

Recovering Stolen Art — Australian, English and US Law on Limitations of Action



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Statutory limitation periods can bar claims to recover stolen artworks. In doing this, Australian limitations law generally does not consider the conduct of either a dispossessed owner or current possessor of a stolen artwork. This paper compares Australian, English and US law on the issue and argues that recent proposals for reform should be extended so that Australian law encourages all art market actors to be diligent in their dealings with artworks that may have been stolen.

WHAT is the legal position of art museums, dealers or private owners if they hold stolen art? What should museums, dealers, artists and owners do if artworks are stolen from them? These questions have received some recent English and US attention, but legal and art industry approaches considered in those countries warrant examination from an Australian perspective. Stolen art is reported to be a huge illegal market internationally. In the early 1990s, Scotland Yard estimated annual worldwide art thefts at £3 billion.¹ And in 2000, an English ministerial advisory panel on illicit trade in artworks suggested insured losses of stolen artworks in the

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1. N Palmer 'Recovering Stolen Art' [1994] Current Legal Problems 215, 218.

UK alone ranged from £50 million to £150 million annually.² These estimates suggest that the size of the stolen art market involving Australian art, or art market actors, may be significant.

As well as concerns about contemporary thefts, recent legal disputes have focused international attention on artworks stolen during World War II, when Nazi forces removed a huge number of artworks – perhaps one-fifth of all the world's art, or over three million objects.³ A leading US museum official has suggested that almost every Western art museum must contain Nazi-looted material.⁴ The Holocaust-related claims, not surprisingly, have highlighted weaknesses in many countries' laws. A particular concern has been the effect of limitations of action legislation. As Norman Palmer has noted:

Amidst all the demands to mitigate the rigours of strict law in Holocaust-related claims, no field of doctrine has attracted greater disparagement or advocacy for change than that of limitation periods.⁵

Extra-legal responses, more than legal reform, are likely to offer the best options for Holocaust-related claims.⁶ Indeed, Lawrence Kaye has suggested that limitation periods could be suspended in relation to World War II claims under the 1968 Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes Against Humanity.⁷ In any event, these claims have highlighted the difficulty in applying limitations law to the recovery of stolen art. Many of these difficulties also exist for contemporary art thefts, in Australia and elsewhere.

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2. Ministerial Advisory Panel *Report on Illicit Trade* (London: HMSO, 2000) para 21.
 3. RZ Chesnoff *Pack of Thieves: How Hitler and Europe Plundered the Jews and Committed the Greatest Theft in History* (New York: Doubleday, 1999). Estimates vary, but for a succinct overview of looting by Nazi and other armed forces during the period 1933-1945, see N Palmer *Museums and the Holocaust: Law, Principles and Practice* (Leicester: Institute of Art & Law, 2001) 6-12.
 4. This comment has been made by R Lauder, Chair of New York's Museum of Modern Art Board of Directors: see generally Palmer *supra* n 3, 5.
 5. Palmer *ibid*, 74.
 6. See eg RL Garrett 'Time For A Change? Restoring Nazi-Looted Artwork to Its Rightful Owners' (2000) 12 Pace Int'l L Rev 367; AFG Raschèr 'The Washington Conference on Holocaust-Era Assets' (1999) 8 Int'l J Cultural Property 338; Palmer *ibid*, 80 and n 26 with regard to similar approaches in other European countries; J Morgan 'Stolen Art Works Test Galleries' Ethics' *The Sydney Morning Herald* (Sydney, 18 Jul 2001) 6; R Wallace 'Nazi Treasure Hunt at Gallery' *The Herald Sun* (Melbourne, 18 Jul 2001); D Farrant 'Search for Nazi Ghosts in Gallery' *The Age* (Melbourne, 12 Oct 2000); National Gallery of Victoria *Provenance Review Committee – Draft Discussion Paper* (Melbourne, Aug 2001). This draft was circulated to 200 museums and related professionals to encourage wide participation in the gallery's policy development process.
 7. LM Kaye 'Looted Art: What Can and Should be Done' (1998) 20 Cardozo L Rev 657. Kaye suggests the Convention could apply to legal actions related to the theft of cultural objects.

This paper examines Australian law regarding stolen artworks that re-enter the art market, particularly the law relating to limitations of action. The focus is on objects stolen in Australia, which remain in Australia. The domestic Australian law will be compared with the law of England and the US for artworks that are stolen and re-appear in each of those countries. These are useful comparative jurisdictions because of their common law tradition and significant art markets, particularly in the cities of London and New York. Left to one side here are the extra complexities of private international law that can arise when stolen artworks move between jurisdictions.

This analysis is an initial step in investigating the legal situation facing Australian public institutions, commercial dealers, artists and collectors who deal with stolen art. The wider investigation will bring a criminological perspective to an evaluation of the Australian legal rules on recovering stolen art. To this paper's domestic legal analysis, it will add considerations of private international law and relevant conventions, and qualitative material about the understandings and actions of museums, dealers and other art market actors about their legal rights and obligations in relation to stolen art. Here we offer some tentative conclusions that will be developed through future empirical research about what art market actors actually do when confronted with stolen or suspicious artworks, and what they understand about the law on recovering stolen art.

Here our focus is on limitations of action and stolen artworks. For an example of the type of situation that can arise, consider this theft. In 1977, thieves used a car to smash their way into a commercial art gallery in the early hours of a public holiday and stole 27 works by Grace Cossington-Smith. None has ever re-surfaced, and their mid-1990s value has been estimated at more than \$400,000.⁸ Artworks that have been stolen may later be sold, donated or loaned to third parties. If one of these Cossington-Smiths was to re-appear in Australia, the artist's estate might be interested in pursuing a claim to recover the work from its current possessor.⁹ In Australia, that claim would almost certainly be barred by limitations legislation.

