Don’t Tell Me About the Limitations:
The law on stolen art recovery

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In Australian law, a thief gets no title to stolen property upon stealing it. The owner still has legal title. This might suggest that the owner of stolen artwork could sue whoever has possession of the work for its return. Four issues influence whether this can happen under law. First, will an Australian court apply foreign law when an artwork has been stolen overseas and then entered Australia; for example, in a touring art exhibition? Second, what is the effect of ‘limitation periods’? Third, does ‘due diligence’ affect a limitation period? Fourth (and only for international loans of stolen artworks), what is the effect of ‘anti-seizure’ laws? After briefly exploring these four issues, this paper will focus on limitation periods and their affect on recovering stolen art.

I INTRODUCTION

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 viewpoint. Stolen art is reported to be a huge illegal market internationally. In the early 1990s, London’s Scotland Yard estimated annual worldwide art thefts at £3 billion. And in 2000, an English Ministerial Advisory Panel on Illicit Trade in art objects suggested insured losses of art theft in the UK alone ranged from £50 million to £150 million annually. These estimates suggest the size of the stolen art market involving Australian art, or art market actors, must be significant. As well as concerns about contemporary thefts, recent legal disputes have focused international attention on artworks stolen during World War II, when German forces removed a huge number of artworks – perhaps one-fifth of all the world’s art, or over three million art objects. A leading US museum official has suggested almost every western art museum would contained Nazi-looted material. The Holocaust-related claims, not surprisingly, have highlighted weaknesses in the formal law of many countries. 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.¹

Extra-legal responses, more than legal reform, are likely to offer the best options for Holocaust-related claims. Indeed, Lawrence Kaye has suggested that limitation periodscould 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 Humanity² But in any event, the claims

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¹ Norman Palmer (with specialist contributors Leila Anglade, Debra Morris, Emily Pocock, Ruth Redmond-Cooper and Barbara Zeitler), Museums and the Holocaust: Law, Principles and Practice (2001) 74.
have highlighted the complexity of applying limitations to recovering stolen art. Many of those weaknesses also exist for contemporary art thefts, in Australia and elsewhere.

In Australian law, a thief gets no title to stolen property upon stealing it. The owner still has legal title. This might suggest that the owner of stolen artwork could sue whoever has possession of the work for its return. Four issues influence whether this can happen under law. First, will an Australian court apply foreign law when an artwork has been stolen overseas and then entered Australia; for example, in a touring art exhibition? Second, what is the effect of ‘limitation periods’? Third, does ‘due diligence’ affect a limitation period? Fourth (and only for international loans of stolen artworks), what is the effect of ‘anti-seizure’ laws? After briefly exploring these issues, this paper will focus on limitation periods and their effect on recovering stolen art.

Australian courts can apply foreign law
The law of foreign countries may be applied in disputes involving Australian art market actors. Where stolen art has moved into Australia, Australian courts might apply Australian or foreign law. This depends on the legal area known as ‘conflict of laws’ (or ‘private international law’). Conflict of laws is a central legal issue affecting recovery. It cannot be outlined in detail here, but it worth noting that through the case of John Pfeiffer Pty Ltd v Rogerson, relevant rules for conflicts of law have been made simpler where the theft occurred in another Australian state, but the rules have not yet been simplified for international cases.

Limitation periods can prevent recovery: the Australian approach
Limitation periods are time limits that apply when owners want to recover stolen property. In general, an owner cannot sue once six years have elapsed from a theft. This limit applies even if the owner has been unable to identify where stolen artwork is, and whether or not the owner has been diligent in attempting to locate the artwork. Similarly, current Australian law on limitation periods does not take into account the diligence that people have exercised (or failed to exercise) when they buy or borrow stolen art. Limitation periods may appear severe, and exceptions to limitation periods have developed to alleviate particular injustices; eg, a negligence claim may be made many years after an employee has been exposed to carcinogens at work. In Australia, however, these exceptions apply to almost no case of stolen art. Australia has a definite rule: a former owner will lose six years after the theft, even if the current possessor bought the artwork in suspicious circumstances. But law reform proposals suggest due diligence will become more important. And I will examine the law in Australia and in important comparative jurisdictions, and reform options, below.

