverability approach on the question of when time commences to run, but failed to consider the different treatment of stolen property claims in comparable international jurisdictions: Queensland Law Reform Commission, *A Review of the Limitation of Actions Act 1974*, Report 53 (1998); Law Reform Commission of Western Australia, *Limitation and Notice of Actions*, Report 36(II) (1997) [171]-[172], [176]; Law Reform Commission of Western Australia, *Review of the Criminal and Civil Justice System*, Report 92 (1999) [10.22]; and see Kenyon and Mackenzie, above n 5, 240.

on the value of databases listing stolen art, on which dispossessed owners could list their losses and potential art buyers search before purchase.¹⁸ In addition, the 1995 UNIDROIT *Convention on Stolen or Illegally Exported Cultural Objects* requires due diligence of possessors, and defines it to include consulting 'any reasonably accessible register of stolen cultural objects'.¹⁹ So, our suggested Australian reforms would accord with moves in the international literature and conventions. They could draw on the promotion of databases to create a simple, inclusive definition of 'due diligence', in the style of the UNIDROIT Convention. This would overcome criticisms by some commentators of the term's vagueness, particularly in the US.²⁰ In relation to stolen art, using a listing service could be prima facie evidence of diligence or good faith, just as US and English case law and UNIDROIT would suggest.²¹

Thus, the first part of this project suggested reforming Australian limitations law, and encouraging the use of listing services as a likely way of improving how the art market considers provenance.²² It demonstrated how concepts of due diligence and good faith have great relevance under English law and in the US, and suggested reforms for Australia that would increase the significance of due diligence and good faith. From this base, this article explores whether, and how, the knowledge and practices of Australian art market actors may affect these suggestions. The research does provide support, of a limited empirical nature, to existing suggestions that art market actors have poor knowledge of their legal position.²³ But the more valuable aspect of this research may be to suggest how the proposed reforms

¹⁸ Kenyon and Mackenzie, above n 5, 248-51.

¹⁹ UNIDROIT *Convention on Stolen or Illegally Exported Cultural Objects*, opened for signature 24 June 1995, art 4(4) (entered into force 1 July 1998) ('UNIDROIT Convention'). On the Convention generally, see Lyndel V Prott, *Commentary on the UNIDROIT Convention on Stolen and Illegally Exported Cultural Objects 1995* (1997).

²⁰ Eg Rodney Schwartz, 'The Limits of the Law: A Call for a New Attitude Toward Artwork Stolen During World War II' (1998) 32 *Columbia Journal of Law and Social Problems* 1.

²¹ Eg *Autocephalous Greek Orthodox Church of Cyprus v Goldberg*, 917 F 2d 278 (7th Cir, 1990) and at first instance *Autocephalous Greek Orthodox Church of Cypress v Goldberg*, 717 F Supp 1374 (SD Ind, 1989); *De Préval v Adrian Alan Ltd* (Unreported, QBD, Arden J, 24 January 1997); noted by Ruth Redmond-Cooper in (1997) 2 *Art Antiquity and Law* 55; and see Kenyon and Mackenzie, above n 5, 243-6.

²² Kenyon and Mackenzie, above n 5, 251-2.

²³ Eg Norman Palmer, *Art Loans* (1997).

could be received and acted on within current Australian art market practices.

Methodological Matters

In its empirical aspects, the research is based on a series of 12 interviews with art market professionals. They were conducted in Melbourne and Sydney late in 2001, audio-recorded and transcribed.²⁴ The subjects mainly came from commercial art galleries, but the sample also included representatives of three of Australia's major auction houses. The interviews were conducted with the invaluable assistance of the Australian Commercial Galleries Association.²⁵ The interviews proceeded through three main areas. These were: (a) the interviewee's knowledge and understanding of the law relating to stolen art, in particular, limitation periods and surrounding questions of due diligence and good faith; (b) the interviewee's usual practice when buying and/or selling artworks, including the obtaining, and passing on, of provenance information relating to the works; and (c) the interviewee's personal experience of art theft, whether as victim, or possessor of a previously stolen work. Clearly, the investigation was exploratory, but it offers an indication of the legal understandings of art market actors within some sectors of the Australian art market. In relation to larger auction houses and established commercial galleries, the range of interviews is thought to offer a meaningful image of practice. There was a large degree of similarity in interviewees' responses, and there is little to suggest the interviewees were atypical, although caution is required from such an exploratory study. The most valuable area to develop may be in relation to the knowledge and practices of public museum and gallery personnel. In any event,

²⁴ One further interview was not audio-recorded and produced very limited data (in the form of written notes). The obvious wariness of this particular interviewee limited the interview's value and it has not been drawn on in this article.