The Australian approach to limitations, outlined in Part I of this article, offers a clear rule, but it is one that may operate harshly against a dispossessed owner. The legal position in Australia is significantly different in several respects from the English and US legal position, examined in Parts II and III. To varying degrees, these jurisdictions take into account the conduct of one or both parties to an art recovery claim. Recent Australian reform proposals regarding limitation periods,

8. See generally B James 'Who Stole the Show?' *The Age* (Melbourne, 20 Jul 1996) 'Good Weekend Supplement' 20.

9. A case between the artist and the gallery was settled out of court; it appears that Cossington-Smith rather than the gallery retained ownership in the stolen works: James *ibid*, 24.

which might have improved the situation, may have been shelved.¹⁰ In Part IV we argue that a comparative examination of the law of limitations for stolen property, and particularly stolen art, underlines the need to extend those reform proposals in light of much existing writing about stolen art and limitations law. In this, cultural property offers a site in which to consider limitations law more generally, rather than one in which to argue for a special regime.¹¹

I AUSTRALIAN LIMITATION PERIODS FOR RECOVERING STOLEN ART

In Australian law, a thief gets no title to property upon stealing it and can pass no title to a third party. The owner retains title.¹² The legal position is summed up in the Latin maxim: 'nemo dat quod non habet'. This may suggest that the dispossessed owner of a stolen artwork could sue whoever later possesses the work. Under Australian law, the dispossessed owner may be able to sue in the torts of conversion and detinue. Conversion is the intentional dealing with chattels by a person other than their owner in a manner inconsistent with the owner's rights.¹³ Detinue is the wrongful detention of chattels following a claim for their return.¹⁴ However, a reasonable amount of time may be taken by an artwork's possessor to investigate a claim before returning the work without constituting conversion or detinue.¹⁵ The actions differ in their remedies: detinue allows the court to order the artwork's return, and not merely damages.

Limitation periods affect whether a dispossessed owner will be able to sue a third party at all. For centuries, the law has placed time limits on civil actions.

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10. Qld LRC *A Review of the Limitation of Actions Act 1974* Report No 53 (Brisbane, Sep 1998); WA LRC *Limitation and Notice of Actions* Report No 36(II) (Perth, Jan 1997).
 11. A similar argument is made in relation to private international law and the lex situs rule by JM Carruthers 'Cultural Property and Law – An International Private Law Perspective' [2001] *Juridical Rev*, 127, 131, 139; cf DL Carey-Miller, DW Meyers & A Cowe 'Restitution of Art and Cultural Objects: A Reassessment of the Role of Limitation' (2001) 6 *Art Antiquity & Law* 1.
 12. This would apply to all situations, except in the rare case where provisions in sale of goods legislation apply, such as where the owner has by conduct represented that a third party has authority to sell the goods. For an international statement of this principle, see JP Benjamin *Benjamin's Sale of Goods* 5th edn (London: Sweet & Maxwell, 1997).
 13. See eg *Lancashire & Yorkshire Rly v MacNicol* (1919) 88 LJB 601, Atkin J. Strictly, the action protects the rights of a possessor rather than an owner, and allows any person with an immediate right to possession to sue. For artworks this could arise if works were stolen while held on loan. But here, for simplicity, the most common situation of ownership will be considered.
 14. See eg *Lloyd v Osborne* (1899) 20 LR (NSW) 190.
 15. Eg *Craig v Marsh* (1935) 35 SR (NSW) 323, Davidson J 326: 'If refusal is by a person who does not know the plaintiff's title and, having a bona fide doubt as to the title of the goods, detains them for a reasonable time before clearing up that doubt, it is not a conversion.'

Promoting the speedy resolution of litigation supports the administration of justice and promotes commercial certainty, although, as the English Law Commission has recently argued, limitations law can also be seen as complex, outdated, uncertain and unfair on relatively innocent parties.¹⁶ The legislative origins of limitations law lie in the Statute of Limitations 1623, which set a general period of six years. Notwithstanding social, economic, political and technological revolutions since then, this remains the most common limitation period. It follows that a plaintiff usually cannot sue in tort once six years have run from the accrual of the cause of action.¹⁷ A cause of action accrues when a competent plaintiff and defendant exist, and when all material facts are present for the claim to be capable of succeeding. Even if a potential plaintiff cannot identify a defendant, the cause of action accrues.¹⁸

The cause of action in conversion accrues when a chattel is dealt with in a manner inconsistent with the chattel owner's rights.¹⁹ For conversion of an artwork by theft, there rarely is any doubt about an intention to deal with the work to the owner's detriment. The owner has six years from the date of the theft to sue whoever comes into possession of the artwork. A cause of action in detinue accrues when detention of a chattel becomes wrongful (ie, when the owner lawfully demands the chattel's return and is refused).²⁰ When an artwork is stolen, this may suggest that time will not begin to run until the owner identifies the possessor and demands the work's return. Statutory provisions relating to successive conversions, however, make it impossible to bring an action for detinue after the expiration of a limitation period for conversion. Victorian and New South Wales limitations legislation, for example, provides that where a cause of action in conversion or detinue has accrued, and a further conversion or detinue occurs before the chattel is re-possessioned, a plaintiff can make no claim after the expiry of the limitation period for the *original* conversion or detinue. Thus, limitations legislation precludes a further limitation period accruing in respect of the subsequent conversion or wrongful detention.²¹