Due diligence can be important in the US, England (and Australia)
Although due diligence is not yet part of Australian limitation periods, it may have increasing Australian relevance through law reform, and greater use of stolen art registers. In addition, foreign law which considers due diligence may be applied in disputes involving Australian art market actors. Even without law reform, other countries’ approaches to limitation periods can be important in Australia due to conflict of laws. And thus the diligence exercised by each party already may be crucially important; ie, due diligence may determine whether the owner, or the current possessor, wins a legal dispute about an artwork. Recently, commercial services have appeared overseas that will certify that a buyer was diligent (eg TransArt International: www.trans-art.com). Due diligence also is prominent in the art market’s self-regulatory efforts to create databases of stolen works. And it is important in the Unidroit Convention on Stolen or Illegally Exported Cultural Objects 1995. When the convention begins operation, it will affect how dispossessed owners can sue in other countries.
Anti-seizure laws also have practical effects on recovery

A fourth issue can arise for loans, rather than sales and purchases of stolen art. Artwork that has been stolen in the past may be loaned to a museum. In some countries, such works can be immune from being seized by a third party while they are on loan; eg anti-seizure laws exist in some parts of the US, Canada and France. The number of these laws has increased since the late 1990s. Anti-seizure laws are a major issue in relation to Holocaust art claims. The laws mean dispossessed owners may not be able to sue museums exhibiting stolen art. The owners must wait until the art returns to the lenders. The issue has gained prominence, largely due to long running challenges to New York’s anti-seizure law in People v The Museum of Modern Art. Also, a high profile instance in France earlier in the 1990s led to that country’s anti-seizure law being introduced. Australia does not have specific anti-seizure laws, but some protection can exist through general legislation, such as the Foreign States Immunities Act 1985 and the Protection of Movable Cultural Heritage Act 1986. The issue’s high international profile suggests it will remain on Australian museums’ agendas.

The research I am undertaking with Professor Ken Polk and others at the University of Melbourne is examining all these issues and we are seeking input from art museum professionals, commercial dealers and other art-market actors. Our immediate aim is to develop a database of works that previously have been stolen in Australia. There is a lot of individual knowledge held by art market actors about art thefts, as well as anecdotal material available through the media. But the lack of an easily accessible database would appear to lessen the opportunities for people to exercise appropriate care when involved in sale and loan transactions. [I will say some more about how you may be able to help us with that work, at the end of this paper.]

Our longer term aim is to learn more about the understandings and practices of people within the art market about their legal position. The combination of factors I outlined above results in a complex and variable legal position. But we would argue that any evaluation of the current Australian approach to stolen art recovery would be assisted by this sort of work– so we also will be seeking help from many of you in qualitative interview-based research so we can draw on that in a legal and criminological analysis of this one issue of contemporary concern for museums, galleries and the art market.

In relation to both these research aims, we would welcome any queries or suggestions you may have and please speak with us during this event, or you can contact my anytime by email– above.

But this paper examines Australian law regarding stolen artworks that reenter the market, particularly limitations of action. The focus is on the situation of objects stolen in Australia, which remain in Australia. This domestic Australian situation will be compared to approaches in England and the US for works that are stolen and reappear in each of those countries. These are useful comparative jurisdictions because of their common law traditions and significant art markets, particularly in the cities of London and New York and through the activities of the countries’ major museums and galleries. Left to one side here are the extra complexities of private international law that can arise when stolen artworks move between jurisdictions.

For an example of the situations that can arise, consider this situation. In 1977, unknown thieves used a maroon Holden to smash their way into a commercial gallery in the early morning hours of a public holiday and stole 27 works by Grace Cossington-Smith. None has ever resurfaced, and
their mid-1990s value has been estimated at more than $400,000. Artworks that have been stolen can later be sold, donated or loaned to third parties. If one of these Cossington-Smith works 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. In Australia, that claim would almost certainly be barred by limitations legislation. The Australian approach to limitations, outlined in Part II, offers a clear rule, but it is one that appears to operate harshly against disposessed owners. The legal position in Australia is significantly different in several respects from the English and US legal regimes, examined in Parts III and IV. To differing degrees, they take into account the conduct of one or both parties to an art recovery claim. Recent Australian reform initiatives, which may have improved the situation, appear to be passing without implementation. A comparative examination of the law of limitations on stolen property, and particularly stolen art, underlines the value in those suggestions for reform of limitations, and suggests how they could be extended in light of much existing writing about stolen art and limitations, which is considered in Part V.

II AUSTRALIAN LIMITATION PERIODS FOR RECOVERING STOLEN ART

In Australian law, a thief gets no title to stolen property upon stealing it and can pass no title to a third party. The owner still has legal title. This might suggest the disposessed owner of a stolen artwork could sue whoever later possessed the work. Under Australian law, the disposessed owner may be able to sue under 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. Detinue is the wrongful detaining of chattels following a claim for their return. The actions differ in their remedies: detinue allows the court to order the artwork’s return, rather than merely award damages.

