Museums Board of Victoria v Carter - [2005] FCA 645

FEDERAL COURT OF AUSTRALIA

Museums Board of Victoria v Carter [2005] FCA 645

MUSEUMS BOARD OF VICTORIA v RODNEY CARTER

VID 1240 of 2004

RYAN J

20 MAY 2005
MELBOURNE

IN THE FEDERAL COURT OF AUSTRALIA

VID 1240 of 2004

VICTORIA DISTRICT REGISTRY

BETWEEN: MUSEUMS BOARD OF VICTORIA

Applicant

AND: **RODNEY CARTER**
Respondent

JUDGE: **RYAN J**

DATE OF ORDER: **20 MAY 2005**

WHERE MADE: **MELBOURNE**

THE COURT ORDERS THAT:

1. The application stand over to date and time to be fixed for the making of orders in conformity with the reasons published this day.

Note: Settlement and entry of orders is dealt with in Order 36 of the Federal Court Rules.

IN THE FEDERAL COURT OF AUSTRALIA

VICTORIA DISTRICT REGISTRY **VID 1240 of 2004**

BETWEEN: **MUSEUMS BOARD OF VICTORIA**
Applicant

	RODNEY CARTER
AND:	**Respondent**

	RYAN J
JUDGE:	
	20 MAY 2005
DATE:	
	MELBOURNE
PLACE:	

REASONS FOR JUDGMENT

1. There is before the Court a third amended application by the Museums Board of Victoria ("the Museum") under s 5 of the *Administrative Decisions (Judicial Review) Act 1977* (Cth) ("the AD(JR) Act") for review of certain decisions of the respondent ("the Inspector") in his capacity as an inspector appointed under s 21R of the *Aboriginal and Torres Strait Islander Heritage Protection Act 1984* (Cth) ("the Act"). The decisions concerned were those to make successive emergency declarations under s 21C of the Act in respect of certain Aboriginal artefacts being two bark etchings dating from around 1854 and originating from Dja Dja Wurrung Country in the area around Boort, another bark etching dated from about the 1870's originating from Jupagalk Country in the Lake Tyrell area and a ceremonial emu figure made from river redgum and decorated with red and white ochres ("the ceremonial piece"). In these reasons I shall refer to the three etchings and the ceremonial piece collectively as "the objects."

2. The first emergency declaration made by the Inspector was dated 18 June 2004 and was confined to the three bark etchings. It was in these terms;

> *'SCHEDULE 2 Regulation 6*
>
> *COMMONWEALTH OF AUSTRALIA*

EMERGENCY DECLARATION UNDER SUBSECTION 21C (1)
OF THE ABORIGINAL AND TORRES STRAIT ISLANDER
HERITAGE PROTECTION ACT 1984

I, Rodney Carter, an Inspector appointed under section 21 R of the Aboriginal and Torres Strait Islander Heritage Protection Act 1984 , after an application made to me by representatives of the Dja Dja Wurrung and Jupagalk peoples, hereby make under subsection 21C(1) of the Aboriginal and Torres Strait Islander Heritage Protection Act 1984 an Emergency Declaration in relation to three significant cultural heritage objects [see Annexures attached] as displayed in the exhibition Etched in Bark 1854 *and as loaned by the British Museum to Museum Victoria specifically:*

1. *Two Dja Dja Wurrung Country smoke-blackened eucalyptus Bark Etchings of a Corroborree Scene and a Bark Etching of a Hunting Scene (cultural heritage objects) dated around 1854 from Boort.*

2. *One Jupagalk Country smoked Bark Etching of Aborigines and Settlers dated around 1870's from Lake Tyrrell.*

All three objects are exhibited in Museum Victoria, Carlton Gardens Carlton Victoria Australia.