Traditionally, limitation periods have been seen as being either procedural or substantive. Procedural limitations bar the cause of action, while substantive

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16. See Law Commission (Eng) *Limitation of Actions: Making the Law on Civil Limitation Periods Simpler and Fairer* Discussion Paper No 151 (London, 1998) paras 1.1-1.5, 11.1-11.15; *Limitation of Actions* Report No 270 (London, Apr 2001) paras 1.4-1.9.
 17. See eg Limitation of Actions Act 1958 (Vic) s 5; Limitation Act 1969 (NSW) s 14; cf the 3 year rule in the Northern Territory: Limitation Act 1981 (NT) s 12(1)(b).
 18. *RB Policies at Lloyd's v Butler* [1950] 1 KB 76.
 19. Eg Limitation of Actions Act 1958 (Vic) s 5; Limitation Act 1969 (NSW) s 14.
 20. *Philpott v Kelley* (1853) 3 Ad & E 106; 111 ER 353; *Lloyd v Osborne* (1899) 20 LR (NSW) 190.
 21. Eg Limitation of Actions Act 1958 (Vic) s 6(1); Limitation Act 1969 (NSW) s 21. In some jurisdictions, the same result would be achieved under general principles rather than a specific statutory provision. California is one relevant jurisdiction where there has been debate on this, and successive limitation periods remain arguable: see Carey-Miller, Meyers & Cowe *supra* n 11, 4-8.

limitations extinguish legal rights, such as title to property. The law of the forum decides this classification as procedural or substantive. However, Australian legislation exists to counter 'forum shopping' for the best limitation period. If a court is applying the law of another Australian jurisdiction, the court is to treat that jurisdiction's limitations law as substantive and apply it.²² Australian common law now accords with this legislative position;²³ thus, for an intra-Australian claim arising out of an art theft, the law of the State where the theft occurred – including any question of limitations law – will apply. In any event, for the property claims being considered here, limitations are substantive.²⁴ Limitation periods being substantive also means that title to property is lost when the period ends, and even so-called self-help remedies are not available. In other words, the former owner cannot physically retrieve a stolen artwork because the owner's title has been extinguished once the limitation period has run.

In respect of claims to recover stolen art, there are relatively few options for delaying the start of time running or extending time once it has commenced to run. Thus, the former owner will lose out even if the current possessor bought the artwork in suspicious circumstances. A system like this, which places no good faith requirement on buyers, might be thought to prejudice dispossessed owners. It certainly does nothing to allay the impression that, in the art market, it is unwise to ask questions about a work's provenance before buying it.

Fraud may be one option for delaying the limitation clock. Limitation legislation provides that where an action is based on fraud, the limitation period does not start to run until the plaintiff has discovered the fraud or could have done so with reasonable diligence.²⁵ In Victoria, for example, section 27 of the Limitation of Actions Act 1958 provides that: (a) where the action is based on the defendant's fraud, or (b) the right of action is concealed by the defendant's fraud, the limitation period will not begin until the plaintiff has discovered the fraud or could have discovered it with reasonable diligence. For the action to be 'based on the defendant's fraud', fraud must be an essential element of the cause of action. Fraud is not an essential element of conversion.²⁶ Some thefts, however, could come within (b) and its idea of fraudulent concealment. For example, where the defendant has fraudulently concealed the existence of a right of action by replacing a stolen artwork with a copy, time will not start to run until the plaintiff has discovered the

22. Eg Limitation Act 1969 (NSW) s 78 (and Choice of Law (Limitation Periods) Act 1993 (NSW)); Choice of Law (Limitation Periods) Act 1993 (Vic).

23. *John Pfeiffer Pty Ltd v Rogerson* (2000) 172 ALR 625.

24. Eg Limitation of Actions Act 1958 (Vic) s 6(2); Limitation Act 1969 (NSW) ss 63-65, 68, 68A.

25. Eg Limitation of Actions Act 1958 (Vic) s 27; Limitation Act 1969 (NSW) s 55.

26. *Beaman v ARTS Ltd* [1949] 1 KB 550, 558.

fraud (or could with reasonable diligence have done so).²⁷ Common law fraud is required – that is, ‘actual fraud, personal dishonesty or moral turpitude’.²⁸ The provision, however, also requires fraudulent *concealment* of the cause of action. Most thefts would not amount to this. Facts relevant to the action must be concealed fraudulently. Where the *fact of the theft* itself is fraudulently concealed, time should not start to run until the fact of the theft has been (or could reasonably have been) discovered. In *Bulli Coal Mining Company v Osborne*,²⁹ for example, the Privy Council held that the furtive removal of underground coal through secret trespass amounted to fraudulent concealment. In New South Wales, the Northern Territory and the Australian Capital Territory concealing identity could be enough. Section 55(1)(b) of the Limitation Act 1969 (NSW) states that where the *identity* of a person against whom a cause of action lies is fraudulently concealed, the period between the commencement of a limitation period and the discovery (or reasonably imputed discovery) of the fraud is not counted in reckoning the limitation period.³⁰ These fraud-related provisions will not apply where the defendant obtained the artwork for valuable consideration without notice of the fraud.³¹ Thus, fraud *may* delay time running, but when it does questions of good faith or due diligence could be decisive.