²⁵ All interviewees are sincerely thanked for their assistance. The Association also hosted information sessions for its members in Melbourne and Sydney, which saw presentations by Professor Ken Polk, Andrew Kenyon and Detective Sergeant Bryan Hanley. The interviews also sought to gather data on Australian art thefts with a view to compiling this data, so that it may be used in a future register of Australian thefts that would hold the Object ID and digital images, if available, of stolen artworks. Object ID is discussed by Robin Thornes, Peter Dorrell and Henry Lie, *Introduction to Object ID: Guidelines for Making Records that Describe Art, Antiques and Antiquities* (1999).

this research lays a basis for a broader or deeper sociolegal project into art market practices and law.²⁶

Given this caveat, in what way can extrapolations be drawn from the data?²⁷ In terms of the interview data's reliability, we expect broadly similar material would be found by another researcher or presented by these interviewees at another time. The questions asked in interviews related to pre-existing legal issues and the routine professional practices of the interviewees. At the same time, the transcription and summarisation of the interviews aimed to maintain good access to the data – to what people said, and the way subjects described the law and their practice. The project's limited scope, however, means it cannot avoid at least some appearance of a failing that can exist in larger qualitative projects; namely, anecdotalism.²⁸ With a larger amount of material, this can be addressed by a comprehensive treatment of the data through including atypical cases and documenting the number of responses being relied on in relation to a given issue.²⁹ But such criticisms would be misplaced for exploratory work like this project. The research seeks to investigate practices and provide some data where there has been almost none.

A separate concern about the data also should be noted. In any interviews of this sort, problems remain about interviewees' retrospectively reporting their behaviour.³⁰ In this instance, the interviews could be prone to suffering from weaknesses for two reasons. First, the interviews focused on interviewees' professional practice, and there may be some reasons for interviewees to misrepresent their ac-

²⁶ A broader research project may seek to achieve a greater degree of representativeness, while deeper work may focus on a close case study analysis, eg, Bent Flyvbjerg, *Rationality and Power: Democracy in Practice* (Steven Sampson trans, 1998).

²⁷ This may be a more useful approach than using the label 'generalizability': Pertti Alasuutari, *Researching Culture: Qualitative Method and Cultural Studies* (1995) as noted in David Silverman, *Doing Qualitative Research: A Practical Handbook* (2000) 110-11. That is, to what extent can the research have what commonly is called reliability and validity? For an overview of current qualitative approaches to reliability, see Clive Seale, *The Quality of Qualitative Research* (1999) ch 10.

²⁸ Eg Silverman, *Doing Qualitative Research*, above n 27, 11 who discusses how researchers can quote a few comments from interviews, without it being apparent how representative the responses are and without contrary examples being considered.

²⁹ See, eg, David Silverman, *Interpreting Qualitative Data: Methods for Analysing Talk, Text and Interaction* (1993) 163. See generally Seale, above n 27, ch 9.

³⁰ Eg, see generally James A Holstein and Jaber F Gubrium, *The Active Interview* (1995); Richard Ingleby, *In the Ball Park: Alternative Dispute Resolution and the Courts* (1991) 6-7.

tivities. For example, perhaps interviewees would report greater diligence in relation to legal title than actually is applied in practice. And while that was not apparent, it remains a notable point given the project's scope. Second, the interviewers did not share a professional similarity with interviewees, coming from academic law and criminology rather than the commercial art market. However, the involvement of the Australian Commercial Galleries Association in promoting the research to its members and hosting information seminars went a substantial way towards overcoming any weaknesses that may have flowed from this.

The Wider International Context

Our previous research limited its consideration to domestic recovery within Australia, England or the US,³¹ but artworks may well cross international borders. Case analyses of such transnational recovery claims have figured prominently in recent international literature.³² It is very clear that the difficulties of private international law can significantly add to the complexity of claims. Indeed, Norman Palmer has suggested the forensic difficulties and cost of transnational recovery claims mean it can be questioned 'whether anyone, other than a State, a State-supported party, an oil company, or a private individual of enormous wealth, could seriously contemplate' such litigation.³³ Two aspects about the wider international legal context are worth noting here. First, in whichever jurisdiction the claim is brought, foreign law may well be applied if the artwork has changed hands in another country. So, a claim made in Australia about artwork currently in Australia could see, for example, English or US law being applied under what is called the *lex situs* rule. For claims relating to tortious dealings with personal property, choice of law rules traditionally apply the *lex situs*; that is, the law of the place where the property was when the transaction at issue occurred.³⁴ This law will affect whether

³¹ Kenyon and Mackenzie, above n 5.

³² Eg Joost Blom, 'Laying Claim to Long-Lost Art: The Hoge Raad of the Netherlands and the Question of Limitations Periods' (2000) 9 *International Journal of Cultural Property* 138; Paul Lomas and Simon Orton, 'Potential Repercussions from the City of Gotha Decision' (1999) 4 *Art Antiquity and Law* 159; Lambert Köhling, 'Greek Orthodox Patriarchate of Jerusalem v Christie's: Case Note and Reflections on Recent Developments in US Law' (2001) 6 *Art Antiquity and Law* 249.