But limitation periods affect whether disposessed owners will be able to sue a third party at all. For centuries, law has placed time limits on civil actions. Promoting speedy litigation is seen to support the administration of justice and promote commercial transactions although, as the English Law Commission recently argued, limitations law can be seen as complex, outdated,


4 A case between the artist and the gallery was settled out of court, and it appears that Cossington-Smith rather than the gallery retained ownership in the stolen works: James, above 3, 24.
6 This would apply to all situations, except rare cases where provisions in sale of goods legislation applied, such as where the owner has by conduct represented that a third party has authority to sell the goods.
7 Strictly, the action protects the rights of a possessor rather than 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.
uncertain, and unfair on relatively innocent parties.\(^8\) The legislative origins of limitations lie in the English *Statute of Limitations* 1623, which set a general period of six years. Notwithstanding social, economic, political and technological revolutions since the 17th century, this remains the most common limitation period. So a plaintiff usually cannot sue in tort once six years have run from the accrual of the cause of action. 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.

The cause of action in conversion accrues when chattels are dealt with in a manner inconsistent with the chattel owner’s rights. 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 theft to sue whoever comes into possession of the artwork. A cause of action in detinue accrues when detention of a chattel becomes wrongful. That is, when the owner lawfully demands the chattel’s return and is refused. When an artwork is stolen, this may suggest time will not commence running 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.

Traditionally, limitations are seen as being either procedural or substantive. Procedural limitations bar the cause of action, while substantive ones extinguish legal rights, such as title to property. For the property claims being considered here, limitations are substantive. Limitation periods being substantive means title to property is lost when the period ends, and even so-called self-help remedies are not available. That is, the former owner cannot physically retrieve stolen art because the owner’s title has been extinguished once the limitation period has run.

For 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 such as this, which places no good faith requirement on buyers, might be seen to prejudice dispossessed owners. It certainly does nothing to assuage impressions about the secondary art market that it is impolite to ask much about a work’s provenance when buying. And it would appear not to be in any wider public interest because it does little to discourage illicit trade.

Fraud may be one option for delaying the limitation clock. Limitation legislation provides that where an action involves fraud, the limitation period does not start to run until the plaintiff has discovered the fraud or could have done so with reasonable diligence. In Victoria, for example, section 27 of the *Limitations of Actions Act* 1958 provides (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 fraud’ of the defendant, fraud must be an essential element of the cause of action. Fraud is not an essential element of conversion. 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 discovered the fraud (or could with reasonable diligence have done so). Common law fraud is required; that is, ‘actual

fraud, personal dishonesty or moral turpitude'. 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 should reasonably have been) discovered. In one old case for example, the Privy Council held 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 NSW Limitation Act 1969, for example, says 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. These fraud related provisions will not apply where the defendant obtained the artwork for valuable consideration without notice of the fraud. Thus fraud may sometimes delay time running, but when it does questions of good faith or due diligence could be decisive.

Limitation legislation also provides for the extension of time in certain circumstances. Again, little in the provisions will help a victim of 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 found out after the limitation period ended or where the failure to commence within time was caused by the defendant’s conduct. The action must be brought within 12 months of the material facts becoming known and the court must be satisfied an extension of time is just in all the circumstances. The plaintiff’s conduct, however, could be important for whether a court considers it 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.

But 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 noteworthy. 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. Instead, there would 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 a proceeding. A longstop period of ten years from the date on which the conduct giving rise to the claim occurred also was recommended. This is broadly similar to the 2001 recommendations of the English Law Commission, discussed below in Part III. But, no extra change was recommended for the treatment of stolen property to bring it closer to the English approach.

In 1997, the Law Reform Commission of Western Australia made similar proposals to those in Queensland. No legislation has yet appeared, but change remains on the agenda. The Commission recommended the adoption of an entirely new Act based largely on an Alberta

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9 Bahr v Nicolay (No 2) (1988) 164 CLR 604. The English position appears slightly less strict: see Palmer, above 1, 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’.

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. The Commission also recommended all actions have an ‘ultimate limitation period’ of 15 years. If 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 from six years after the theft. The former owner then will have no title to the artwork. But two Australian jurisdictions have seen recent suggestions to move to a discoverability regime for limitations. While that may be simple and suitable for many actions, it would not deal with stolen property claims as some ideas from England.