Limitations legislation also provides for the extension of time in certain circumstances. Again, there is little in these provisions to help the victim of an art theft. The most important extension provisions are for personal injury and death claims. Two Australian jurisdictions offer more in terms of extending time. In South Australia and the Northern Territory time can be extended for all causes of action where a material fact was discovered after the limitation period ended or where the failure to commence an action within time was caused by the defendant’s conduct.³² The action must be brought within 12 months of the material fact becoming known and the court must be satisfied that an extension of time is just in all the circumstances. Case-law suggests that a wide meaning will be given to the concept of a material fact.³³ It will probably include the identity of the current possessor of

27. For example, consider the facts of the US case *Naftzger v American Numismatic Society* 42 Cal App 4th 421 (1996), *infra* n 59.

28. *Bahr v Nicolay (No 2)* (1988) 164 CLR 604. Unconscionable conduct does not amount to common law fraud: *CE Heath Underwriting & Insurance (Australia) Pty Ltd v Daraway Constructions Pty Ltd* (Unreported, Vic Sup Ct 3 Aug 1995). The English position appears to be slightly less strict: see Palmer *supra* n 3, 79-80, who suggests that where an artwork’s owner was ‘coerced into parting with that work at an undervalue, an English court may well agree ... there was “fraud or fraudulent concealment”’; but the situation would still be ‘extremely rare’.

29. [1899] AC 351.

30. In the ACT, deliberate rather than fraudulent concealment is required: Limitation Act 1985 (ACT) s 31(1)(b).

31. Eg Limitation of Actions Act 1958 (Vic) s 27; Limitation Act 1969 (NSW) s 55(4).

32. Limitation of Actions Act 1936 (SA) s 48; Limitation Act 1981 (NT) s 44.

33. Eg *Sola Optical Australia Pty Ltd v Mills* (1987) 163 CLR 628; *Napolitano v Coyle* (1977) 15 SASR 559.

a stolen artwork. The plaintiff's conduct, however, could be important in determining whether it is 'just in all the circumstances' to grant an extension of time. Again, as for the case of fraud, it may be that due diligence would be considered.

The present Australian law on limitations generally would not consider the conduct of either a dispossessed owner or an artwork's current possessor. In this regard, two Australian reform proposals from the late 1990s are worth noting. In 1998, the Queensland Law Reform Commission recommended the law change from the position that time commences to run when the cause of action accrues.³⁴ Instead, there should be a general limitation period of three years from the date on which the plaintiff knew, or in the circumstances ought to have known, that the injury had occurred, that it was attributable to another person, and that it warranted bringing proceedings. A longstop period of 10 years from the date on which the conduct giving rise to the claim occurred was also recommended. This is broadly similar to the recommendations made by the English Law Commission in 2001, discussed below in Part II. But no extra change was recommended for the treatment of stolen property to bring it closer to the English position.

In 1997, the Law Reform Commission of Western Australia made similar proposals to those in Queensland.³⁵ In its 1999 *Review of the Criminal and Civil Justice System*, the Commission again endorsed reform of limitation periods.³⁶ No legislation has yet appeared, but change remains on the agenda. The Commission examined a range of limitation statutes from around the world, and recommended the adoption of an entirely new Act based largely on an Alberta proposal. Actions would have a 'discovery limitation period' of three years. This would run from the date on which the plaintiff suffers an injury, can attribute the injury to the defendant's conduct, and the injury warrants bringing proceedings. It was recommended that 'injury' be broadly defined to include conversion and detainment. The Commission also recommended that all actions have an 'ultimate limitation period' of 15 years. When either the discovery or ultimate periods expired a claim would be statute-barred, except with leave of the court. Again, no specific consideration was given to the English provisions for stolen property claims.

The Australian position means that a dispossessed owner of a stolen artwork is unlikely to be able to sue more than six years after the theft. At that stage the former owner has no title to the artwork. But two Australian jurisdictions have recently put forward proposals to move to a discoverability regime for limitations. While that may be simple and suitable for many actions, it would not deal adequately with stolen property claims.

34. Qld LRC *A Review of the Limitation of Actions Act 1974* supra n 10.

35. WA LRC *Limitation and Notice of Actions* supra n 10, paras 171-172, 176.

36. WA LRC *Review of the Criminal and Civil Justice System* Final Report No 92 (Perth, Sep 1999) para 10.22.

II ENGLISH LIMITATION PERIODS FOR RECOVERING STOLEN ART

Limits similar to those in Australia apply to the conversion of chattels in England. Before 1980, the English law on limitations and stolen property resembled the Australian law.³⁷ Now there is one important difference.³⁸ In England, the Limitation Amendment Act 1980 changed the law so that time could not run in favour of a thief.³⁹ Under the English law, general limitations of six years apply to torts, with similar provisions to those in Australia for successive conversions.⁴⁰ Section 4 of the Limitation Act 1980 means an owner can always sue the thief and often can sue a person who has obtained title from the thief. The section means time only starts to run on the first good faith conversion of the stolen property. In addition, there is a presumption that a later conversion is 'related to' an earlier theft. Where the possessor of a chattel can establish that he or she purchased the chattel in good faith, time will start to run in the possessor's favour from the date of the good faith conversion. Thus, the purchase of an artwork from a stranger in a hotel bar would not start time running unless good faith could be shown. Six years later the possessor could not be challenged and the original owner's title would be extinguished.⁴¹ In comparison to Australia, this rule places obligations on purchasers of property, including artworks, to investigate a vendor's title.

There are three points to note in relation to the English provisions: first, good faith and what it requires; second, the special provisions in section 4 for conversions by theft and their status in terms of English public policy; and third, current recommendations for reform.