³³ Norman Palmer, 'Recovering Stolen Art' [1994] *Current Legal Problems* 215, 218.

³⁴ The *lex situs* rule is quite consistent with the recent simplification of international choice of law rules in Australia for other tortious claims (not related to property) under *Regie Nationale des Usines Renault SA v Zhang* (2002) 187 ALR 1.

a purchaser obtains legal title to stolen artwork. And, in situations where title is not immediately obtained by good faith purchasers, it will affect whether the dispossessed owner's claim is extinguished by legislative limitation periods. Several examples can illustrate the wide range of possibilities. An artwork may be stolen in Australia, be exported to a civil law jurisdiction such as Italy, and sold there to a good faith buyer. Even if the artwork is returned to Australia, key questions in any civil recovery claim would involve the application of Italian law.³⁵ Or, the artwork may travel from Australia to England and be sold to a third party, who would obtain no immediate title to the property, just as under Australian law. But, for the limitation period to begin running, the buyer would need to demonstrate good faith.³⁶ Again, this requirement would be applied by an Australian court hearing such a claim. And in the US, time may start to run only once the stolen object was reasonably discoverable by a dispossessed seller.³⁷ Claimants within Australia could face any of these varying title and limitation issues under the *lex situs* rule where artworks have crossed international borders. Thus, even under current Australian law, the English and US approaches to good faith and due diligence could be decisive.³⁸

The second international matter worth noting is the existence of various conventions, which can affect recovery claims. Two are important for our purposes.³⁹ First, Australia became a signatory in 1989 to the UNESCO *Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property*.⁴⁰ The UNESCO Convention is designed to embody international statements of distaste about illicit trade in cultural property, and to require its signatories to take certain action to stem this trade.

³⁵ The equivalent situation for goods stolen in England, sold in Italy, and claimed by the disposed owner after the goods returned to England, is provided by *Winkworth v Christie, Manson & Woods* [1980] 1 Ch 496. On civil law limitations see, eg, Ruth Redmond-Cooper, 'Time Limits in Actions to Recover Stolen Art' in Norman Palmer (ed), *The Recovery of Stolen Art* (1998) 145.

³⁶ Kenyon and Mackenzie, above n 5, 243.

³⁷ *Ibid* 246.

³⁸ In addition, good faith may be significant in particular recovery situations under the limitation law of some Australian jurisdictions: see above n 10 and text.

³⁹ Another convention with lesser relevance to this article's concerns is the *Convention for the Protection of Cultural Property in the Event of Armed Conflict*, done at the Hague 14 May 1954 (entered into force 7 August 1956).

⁴⁰ *Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property*, done at Paris 14 November 1970 (entered into force 24 April 1972) ('UNESCO Convention').

Its provisions are broad and have been criticised as largely symbolic. But the UNESCO Convention does require its signatories to act in limited circumstances, such as preventing museums and other cultural institutions from acquiring cultural property that has been illegally exported from another state party,⁴¹ and prohibiting the import of cultural property stolen from the inventoried collection of a state party's monument or similar institution.⁴² A source state can request another state party to return illicitly removed cultural property, but the Convention does not affect private legal remedies. Thus, it does not address much of the complexity surrounding the civil recovery of stolen art.

Second, while the UNESCO Convention creates a mechanism to return cultural property at the request of source states, the UNIDROIT Convention⁴³ provides a mechanism for individuals to sue for the return of stolen cultural objects. The UNIDROIT Convention declares simply that any such stolen property shall be returned.⁴⁴ Unlike existing remedies in some civil law jurisdictions, however, it gives good faith possessors of such objects the right to be compensated by claimants.⁴⁵ Plaintiffs, therefore, may need to buy back their stolen cultural property under the UNIDROIT Convention. Many art market states have decided against ratification of the UNIDROIT Convention. This notably includes the UK, which only recently acceded to the UNESCO Convention,⁴⁶ the US, Australia, Belgium, France and Switzerland. The latter two countries signed the Convention in 1995 and 1996 respectively, but have not yet ratified it.⁴⁷ In many cases, ratification has been rejected because of the incompatibility of UNIDROIT's novel system of limitations with domestic limitations laws. The Convention introduces a special limitations rule, which is weighted very much in favour of dispossessed owners.⁴⁸ It states that 'any claim for restitution shall be

⁴¹ Ibid art 7(a).

⁴² Ibid art 7(b)(i).

⁴³ *Convention on Stolen or Illegally Exported Cultural Objects*, opened for signature 24 June 1995 (entered into force 1 July 1998).

⁴⁴ Ibid art 3(1).