III  

ENGLISH LIMITATION PERIODS FOR RECOVERING STOLEN ART

Limits similar to Australia apply for the conversion of chattels in England and before 1980 the law on limitations and stolen property resembled the Australian position. But now there is one important difference. In England, the Limitation Amendment Act 1980 changed the law so time could not run in favour of a thief. Under the English law, general limitations of six years apply for torts, with similar provisions to Australia for successive conversions. But section 4 of the Limitation Act 1980 means an owner always can 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. And there is a presumption that a later conversion is ‘related to’ an earlier theft. So the purchase of an artwork from a stranger in a hotel bar would not start time running unless good faith could be shown. Only if good faith could be shown, six years later the possessor could not be challenged and the original owner’s title would be extinguished. In comparison to Australia, this law places obligations on purchasers of property, like 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 s 4 for conversions by theft and their status in terms of English public policy; and third, current recommendations for reform.

The 1997 decision of De Préval v Adrian Alan Ltd considered good faith.\textsuperscript{11} It shows that the probity required by an artwork’s current possessor can be ‘extremely’ high.\textsuperscript{12} In De Préval, the plaintiff claimed that a pair of nineteenth century candelabra had been stolen from her in France in 1986. She issued a writ in May 1995 after the candelabra were pictured on a Sotheby’s catalogue cover. The defendant dealer said he bought the objects from a reputable New York dealer in 1984, which is before the plaintiff’s candelabra were stolen. But the court concluded the defendant must have acquired them later in the 1980s. If the defendant had bought in good faith prior to May 1989 then time would have run and the plaintiff would fail. As noted already, English law presumes a conversion is related to an earlier theft unless the defendant shows good faith. In De Préval, after gaining possession of the objects the defendant had tried to sell them twice through major auction houses, which appeared to be consistent with him having obtained them in good faith. But this was not enough to establish good faith under the legislation. The candelabra were unique and the judge said a dealer of Alan’s experience would have known this.

\textsuperscript{11} Unreported, Arden J, 24 January 1997; noted by Ruth Redmond Cooper in (1997) 2 Art Antiquity and Law 55.

\textsuperscript{12} Palmer, above n 1, 78 and its note 21.
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 so he failed in establishing good faith. For people like dealers, or experienced museum professionals, the standard for showing good faith appears to be very high. In Australia, De Préval would not have been able to recover.

Second, what is the status of the statutory provisions applying to conversions by way of theft in terms of English public policy? Some indication exists in the 1998 City of Gotha decision.\(^\text{13}\) 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 reappeared in London at Sotheby’s in 1992. The Federal Republic of Germany and the city of Gotha attempted to reclaim the work in England. The judge upheld the claim against a Panamanian company that had consigned the work to Sotheby’s. The judge also considered whether German law should not be applied because it was contrary to English public policy.\(^\text{14}\) The German law was argued to contravene 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 listener will note the German position has some resemblance to the Australian limitation law, where time can run even if the owner is unaware of the possessor. Time runs from the first conversion. The judge held public policy in English law favoured the owner of stolen property unless a later possessor can show good faith – that is, the section 4 provisions already discussed are part of English public policy. While recognising the German approach differed in having a much longer limitation period than England, the judge 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. The judge’s comments highlight the importance of the theft provisions in English law, and underline its difference from Australia.

Third, substantial reform has been proposed in England. After a consultation paper issued in June 1998, the Law Commission released a report into English limitation of actions in April 2001. The proposed new regime involves a core limitation period of three years from the discoverability of the cause of action and the identity of the defendant, together with a long-stop period of 10 years from when the cause of action accrued. For conversion an extra factor would be added to this date of discoverability or knowledge test; namely, knowledge of the property’s location. So 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 is significant.\(^\text{15}\) The 10 year long-stop limitation period would run from the date of first conversion, unless that conversion was by way of theft in which case time would only run from the first good faith conversion. Under this model, courts would have no other discretion to extend or not apply the limitation period.\(^\text{16}\) At the end of the period, a theft victim’s title to artwork would be extinguished. Thus, a relatively simple model has been proposed which could still allow very

\(^{13}\) *City of Gotha v Sotheby’s and another; Federal Republic of Germany v Same* (unreported, Moses J, 9 Sept 1998).

\(^{14}\) Section 2 of the *Foreign Limitation Periods Act 1984* raises this as an issue.