In 1997, the English High Court in *De Préval v Adrian Alan Ltd* considered good faith.⁴² This decision shows that the probity required of an artwork's current possessor can be extremely high.⁴³ The plaintiff claimed that a pair of 19th century candelabra had been stolen from her in France in 1986. She issued a writ in May 1995 after the candelabra had been pictured on the front cover of a Sotheby's catalogue. The defendant dealer said he had bought the candelabra from a reputable

37. See generally Limitation Act 1939 (UK).

38. See Torts (Interference with Goods) Act 1977 (UK) as to the action and terminology.

39. This followed the Law Reform Committee (Eng) *Limitation of Actions* Report No 21 (London: HMSO, 1977) Cmnd 6923, which was primarily concerned with personal injury claims: M O'Connor 'Limitation Amendment Act 1980' [1980] New L J 494. The Limitation Act 1980 (UK) consolidated these and earlier changes.

40. Limitation Act 1980 (UK) ss 2, 3.

41. *Ibid.*, s 3(2).

42. Unreported, High Court (QBD) 24 Jan 1997 Arden J; noted by R Redmond-Cooper (1997) 2 Art Antiquity & Law 55.

43. Palmer *supra* n 3, 78.

dealer in New York in 1984, which was before the plaintiff's candelabra were stolen. However, the court concluded that the defendant must have acquired his candelabra in the late 1980s. If the defendant had bought in good faith prior to May 1989, time would have run and the plaintiff would have failed. But, as noted already, English law presumes a conversion is related to an earlier theft unless the defendant shows good faith. In the instant case, after gaining possession of the candelabra the defendant had tried to sell them twice through major auction houses, which appeared to be consistent with his having obtained them in good faith. But this was not enough to establish good faith under the legislation. The candelabra were unique and Arden J held that a dealer of Adrian Alan Ltd's experience would have known this, should have been on notice about checking their provenance, and should not have bought them without verifying the vendor's title. There was no evidence that the dealer had consulted computerised registers or other sources, and thus he failed to establish good faith. For dealers, and experienced museum professionals, the standard of proof in relation to good faith appears to be very high.

Second, what is the status of the statutory provisions which apply to conversions by theft in terms of English public policy? Some indications can be found in the 1998 *City of Gotha* decision.⁴⁴ The case concerned Wtewael's *The Holy Family*, which disappeared from Gotha at the end of World War II, was smuggled to Moscow in the 1980s, emerged briefly in Berlin in 1987, and re-appeared in London at Sotheby's in 1992. The Federal Republic of Germany and the City of Gotha attempted to re-claim the work in England. Moses J upheld the claim against a Panamanian company that had consigned the work to Sotheby's. In obiter comments, the judge considered whether German law should not be applied because it was contrary to English public policy. Section 2 of the Foreign Limitation Periods Act 1984 (UK) raises this as an issue. It was argued that German law contravenes English public policy because its 30 year limitation period runs irrespective of whether the claimant is aware of the existence of the claim or the possessor's identity. The attentive reader will note that the German position has some resemblance to Australian limitation law, where time can run even if the owner is unaware of the possessor. Moses J held that public policy in England favours the owner of stolen property unless a later possessor can show good faith – that is, the section 4 provisions already discussed are part of and reflect English public policy. While recognising that the German approach differed in having a much longer limitation period than England, Moses J found this insufficient to subordinate a theft victim's rights to a possessor who lacked good faith. German limitation law was contrary to English public policy.

44. *City of Gotha v Sotheby's; Federal Republic of Germany v Sotheby's* (unreported, High Court (QBD) 9 Sep 1998 Moses J).

Some commentators have criticised these obiter comments,⁴⁵ and it had earlier been suggested that the public policy exception for foreign limitation periods should be applied very narrowly.⁴⁶ Of course, demonstrating good faith for old claims may be very difficult, which may offer one reason for a legal system not to require it. But the judge's comments highlight the importance of the theft provisions in English law, and underline the difference between English and Australian law in this regard.

Third, substantial reform has been proposed in England. Following a consultation paper issued in June 1998, the Law Commission released a report into English limitation periods in April 2001.⁴⁷ The proposed reform involves a core limitation period of three years from the date of discoverability of the cause of action and the identity of the defendant, together with a longstop period of 10 years from when the cause of action accrued.⁴⁸ For conversion an extra factor would be added to this date of discoverability or knowledge test, namely knowledge of the property's location.⁴⁹ Thus, for conversion the law would require actual or constructive knowledge of the property's location, the facts constituting the cause of action, the defendant's identity, and that the cause of action was significant.⁵⁰ The 10 year longstop limitation period would run from the date of first conversion,⁵¹ unless that conversion was by way of theft, in which case time would run only from the first good faith conversion.⁵² Under this model, the courts would have no discretion to extend or not apply the limitation period.⁵³ At the end of that period, a theft victim's title to artwork would be extinguished.⁵⁴ Thus, a relatively simple model has been proposed which could still allow very long limitation times in relation to stolen art. English law would retain the obligation on a possessor to show good faith, and would encourage dispossessed owners to be diligent in investigating thefts through the three year discoverability test.

45. Eg P Lomas & S Orton 'Potential Repercussions from the *City of Gotha* Decision' (1999) 4 Art Antiquity & Law 159.

46. PB Carter 'The Foreign Limitations Periods Act 1984' (1985) 101 LQR 68.

47. Law Commission (Eng) *Limitation of Actions* supra n 16.

48. The longstop would not apply where the defendant dishonestly concealed relevant facts: Law Commission (Eng) *Limitation of Actions* supra n 16, para 3.145; Draft Bill cl 26(1),(2),(4).

49. Ibid, para 4.67; Draft Bill cl 14(2),(5).

50. The law would require actual or constructive knowledge. 'Significance' refers to the plaintiff having full knowledge of the loss or damage, or where a reasonable person would think it worthwhile making a claim: ibid para 3.33; Draft Bill cl 2(5).