⁴⁵ Ibid art 4(1).

⁴⁶ See Mira T Sundara Rajan, 'UK Arts Law Update: A Time of Change in the United Kingdom' (2002) 7 *Media & Arts Law Review* 241, 242-5.

⁴⁷ A regularly updated list of those countries who have signed, those who have ratified and those who have acceded to the UNIDROIT Convention can be found at <www.unidroit.org/english/implement/i-95.htm>.

⁴⁸ *Convention on Stolen or Illegally Exported Cultural Objects*, opened for signature 24 June 1995, art 3(3) (entered into force 1 July 1998).

brought within a period of three years from the time when the claimant knew the location of the cultural object and the identity of its possessor, and in any case within a period of fifty years from the time of the theft'. The 50 year long-stop is removed for objects 'forming an integral part of an identified monument or archaeological site, or belonging to a public collection'.⁴⁹ This structure has been flagged up by the Ministerial Advisory Panel on Illicit Trade in the UK as 'the greatest barrier' to adopting the Convention. The Panel recognised that 'a claimant who fails to take obvious and reasonable steps to discover these matters might therefore remain immune from the passing of time' as long as the claimant has no actual knowledge of the object's location and its possessor's identity.⁵⁰

For present purposes, three related points can be taken from this international context. First, the international situation increases the legal complexity that has been discussed in relation to domestic recovery claims, and highlights the unusual position Australia occupies in relation to limitation periods for stolen property in comparable common law jurisdictions. Second, it in part explains the development of listing services for stolen art, and the consideration of those resources in the existing literature. This is because internationally, and in such art market centres as London and New York, good faith and due diligence are important for recovery claims. Third, the conventions and the discourse they engender underscore an international trend towards encouraging greater diligence, or at least the discussion of changed ethical standards, in museum, gallery and trade practices. Strong contemporary examples of this trend can be seen in the treatment of holocaust-related art claims,⁵¹ the repatriation of indigenous material, including human remains,⁵² and the growing role

⁴⁹ Ibid art 3(4).

⁵⁰ Ibid.

⁵¹ Elizabeth Simpson (ed), *The Spoils of War: World War II and its Aftermath: The Loss, Reappearance, and Recovery of Cultural Property* (1997); Jonathan Petropoulos, *The Faustian Bargain: The Art World in Nazi Germany* (2000); Norman Palmer, *Museums and the Holocaust: Law, Principles and Practice* (2000).

⁵² See, eg, the special issue (1999) 8(1) *International Journal of Cultural Property*, the whole of which is dedicated to papers discussing the treatment of indigenous remains and artefacts. In the museum context, a UK working group of academics and museum representatives was established in early 2001, under the chair of Professor Norman Palmer, with the remit of examining the current legal status of human remains in UK government funded museums and galleries: DMCS, 'Working Group Will Consider Potential Return by Museums of Human Remains' (Press Release, 8 May 2001). Submissions were called for on 22 August 2001, but no further material has yet been made public.

of criminal law in relation to the antiquities trade.⁵³ Because of the international movement of art and heritage items, these three related points about complexity, the role for databases, and the trend towards due diligence have a current importance within Australia. They may arise under the existing legal regime. But they also reinforce the value of the possible reforms suggested in our earlier work. All this raises the relevance of the current knowledge and practices of Australian art market actors, and what this might suggest about these reform possibilities.

Interviews with Australian Art Market Actors

Earlier research has suggested that while they are very aware of art theft, dealers know little about their legal position in relation to stolen art.⁵⁴ Our interview data confirms this. Concepts like 'due diligence', the 'good faith purchase', 'reasonable investigations into title', and even the broader idea that there might be a form of time limitation on the ability of a dispossessed owner to raise a civil claim for the recovery of their stolen artwork, are largely foreign to our respondents. We consider the interviewees' knowledge of the law and its operation first, before examining the difficulties art market actors can encounter in obtaining details of provenance. While the data on legal knowledge may have been expected, the information about current practices in relation to provenance offers useful support for our recommendations to alter limitations law *and at the same time* promote listing services of stolen art.

Knowledge of the Law and its Operation

These examples from the interview transcripts illustrate the amount of knowledge our interviewees had of such legal issues as limitation periods and good faith. In almost every case, the answer was none.

Interviewer: Do you know anything about time periods in which an owner has to pursue their work?

⁵³ Eg the recent US conviction of prominent antiquities dealer, Frederick Schultz: *United States of America v Schultz*, 178 F Supp 2d 445 (2002), and the UK recommendation to introduce a specific criminal offence dealing with illegally exported, or stolen, heritage material: Department for Culture, Media and Sport, above n 1, [67]; cf the historical attitude that dealing with antiquities within major trading centres like London and New York would not involve any criminal activity: see the overview article by Christine Alder and Ken Polk, 'Stopping This Awful Business: The Illicit Traffic in Antiquities Examined as a Criminal Market' (2002) 7 *Art Antiquity and Law* 35.