\(^{15}\) The law would require knowledge or a situation in which the plaintiff ought reasonably know. ‘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: para 3.33, Draft Bill cl 2(5).

\(^{16}\) 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.
long limitation times in relation to stolen art. And England would retain its obligations on a possessor to show good faith, as well as encourage dispossessed owners to be diligent in investigating thefts through the three year discoverability test.

IV UNITED STATES LIMITATION PERIODS FOR RECOVERING STOLEN ART

There is much greater variation in approaches in the United States. Three are noteworthy here: due diligence, actual discovery and demand and refusal. 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. This is similar to the law reform recommendations in England and Australia. Due diligence was considered in the 1990 decision of Autocephalous Greek Orthodox Church of Cyprus v Goldberg. In the case, the plaintiffs had made substantial efforts to discover the location of stolen mosaics and to notify relevant authorities. This meant 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 time-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 and Bauer CJ held the action was timely. It accrued when the plaintiffs learnt the mosaics were in possession of Goldberg, and the plaintiffs exercised due diligence in searching for mosaics. The 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.

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 has been enacted 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 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. It should not be any different under current law, which will strongly favour art owners in an important US art market.

The third approach is demand and refusal. New York, the other main US centre for commercial art transactions, has adopted this approach which also favours owners. Under demand and refusal, time does not start running until the dispossessed owner formally demands the possessor return the property. The rule was affirmed in the early 1990s in Guggenheim v Lubell, when the New York court rejected a due diligence rule. In Guggenheim v Lubell, a Chagall painting had been stolen from the Guggenheim museum 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 museum demanded its return, which was refused, and it sued in 1987. At first instance the court used a due diligence approach and held the action was time-barred. The

17 917 F 2d 278 (7th Cir 1990); and the earlier first instance decision Autocephalous Greek Orthodox Church of Cyprus v Goldberg 717 F Supp 1374 (SD Ind 1989).
museum had not taken active steps towards recovery over a 20 year period other than searching its own premises. The trial court said the museum should have told the police, FBI, Interpol and other agencies, and time began to run from date of second exhibition. 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 there were difficulties in declaring what conduct would be necessary to show due diligence; and such a duty could encourage illicit trading of stolen art. New York courts have followed *Guggenheim*, and held a duty of due diligence on the original owner is not a necessary aspect of the demand and refusal rule. 19

US jurisdictions like California and New York are extremely favourable to dispossessed owners. But without some encouragement for dispossessed owners to search promptly, these US approaches seem unlikely to be adopted elsewhere.

V REFORM?

The last few years have seen many writers address limitation questions in relation to art, often in the context of holocaust-related claims. I will briefly outline their reform suggestions, before returning to consider the Australian situation. The international suggestions increasingly focus on the possibility of fairly comprehensive searches by potential buyers and widespread listing by dispossessed owners on databases and similar services. As Parts II to IV suggest, 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 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 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. 20 It is easy for potential buyers to consult registers to investigate a vendor’s title, and probably easier to do that than it is for a theft victim to search indefinitely through auction catalogues in the hope that the missing artwork will surface. But it also appears desirable to encourage dispossessed owners to be diligent.

Recent suggestions for reform can be collated, 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 police and international computerised databases of art thefts. The claim is 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.’ 21 The approach would be comparatively simple, once issues of which database or databases would be legally effective were dealt with. The theme runs also through

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19 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 the prior owner could have discovered the location of the property at a much earlier date. That means concepts of due diligence could be considered, but with the burden of proof on the defendant.


Ralph Lerner’s suggestions. 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 to 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. And the English limitations writer, Ruth Redmond Cooper, has made broadly similar suggestions about encouraging registration and checking through some link to a reformed limitations regime. 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. He suggests 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 – and its incorporation of the possessor’s conduct – the rule places the burden of proof on good faith purchasers to demonstrate diligence prior to purchasing the work. It assigns obligations to both parties and avoids the complication of trying to define ‘reasonable diligence’ by the dispossessed owner alone. Thus, it will promote more thorough provenance searches. Canadian writer Robert Patterson also suggests it is feasible to require purchasers to conduct reasonable investigations about provenance. Writing at the start of the 1990s, in a somewhat different communications environment, Leah Eisen suggested a great weakness in due diligence requirements is that US courts had not yet been clear about the degree of effort a dispossessed owner needs to exercise to establish due diligence. To avoid apparently unprincipled favouritism between the two parties, she suggested the law needs clear measures for determining whether an owner can bring an action. The most significant standard should be whether the plaintiff has contacted law enforcement agencies and art foundations which disseminate information on art thefts. This suggestion would seem even more applicable nearly one decade later. She also suggested that a duty to check 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. The theme in all these recommendations is that by imposing due diligence obligations on both sides, courts will establish a more equitable basis for awarding ownership.