51. Ibid para 4.67; Draft Bill cl 14(1).

52. Ibid; Draft Bill cl 14(3),(5).

53. In the Consultation Paper, no discretion to extend the period was proposed, but in the Report a discretion would exist for personal injury claims: ibid para 3.169; Draft Bill cl 12.

54. Ibid, para 4.67; Draft Bill cl 14(4).

III US LIMITATION PERIODS FOR RECOVERING STOLEN ART

There is much greater variation in the laws of the United States. Three approaches are noteworthy here: due diligence, actual discovery, and demand and refusal.⁵⁵ First, most US jurisdictions operate under a due diligence, or reasonable discovery, requirement – that is, time starts to run against the owner of stolen goods from the date on which the owner could have been expected to discover the location of the goods and the identity of the possessor.⁵⁶ This is similar to recent reform proposals put forward in England and Australia. Due diligence was considered in *Autocephalous Greek Orthodox Church of Cyprus v Goldberg* in 1990.⁵⁷ The plaintiffs had made a substantial effort to discover the location of stolen mosaics and to notify relevant authorities. This meant that time did not start to run until the plaintiffs discovered the mosaics' location in the US nearly a decade after their theft in northern Cyprus. Thus, their action was not statute-barred. The relative equities of each of the parties in *Autocephalous* suggest a successful limitations defence would have been a harsh penalty for the plaintiffs. The Indiana court applied domestic US law, Bauer CJ concluding that the action was timely. It accrued when the plaintiffs learnt that the mosaics were in the possession of the defendant Goldberg, and the plaintiffs exercised due diligence in searching for those mosaics. The relevant information could not reasonably have been ascertained earlier. One of the criticisms that has been made of the due diligence approach, however, is that the courts have failed to establish sufficiently clear guidelines on the necessary level of diligence.⁵⁸

The second US approach is actual discovery – that is, the owner's cause of action does not accrue until the owner discovers the property's location. This is the position in California, specifically in relation to art and heritage objects. Section 338(3) of California Code of Civil Procedure provides that a cause of action in relation to articles of 'historical, interpretive, scientific or artistic significance' is not deemed to accrue until 'the discovery of the whereabouts of the article by the aggrieved party, his or her agent or the law enforcement agency which originally

55. A fourth approach which uses an analogy to adverse possession of land seems of less interest in the Australian situation, although it is another way that the courts have tried to take into account the actions of the possessor: see eg *Redmond v New Jersey Historical Society* 28 A 2d 189 (1942); Carey-Miller, Meyers & Cowe supra n 11.

56. Eg *O'Keeffe v Snyder* 83 NJ 478 (1980).

57. 917 F 2d 278 (7th Cir 1990); and the earlier first instance decision *Autocephalous Greek-Orthodox Church of Cypress v Goldberg* 717 F Supp 1374 (1989). See generally SL Foutty 'Entrenchment of the Due Diligence Requirement in Replevin Actions for Stolen Art' (1990) 43 Vanderbilt L Rev 1839.

58. Eg R Schwartz 'The Limits of the Law: A Call for a New Attitude Toward Artwork Stolen During World War II' (1998) 32 Columbia J Law & Social Problems 1.

investigated the theft'. It is possible, but unlikely, that the courts may hold a due diligence requirement is implicit in this wording. Under earlier Californian legislation, case-law did not favour any requirement of due diligence. Instead, the cases suggested actual discovery was required.⁵⁹ It should not be any different under the current law, which still strongly favours art owners in the important US art market.

The third approach is demand and refusal. New York, the other main centre for commercial art transactions in the US, has adopted this approach, which also favours owners. Under demand and refusal, time does not start to run until the dispossessed owner formally demands that the possessor return the property.⁶⁰ The rule was affirmed in the early 1990s in *Guggenheim v Lubell*,⁶¹ when a New York court rejected a due diligence rule.

In *Guggenheim*, a Chagall painting had been stolen from the Guggenheim museum in New York in the late 1960s, but the museum told no one. The possessor had purchased the work in good faith in 1967. It had been publicly exhibited twice, in 1969 and 1973, but identified as the missing work only when taken to Sotheby's for appraisal in 1985. In 1986, the Guggenheim museum demanded its return, which was refused, and it sued in 1987. The trial court used a due diligence approach and held that the action was time-barred. The museum had taken no active steps towards recovery over a 20 year period other than searching its own premises. The trial court held that the museum should have told the FBI, Interpol and other law enforcement agencies, and concluded that time began to run from the date of the second public exhibition in 1973. An appeal succeeded, however, with the New York Court of Appeals refusing to apply a due diligence requirement. In deciding not to place a duty of due diligence on the original owner, the court reasoned that there would be difficulties in declaring what conduct would be necessary to show it; and

59. See *Naftzger v American Numismatic Society* 42 Cal App 4th 421 (1996); *Naftzger v American Numismatic Society* (unreported, Cal CA, 17 Jun 1999); CJ Shapreau 'The California Court of Appeal's Second Decision in *Naftzger v American Numismatic Society*' (1999) 8 Int'l J Cultural Property 524. It could be noted that, in the Anglo-Australian terminology, the cause of action in *Naftzger* seems to have been fraudulently concealed, which would have stopped time from running until the fraud was reasonably discoverable. In *Naftzger*, the plaintiff society sought the return of 18th and 19th century coins, which were stolen sometime before 1972, in which year they were sold to a purchaser in good faith. As lesser coins had been substituted for the stolen ones, the theft was not discovered until 1990, and the location of the coins not until 1991. The plaintiff appears to have been blameless in not discovering the theft earlier.