⁵⁴ Eg, Palmer, *Art Loans*, above n 23.

Auction House 2: If it is stolen?

Interviewer: Yes.

Auction House 2: Look, I'm not sure of the legal time limit.

Interviewer: Do you know what I mean by a 'reasonable investigation' by the dispossessed owner, or 'limitation periods'?

Gallery 4: No.

In similar responses about limitation periods, interviewees said they knew 'nothing',⁵⁵ asked in surprise 'is there [any limit]?',⁵⁶ and had 'no idea'⁵⁷ in relation to domestic or international provisions. Only one respondent had a reasonable working knowledge of the law on recovering stolen artwork, but it appeared due to this dealer's presence at a seminar hosted by the research team several weeks before the interview.

Interviewees were similarly unaware of the legal concepts of good faith or due diligence.

Interviewer: I mentioned 'good faith purchaser', are you familiar with that term?

Gallery 7: Good faith, well, I can only assume that it means that you trust the person and take what they have on face value.

As may be painfully obvious to legal readers, this appears close to the opposite of what law would require for good faith. Rather than such blind acceptance, law requires reasonable investigation of a vendor's ability to pass title, and so forth. Indeed, there is authority to suggest that the standard of investigation into a seller's title required to bring a purchasing art dealer within the bounds of good faith can be higher than that required of a non-professional. Art dealers have knowledge and experience that should put them on notice as regards the presence of stolen items in the trade, and this trade expertise has therefore been held to require them to conduct practical checks into the vendor's title (such as the consultation of an art theft register) before they can be seen in law as a good faith purchaser.⁵⁸

⁵⁵ Auction House 3.

⁵⁶ Gallery 6.

⁵⁷ Gallery 7; equivalent from Gallery 8.

⁵⁸ *De Preval v Adrian Alan Ltd* (Unreported, High Court (QBD), Arden J, 24 January 1997); on which see Palmer, *Museums and the Holocaust*, above n 51, and Kenyon and Mackenzie, above n 5, 241-2.

Why should it matter that most commercial galleries and auctioneers know little or nothing of the law in relation to stolen property generally, or stolen artwork in particular? On one reading, it may seem to be the remit of police or lawyers. But even if the theft of an artwork is reported to the police, the officer dealing with the case may not be aware of the legal intricacies of civil litigation. In all probability, officers would not inform complainants to consider international limitation periods if they may seek to raise civil actions for the return of their works, should they reappear in the future. And lawyers, for their part, do not hunt down stolen art. Lawyers would probably only be consulted by theft victims after they had managed to track down their stolen works. If the limitation period has expired at this point, this first consultation with a lawyer would be the first time anyone had brought the period's existence to the attention of the now former owner. Owners of art, and those who deal in art, should be aware of the existence of such laws as limitations periods because they may prescribe action on the owner's part in the event of a theft, as discussed above in parts 1 and 3.

Difficulties Encountered in Obtaining Details of Provenance

The one legal requirement with which interviewees were familiar was the need to check the provenance of artworks being traded, to protect against the consequences of buying stolen works.⁵⁹ This is not to say that provenance was investigated by all the respondents in relation to every artwork. Most viewed the issue as increasing in relevance with the price of the item. When buying or selling works of low value, they would not expect to be able to check provenance from the seller or provide it to the buyer. These provenance responses are interesting for the difficulties they suggest art market actors may face in trying to meet standards of good faith or due diligence. Problems in relation to obtaining provenance come in two main forms: the privacy policies of sellers, notably auction houses, and the practical difficulties that arise from poor document retention by owners of artworks.

⁵⁹ Provenance was also seen as being significant in terms of attribution and authenticity of artworks, which may often be a greater practical concern for art market actors: Gallery 4; Auction House 3; Gallery 1.

The Privacy Policies of Sellers

Art market transactions are notoriously private.⁶⁰ Auction houses, in particular, obtain details from vendors – although that may simply be a name, street address and contact telephone number⁶¹ – but none of this information is passed on to buyers, being treated as ‘completely confidential’.⁶² It may be indicated that a work has been in a private collection for a particular time, but the auction houses ‘never give personal information’.⁶³ Galleries confirmed this pattern:

Interviewer: Do you ever run into problems in getting the provenance?

Gallery 1: The only place I run into that is in the word ‘private collection’, which you run into a lot. They may tell you ‘private collection’ but won’t tell you the name of the owner.

These sorts of policies do limit the investigations that are feasible for commercial galleries to undertake:

Interviewer: What do you do when you buy a picture? What investigations do you make into where it came from?