The second strain of commentary takes a different tack. Rather than working through the minutiae of the mechanics of title, some writers ask whether civil litigation is the best tool for

resolving such disputes over the ownership of works of art. For example, Norman Palmer has suggested the forensic difficulties of massively expensive litigation and complex questions of fact and law make it tempting ‘to ask whether anyone, other than a State, a Statesupported party, an oil company, or a private individual of enormous wealth, could seriously contemplate litigation’ for the return of stolen art across international borders.\footnote{Palmer, above n 1.} Ralph Lerner also has emphasised the unattractive nature of litigating in relation to art disputes. He notes that proving the elements of laches places a heavy evidential burden on a good faith purchaser. The defence turns on an \textit{unreasonable} delay rather than a \textit{long} delay. This he sees as virtually ensuring long and expensive litigation and favouring an original owner too greatly. Such criticism of litigation may be welcome if it prompts exploration of other solutions. But it may be that a duty of diligent inquiry imposed both on buyer and victim, framed in terms of registration and checking with art loss registers, would make for speedier and more concise litigation or settlement of disputes.

\section*{VI Conclusion}

Balancing the interests of good faith buyers and dispossessed owners is a difficult issue for law. That is illustrated by the many variations of limitation implemented by different countries. International efforts at unification of limitations laws are not within the remit of this paper, but one could note 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’\footnote{UNIDROIT Article 4(4).} and accords with the moves to placing greater pressure on buyers to investigate provenance. International, and indeed national, registers of stolen art seem eminently suited to providing the arena for the kind of specific action we would argue must explicitly form the basis of a duty of due diligence if that concept is going to escape from its current muddy location in law.

At the outset I raised the example of a famous Australian art theft. If one of those 27 Cossington-Smith works re-appeared in Australia, how would a claim by the estate proceed? As is clear from Part II, the current Australian law can be expected to prevent a claim. The US jurisdictions of California and New York are at the other extreme and, as outlined in Part IV, a claim would be on strong ground with regards to questions of limitation periods. But the English law, and the 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 – as well as require any possessor of Cossington-Smiths to be able to establish their good faith. As Palmer noted in concluding his recent study, \textit{Museums and the Holocaust}, the criticisms in \textit{City of Gotha} about limitation laws that favour dishonest buyers ‘may prove a milestone in its field’. In light of this, Australian law could consider its own sense of public policy for limitation periods to claims to recover stolen art. And the recent English proposals from the Law Commission appear to be a good model, offering a useful way to extend Australian reform suggestions from the late 1990s. And I would welcome input from the museum community with regard to pursuing that sort of law reform.

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FOOTNOTES

1  Norman Palmer (with specialist contributors Leila Anglade, Debra Morris, Emily Pocock, Ruth Redmond-Cooper and Barbara Zeitler), Museums and the Holocaust: Law, Principles and Practice (2001) 74.


4  A case between the artist and the gallery was settled out of court, and it appears that Cossington-Smith rather than the gallery retained ownership in the stolen works: James, above 3, 24.


6  This would apply to all situations, except rare cases where provisions in sale of goods legislation applied, such as where the owner has by conduct represented that a third party has authority to sell the goods.

7  Strictly, the action protects the rights of a possessor rather than 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.


9  Bahr v Nicolay (No 2) (1988) 164 CLR 604. The English position appears slightly less strict: see Palmer, above 1, 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’.


12 Palmer, above n 1, 78 and its note 21.

13 City of Gotha v Sotheby’s and another; Federal Republic of Germany v Same (unreported, Moses J, 9 Sept 1998).

14 Section 2 of the Foreign Limitation Periods Act 1984 raises this as an issue.

15 The law would require knowledge or a situation in which the plaintiff ought reasonably know. ‘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: para 3.33, Draft Bill cl 2(5).
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.

917 F 2d 278 (7th Cir 1990); and the earlier first instance decision Autocephalous Greek Orthodox Church of Cyprus v Goldberg 717 F Supp 1374 (SD Ind 1989).


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 the prior owner could have discovered the location of the property at a much earlier date. That means concepts of due diligence could be considered, but with the burden of proof on the defendant.


Palmer, above n 1.

UNIDROIT Article 4(4).