60. See eg *Menzel v List* 267 NYS 2d 804 (SC 1966); *Kunstammlungen zu Weimar v Ellicofon* 678 F 2d 1150 (2d Cir 1982) affirming 535 F Supp 813 (1981). Surprisingly, no demand is necessary against a bad faith possessor to start the limitation period running. This has the paradoxical result that time runs out in favour of a bad faith possessor much more quickly, as noted by several writers including RE Lerner 'The Nazi Art Theft Problem and the Role of the Museum: A Proposed Solution to Disputes over Title' (1998) 31 NYU J Int'l Law & Politics 15.

61. *Solomon R Guggenheim Foundation v Lubell* 567 NYS 2d 623 (CA 1991).

such a duty could encourage illicit trading in stolen art.⁶² Since then, the New York courts have followed *Guggenheim* and have held that a duty of due diligence on the original owner is not a necessary aspect of the demand and refusal rule.⁶³

Both the New York and Californian approaches, however, may be tempered by the doctrine of laches. The possessor of stolen goods may resist a claim from a prior owner on the basis that the prior owner could have discovered the location of the property at a much earlier date. In effect, this means concepts of due diligence could be considered, but with the burden of proof on the defendant. The defence of laches usually involves knowledge by an aggrieved party of its rights, an unreasonable delay in exercising those rights, and a change of position by the plaintiff working to the detriment of the defendant. In other words, the defendant needs to show prejudice by the plaintiff's unreasonable delay in demanding the work back. This allows the court to consider the conduct of the defendant purchaser of a stolen artwork.⁶⁴ The defence of laches can complicate litigation in US jurisdictions like California and New York, which otherwise are extremely favourable to dispossessed owners. However, without some encouragement for dispossessed owners to search promptly, these US approaches seem unlikely to be adopted elsewhere.⁶⁵

IV REFORM?

The last few years have seen many writers address limitation questions in relation to art, often in the context of Holocaust-related claims. Here we outline their reform proposals, before returning to consider the Australian position. The international reform proposals increasingly focus on the possibility of fairly comprehensive searches by potential buyers and widespread listing by dispossessed owners on computerised databases and other registers. As our review of various jurisdictions in Parts I to III suggests, this imposition of duties of diligence on both parties seems a desirable approach to take. But the English proposals may do this in a better manner than either California or New York. Certainly, tests which revolve wholly around the diligence of the victim in searching for stolen art – that is, tests which run from a date of reasonable discoverability by the theft victim without a

62. See eg Schwartz *supra* n 58.

63. Eg *Golden Buddha Corp v Canadian Land Co of America* 931 F 2d 196 (2d Cir 1991); *Hoelzer v City of Stamford* 933 F 2d 1131 (2d Cir 1991).

64. See eg Lerner *supra* n 60.

65. The lack of such an obligation in the *Convention on Stolen or Illegally Exported Cultural Objects* (Unidroit, 1995) appears to be a major hindrance to its acceptance in jurisdictions such as England: see eg Ministerial Advisory Panel *supra* n 2, paras 50-53; M Bailey 'Britain Says Yes to UNESCO Convention' *The Art Newspaper* (Apr 2001) 1.

corresponding duty of diligence being placed on the buyer – overlook the effect of developing international registers of stolen art such as the Art Loss Register.⁶⁶ It is easy for potential buyers to consult registers to investigate a vendor's title, and probably easier for them to do that than it is for a theft victim to search through auction catalogues in the hope that the missing artwork will be found there. But it also appears desirable to encourage dispossessed owners to be diligent.

Recent suggestions for reform can be divided, roughly, into two groups. Some place central importance on art registers. It has been suggested by Stephanos Bibas, for example, that title should be preserved immediately and indefinitely for theft victims who report losses to the police and international computerised databases of art theft. The suggestion is that this would 'create clear incentives for owners to report thefts and for buyers and art merchants to check the database, thus drying up the market for stolen art'.⁶⁷ The approach would be comparatively simple, once issues of which database or databases would be legally effective were resolved. The same theme runs through Ralph Lerner's suggestions.⁶⁸ He argues for legislation to encourage dispossessed owners to register losses with an international registry – which could stay limitation periods, at least against purchasers who do not make inquiries – and encourage purchasers to check database listings which would start time running on a short three year limitation period. If neither party had used the registry, some form of discovery approach could be used. The English writer, Ruth Redmond Cooper, has made broadly similar suggestions encouraging registration and checking through some link to a reformed limitations regime.⁶⁹ Some writers have suggested smaller steps in the same direction – encouraging provenance searches and publicising thefts. Rodney Schwartz, for example, supports the New York position of demand and refusal, as long as the idea of laches is given due weight.⁷⁰ He suggests that the demand and refusal rule better serves the art world than existing alternatives. It need not unfairly reward non-diligent former owners at the expense of good faith purchasers. By using the equitable doctrine of laches – with its emphasis on the possessor's conduct – the

66. Available at <<http://www.artloss.com>>; and eg PJ O'Keefe 'The Use of Databases to Combat Theft of Cultural Heritage' (1997) 2 Art Antiquity & Law 357.

67. S Bibas 'The Case Against Statutes of Limitations for Stolen Art' (1994) 103 Yale L J 2437; reprinted in (1996) 5 Int'l J Cultural Property 73. See also T Preziosi 'Applying a Strict Discovery Rule to Art Stolen in the Past' (1997) 49 Hastings Law Journ 225, who argues that future victims of theft should be required to register the theft with an art theft database in order to stop the limitations period, while victims of past thefts could rely on the most generous US approach of actual discovery.