Gallery 8: It’s very difficult because I buy most of my works at auction ... Yesterday I bought [a painting]. Who’s to say whether it was stolen or not? I buy at face value from the auctions. There is nothing else I can do, I wouldn’t have a clue ... No, you can’t research them.

Such policies, while protecting the identity of the seller of the work, could hinder legal policies to encourage buyers to act in good faith by conducting reasonable investigations into the provenance of goods they are buying. Reasonable investigations in this situation will likely get the buyer nowhere closer to verifying the legitimate nature of his or her prospective purchase. Long-term trends are apparent towards the more careful treatment of stolen art and heritage items – particularly in relation to antiquities and claims related to World War II.⁶⁴ These could be expected to impact on such practices of confidential-

⁶⁰ Paul Bator, *The International Trade in Art* (1983) 84, 146; Patrick O’Keefe, *Trade in Antiquities: Reducing Destruction and Theft* (1997) 87; Albert Elsen, ‘An Outrageous Anomaly’ (1992) 1 *International Journal of Cultural Property* 129, 131.

⁶¹ Auction House 1 described the information that would be obtained in this way.

⁶² *Ibid.*

⁶³ *Ibid.*

⁶⁴ This can be seen, for example, through the changes from the 1970 UNESCO Convention to the 1995 UNIDROIT Convention; see above part 3 on the wider international context, and in recent high profile criminal cases, see above n 53.

ity.⁶⁵ But quite apart from these trends, it is important that existing art market practices would make it feasible for art market actors to investigate provenance through listing services.

The problems of confidentiality are exacerbated by the particular situation of auction purchases and the assumptions made by purchasers. Competition among galleries for attractive items at auction often appears to be fierce. Dealers hope to recognise something in a viewing that is highly valuable, but which goes unnoticed by anyone else. Investigating its provenance runs the risk of drawing unwanted attention to the item and attracting the interest of others, thereby passing up the chance to obtain the item at a bargain price:

Gallery 8: Oh, I take it like that and sort out the details afterwards. If you find something really big, a lot of the time it is because the auction house doesn't have a clue. An early Fred Williams went up at [an Australian auction house] a few weeks ago and was bought by a friend of mine for \$200. The auction house didn't know ... He'll get \$20 000 for that. You pick up the opportunity and ask questions later. It would never have occurred to anybody that it was stolen ... I've had some fantastic things over the years.

As with the issue of privacy, these dynamics of purchase at auction and the role of artistic re-attribution to achieve far higher prices on a subsequent resale, need not be unduly compromised by the use of listing services.⁶⁶ It seems that currently in Australia, purchasers assume auction houses conduct some level of checking into the provenance of their lots. Auction houses, however, face practical limitations in their ability to investigate – they simply have too much art moving through their rooms. While galleries may know this and state their assumptions about the duties of auction houses to neutralise, or justify, their own actions in buying goods that may have been stolen, our

⁶⁵ But changes to privacy may well be resisted, as suggested by reports about the London art trade's response to the European *Directive on the Resale Right for the Benefit of the Author of an Original Work of Art* (19 July 2001), which partly concerned the trade's desire to maintain its confidentiality practices: see, eg, Patrick J O'Keefe, 'International Arts Law Update' (2002) 7 *Media & Arts Law Review* 143, 143-5.

⁶⁶ One issue may arise from the role of major auction houses in the international listing service, the Art Loss Register. Its shareholders are listed on the service's website (<www.artloss.com>) and include Christie's, Sotheby's, Bonhams and Phillips. But it does not appear that requests for information from the service would alert auction houses to, for example, a misattributed work coming up for auction.

data does not give us enough basis to comment. What does appear clear, however, is that through this apparent confusion over whose responsibility it is to check artworks' history of ownership, much of it sold at auction is never checked:

Interviewer: How much checking actually happens?

Auction House 1: Not a whole lot unless we have cause to be suspicious. There is an overall assumption that when someone brings in a painting they have the right to sell it. We operate on the basis that they have the right to sell it.

Interviewer: Is it your responsibility to check what comes through?

Auction House 3: It is our responsibility to ascertain, within reasonable grounds, that the person who brings it in actually owns it, but nobody has documentation ... and it is very difficult to actually prove or disprove ownership. Unless you have bought a picture at a prior sale but then that is confidential information and we don't tell anyone who our vendors or buyers are. If someone tells me they bought something at [another auction house] and I were to go to [that auction house] and asked them, they will say no. We are obliged to do as much as we can to determine rightful ownership, but there is not really very much that we can do effectively.

Such privacy is not only the remit of auction houses. Fellow galleries are often reluctant to reveal the identity of the sellers they represent and the prior history of the work, beyond such vague assurances as 'from a private collection'. Purchasing dealers, for their part, seem usually to find this acceptable: they 'trust' the selling gallery,⁶⁷ and see the legitimate trade sources they use as an appropriate 'safeguard'.⁶⁸ Interviewees, however, did recognise this could leave them exposed:

Interviewer: What do you do in terms of provenance, stuff that you buy from Europe? Are you concerned about this Holocaust art that has gone missing and now seems to be popping up?