68. Lerner *supra* n 60.

69. R Redmond Cooper 'Time Limits in Actions to Recover Stolen Art' in N Palmer (ed) *The Recovery of Stolen Art* (London: Kluwer, 1998) 145.

70. Schwartz *supra* n 58.

rule places the burden of proof on good faith purchasers to demonstrate due diligence prior to purchasing an artwork. It assigns obligations to both parties and avoids the complication of trying to define 'reasonable diligence' by the dispossessed owner alone. Arguably, it will promote more thorough provenance searches. The Canadian writer Robert Patterson also suggests that it is feasible to require purchasers to conduct reasonable investigations about provenance.⁷¹ Writing at the start of the 1990s, in a somewhat different communications environment, Leah Eisen suggested that a great weakness in due diligence requirements was that the US courts had not at that stage clearly defined the degree of effort a dispossessed owner would need to exercise to establish due diligence.⁷² To avoid apparently inconsistent rulings, she suggested the law needed clear standards for determining whether an owner could bring an action. The most significant standard should be whether the plaintiff had contacted law enforcement agencies and art foundations which disseminate information on art thefts. This suggestion would seem even more applicable today. She also suggested that a duty to check on provenance should be placed on the purchaser. A reciprocal duty would discourage the art theft market. A similar concern for predictable standards is evident in Lyndel Prott and Patrick O'Keefe's work from the 1980s.⁷³ The theme in all these recommendations is that by imposing due diligence obligations on both sides, the courts will establish a more equitable basis for awarding ownership.

The second strain of commentary takes a different tack. It asks whether civil litigation is the best tool for resolving disputes over the ownership of artworks. Norman Palmer, for example, has suggested that the forensic difficulties and complex questions of fact and law that need to be resolved in litigation make it tempting to ask 'whether anyone, other than a state, a state-supported party, an oil company, or a private individual of enormous wealth, could seriously contemplate litigation' for the return of stolen art across international borders.⁷⁴ Ralph Lerner has also emphasised the unattractive nature of litigation in relation to art disputes.⁷⁵ He notes that proving the elements of laches places a heavy evidentiary burden on a good faith purchaser. The defence turns on an *unreasonable* delay rather than a *long* delay. This, he says, ensures long and expensive litigation and favours the original owner. Such criticisms of litigation may be welcome if they prompt exploration

71. RK Paterson 'Hitler and Picasso – Searching for "The Degenerate"' (1999) 33 UBC L Rev 91.

72. LE Eisen 'The Missing Piece: A Discussion of Theft, Statutes of Limitations and Title Disputes in the Art World' (1991) 81 J Crim Law & Criminology 1067.

73. Eg LV Prott & PJ O'Keefe *Law and the Cultural Heritage* vol 3 (Oxford: Professional Books, 1989) para 361: 'Protection Against Claims'.

74. Palmer *supra* n 1.

75. Lerner *supra* n 60.

of other solutions. But it may be that a duty of diligent inquiry imposed both on the buyer *and* the victim, requiring registration and checking with art loss registers, would make for less litigation and more out-of-court settlements.

V CONCLUSION

Balancing the interests of good faith buyers and dispossessed owners is a difficult task. The many different types of limitation legislation in force in different countries testify to this. International efforts at unification of limitations laws are not within the scope of this paper, but one could mention the 1995 *Unidroit Convention on Stolen or Illegally Exported Cultural Objects*' definition of the 'due diligence' which a possessor must exercise. This includes consulting 'any reasonably accessible register of stolen cultural objects',⁷⁶ and accords with moves to place greater pressure on buyers to investigate provenance. International, and indeed national, registers of stolen art would provide an eminently suitable starting point for the kind of specific action we would argue must form the basis of a duty of due diligence if that concept is to become less amorphous than it is now.

At the outset we raised the example of a famous Australian art theft. If one of the 27 Cossington-Smith works re-appeared in Australia, how would a claim by her estate fare? As is clear from Part I, the current Australian law could be expected to prevent a claim. The US jurisdictions of California and New York are at the other extreme, and, as outlined in Part III, a claim would be on strong ground with regard to questions of limitation periods. On the other hand, the English law, and the Law Commission's reform proposals in particular, appear to offer an approach that would encourage the artist's estate to remain diligent in searching for the works – because of the reasonable discoverability element that can start time running – and would also encourage purchasers to be diligent – because the rules require any possessor of one of these Cossington-Smiths to be able to establish good faith. As Palmer noted in concluding his recent study *Museums and the Holocaust*, the criticisms in *City of Gotha* about limitation laws that favour dishonest buyers 'may prove a milestone in this field'.⁷⁷ In light of this, Australian law should consider its own public policy regarding limitation periods for claims to recover stolen art. The recent proposals by the English Law Commission appear to be a good model, offering a useful way to extend Australian reform suggestions from the late 1990s. While once it could have been argued that the Australian approach was needed to ensure the commercial certainty of transactions, the good faith approach now seems appropriate. The law should acknowledge that there are many ways to establish

76. *Convention on Stolen or Illegally Exported Cultural Objects* supra n 65, Art 4(4).

77. Palmer supra n 3, 171.

good faith for different types of transaction – such as checking theft registers in the case of artworks. The current law does little to discourage theft, in comparison to these possible reforms. And discouraging theft would appear to benefit all art market actors. Others may wish to make different interim bids in this particular academic auction, but future work will need to investigate how art market actors do operate, and could operate, under differing legal regimes.