Gallery 2: Am I concerned? Yes. Does it really apply to me? [Interviewee starts to shake head and then changes mind] Yes ... [But] the safeguards are that 90 per

⁶⁷ Gallery 1.

⁶⁸ Gallery 2.

cent of what I buy overseas is bought through legitimate established trade sources who themselves are very wary of it and are subject to regular checking so I have to feel confident that what I am buying ... has some sort of protection ... in that it has already been checked. If I buy something publicly at auction in Europe, which I often do, occasionally I would hope that the auction houses do the same sort of thing.

Interviewer: What sort of information do you get from these trading sources?

Gallery 2: Nothing. I am relying effectively on them, they are all established trade houses ... I guess the bottom line is that I can't be sure.

What is the effect of this very private method of transacting for purchasers who try to meet the standards of good faith through reasonable investigations into the seller's title? As has been outlined above, in part 1, such due diligence by purchasers may be required to start time running on a limitation period in comparable art market countries. Our data suggests that questions asked by purchasers as to provenance will remain unanswered, in substance at least, especially from auction houses. In many instances, such questions will not even be asked by purchasers who realise the limited information that will be supplied. It becomes difficult to identify an appropriate level of due diligence in a market where provenance information is not readily available. Should purchasers simply accept silence as the market's standard operating procedure? And what, if any, level of passivity in purchase would then be necessary to render them in bad faith? A protocol that required purchasers to consult databases listing stolen art prior to purchase may be a sensible way to encourage due diligence among the trade. Selling galleries and auction houses do not have to breach their undertakings of privacy towards their clients, and purchasers at auction do not have to publicly question the provenance of a possible bargain. Confidentially checking a stolen art database to ensure a prospective purchase is not listed is a method that fits with current market practices. It recognises the confidentiality that the market sees as being so important, while providing better access to information necessary to decide whether an artwork has been stolen.

The Practical Difficulties of Poor Document Retention by Owners

Difficulties in meeting standards of diligence or good faith also exist when dealing directly with individual vendors. Legitimate vendors often lack a documentary chain to establish their title:

Auction House 2: We can't have people show a receipt for every item, it's impossible ... We do ask for provenance obviously, if it's a good work. Not every artwork is so great that we ask for provenance or you would be sitting with millions of bits of paper. And some people don't keep the receipts.

Because a legitimate owner may not have a collection of receipts to document the provenance of an artwork being sold, there is more room for an illegitimate possessor to enter the market.⁶⁹ A thief's lack of documentation will probably not trouble a commercial gallery or ultimate buyer, and if the possessor can give a name and address – that may be false⁷⁰ – and a plausible story as to how the work came into her or his possession – that may well not be passed on to a future buyer by the dealer – the illegitimate possessor might encounter no further problems in selling the work. As Polk has noted, the main difficulty may be in a possessor having appropriate knowledge of how the art market works, and the stories of a work's history that will be acceptable to art market actors.⁷¹ But even if a possessor's conduct or appearance does raise suspicions, there appears to be an understandable reluctance to report concerns to the police without firmer evidence, which is unlikely to be obtainable:

Interviewer: If someone were to come in and you suspected that they were trying to sell you stolen works, what would you do?

⁶⁹ Lisette Aarons, 'Art Theft: An Exploratory Study of the Illegitimate Art Market in Australia' (2001) 34 *Australian and New Zealand Journal of Criminology* 17.

⁷⁰ Although second-hand dealers legislation places some obligations on licensed dealers to investigate identity, and recently we have experienced a trend towards the updating of early 20th century legislation by way of new statutes that require the keeping of computerised records of transactions: eg *Second-hand Dealers and Collectors Act 1996* and *Pawnbroker and Second-hand Dealers Regulation 1997* (NSW); *Second-hand Dealers and Pawnbrokers Act 1996* and *Second-hand Dealers and Pawnbrokers Regulations 1998* (SA); *Second-hand Dealers and Pawnbrokers Act 1989*, *Second-hand Dealers and Pawnbrokers (Amendment) Act 2001* and *Second-hand Dealers and Pawnbrokers (Amendment) Regulations 2002* (Vic); *Pawnbrokers and Secondhand Dealers Act 1994* and *Pawnbrokers and Secondhand Dealers Regulations 1996* (WA); *Second-hand Dealers and Collectors Act 1984* and *Second-hand Dealers and Collectors Regulation 1994* (Qld); *Second-hand Dealers and Collectors (Amendment) Acts 1990* and *1995* (ACT); *Consumer Affairs and Fair Trading Act 1996* and *Consumer Affairs and Fair Trading (Pawnbrokers and Second-hand Dealers) Regulations* (NT); *Second-hand Dealers and Pawnbrokers Act 1994* and *Second-hand Dealers and Pawnbrokers Regulations 1996* (Tas).

⁷¹ Ken Polk, 'Art Theft and Fraud' in David Levinson (ed), *Encyclopedia of Crime and Punishment* (2002), vol 1, 66, 67; Aarons, above n 69, 29.

Gallery 6: I don't know whether I would actually get to the point of assuming that it was stolen, but if there was something that I didn't like about a piece or the person selling it, I would just say, look it's not for me. I don't know that I would do anything else.⁷²

It therefore seems unwise to rely on systems of identity-recording and receipt-collection as safeguards against stolen art entering the legitimate market. Art traders know their business better than anyone, and anecdotal evidence suggests their experience provides some security when it comes to checking a vendor's title. But there are more methodical approaches to title investigation, and requirements of diligent investigation supported by the presence of databases of stolen works would provide a structure for more systematic awareness of stolen art within the market. While listing services exist internationally, the most prominent being the Art Loss Register,⁷³ there is no database catering primarily to the Australian market, and it does not appear that any listing service is used much domestically. The interview data suggests the development of such a listing service in Australia is generally supported, particularly with digital documentation becoming increasingly common and images being available for more artworks. Interviewees reacted to the possible development of a database as being 'fantastic',⁷⁴ 'fabulous'⁷⁵ of 'definite' use,⁷⁶ and something that 'would make the onselling of stolen works extremely difficult, extremely dangerous'.⁷⁷

It was also evident that many interviewees were unaware of the existence of international listing services for stolen art.⁷⁸ Geographical distance remained a surprising barrier to the flow of information, and insulation from the workings of foreign markets and their relevance to Australian practices. This adds weight to the argument in favour of the development of an Australian register of stolen art. For much artwork, and particularly work of low to moderate value, a local listing service could provide a very useful focus for the market. And it is probably only a local public sector service that could develop the nec-

⁷² Similar statements were made by Auction House 3; and Gallery 7 recounted an equivalent story of raising suspicions about a work that appeared to have been 'cut from a bigger picture' where the possessor simply left the gallery.

⁷³ See <www.artloss.com>.

⁷⁴ Auction House 1.

⁷⁵ Auction House 2.

⁷⁶ Gallery 5 (from which works had recently been stolen); similar from Gallery 6.

⁷⁷ Gallery 3.

⁷⁸ Even among major auction house staff.

essary listings of past losses to build the database to a viable size. Memories fade over time, and the present use of faxed 'stolen art alerts' that arrive at most commercial galleries and auction houses is of rapidly diminishing value as the weeks pass after an initial alert:

Interviewer: You do have a lot of [artworks] that come through, so a theft register would be quite useful for you to check when things come through and you are suspicious?

Auction House 3: Extremely. As I said, we get a lot of notifications coming to us and it's in your mind for a certain amount of time but after six months or so you forget about it. We got one recently that was a copy of Norman Lindsay's *Magicians*, which is a print that is worth about \$14 000 or so and if one were to come in now it would be in my mind, but if it were in a year's time it might not be.

Conclusion

Our first paper from this project examined Australian, English and US approaches to limitations laws and concluded that Australia might do well to implement a system of limitations that encourages due diligence in the actions of both purchasers and dispossessed owners of art.⁷⁹ The fieldwork reported here further supports our recommendations that laws that encourage reasonable investigations into title and provenance by buyers, and into the whereabouts of their stolen art by dispossessed owners, would make the sale of stolen artworks more difficult. In doing this, it would go some way to redressing what appears to be a major criminal market, and one that is particularly significant in terms of cultural heritage. And it would remove an anomaly in the Australian law on limitations in relation to recovering stolen property.

The responses from art market professionals in the interviews suggest some important matters about why such law reforms may be particularly plausible in the art market. Gallery owners know little of the operation of limitation laws – in some cases not even knowing of the laws' existence. Enshrining requirements of due diligence in these laws seems likely to have little practical effect unless it is supported by the development of simple, effective and widely publicised mechanisms to satisfy such due diligence requirements. Art market transactions are highly private, which creates associated difficulties

⁷⁹ Kenyon and Mackenzie, above n 5.

undertaking reasonable investigations into art vendors' titles. This quality, when viewed with interviewees' general support for a public Australian register of stolen art, points to the conclusion that a listing service might provide the best mechanism by which better limitations laws, and the diligence they should encourage, are brought into trade practice. For provenance to be capable of better investigation, a system of recording is needed that is administratively workable, freely available to buyers who wish to consult it, and which respects, as much as is practicable, the privacy requirements of sellers. This may not be an impossible task.