The declaration is intended to protect and preserve the three cultural heritage objects from further threats of injury and desecration by their removal from Museum Victoria to the British Museum without the written consent of the Traditional Owners, and is made subject to the following terms and conditions:

TERMS AND CONDITIONS

a. *That the three cultural objects will continue to be displayed and/or secured at Museum Victoria under the direction of the Inspector in consultation with the relevant Traditional Owners by the Manager Bunjilaka Aboriginal Centre.*

b. *That the State of Victoria and Museum Victoria will negotiate with Traditional Owners the Dja Dja Wurrung and Jupagalk Native Title Groups as to the future location of the three cultural heritage objects.*

c. *That the British and Australian Governments negotiate the final repatriation of all Indigenous Australian Ancestral Human Remains and Grave Goods held without consent by various British institutions and privately for recovery, return and reburial by Australian Traditional Owners.'*

3. Notification of the making of the first emergency declaration was given pursuant to s 21C(4) of the Act to the following groups, entities and persons;

- *'Dja Dja Wurrung Traditional Owners/Native Title Group c/o Native Title Services Victoria Limited*

- *Jupagalk Traditional Owners/Native Title Group c/o Native Title Services Victoria Limited*

- *North West Nations Clans Aboriginal Corporation 231 Campbell Street Swan Hill Victoria 3585*

- *Hon Gavin Jennings* MLC *Victorian Minister for Aboriginal Affairs Level 21, 555 Collins Street Melbourne 3000*

- *Executive Director Aboriginal Affairs Victoria Level 9, 1 Spring Street Melbourne Victoria 3000*

- *Senator David Kemp Commonwealth Minister for the Environment and Heritage Parliament House Canberra ACT 2600*

- *President Mr Harold Mitchell and Acting Chief Executive Officer Mr Robin Hirst Museum Victoria, Carlton Gardens, Carlton Victoria 3001*

and to each of the following affected Parties:

- *British Government, England*

- *British Museum, England*

- *Economic Botany Collection Royal Botanic Gardens, Kew, England*'

4. A further emergency declaration dated 16 July 2004 was made by the Inspector in respect of the ceremonial piece. That declaration was in substantially similar terms and notified to the same groups and persons as the first emergency declaration dated 18 June 2004. It recited that it was intended "to protect and preserve the Ceremonial Emu Figure from perceived and real threats of injury and desecration."

5. A further emergency declaration dated 18 July 2004 was related to the two etchings from Boort and the Jupagalk etching which were the subject of the first declaration quoted at [2] above. It was in virtually identical terms to the first declaration and notified to the same recipients.

6. On each of 15 August 2004 and 14 September 2004 the Inspector made two further emergency declarations severally directed to the two bark etchings from Boort and the Lake Tyrell etching on the one hand and the ceremonial piece on the other. However, on 14 October 2004, the Inspector effectively issued a single consolidated emergency declaration directed to the two bark etchings from the Boort area and the ceremonial piece but omitted reference to the bark etching from Lake Tyrrell. The conditions attached to the declaration of 14 October 2004 were in slightly different terms from those reproduced at [2] above and recited;

> *'a. That the three significant cultural heritage objects will continue to be lodged in Museum Victoria under the direction of the Inspector in consultation with the Traditional Owners.*

b. That the Minister of Aboriginal Affairs for Victoria expedite the resolution of requests for Temporary and Permanent Declarations regarding the four (sic) significant cultural heritage objects.'

7. On 14 November and 14 December 2004 the Inspector made successive further emergency declarations in substantially identical terms to the declaration of 14 October 2004 described at [6] above.

8. It is common ground that the bark etchings were created by members of the Dja Dja Wurrung People and are the only known Aboriginal bark etchings of their kind that have survived to the present day. One of the bark etchings from the Boort area depicting a corroboree scene was made available on loan to the Museum by the Royal Botanic Gardens in Kew in the United Kingdom. The other bark etching from the Boort area depicting a hunting scene was made available together with the ceremonial piece on loan to the Museum by the British Museum. The third bark etching from the Lake Tyrrell area came from the Museum's own collection. All four artefacts were incorporated by the Museum in an exhibition entitled "Etched On Bark – 1854 Kulin Barks from Northern Victoria" which opened on 18 March 2004 and closed on 27 June 2004.

9. Since the exhibition closed, the Royal Botanic Gardens and the British Museum have been pressing the Museum to return the bark etchings from the Boort area and the ceremonial piece in accordance with the terms of the respective loan contracts into which the Museum had entered with the two British institutions.

10. The Museum seeks review of each decision to make an emergency declaration. The power to make an emergency declaration in circumstances like the present is conferred by s 21C of the *Aboriginal and Torres Strait Islander Heritage Protection Act 1984* (Cth) ("the Act") which provides;

'(1) An emergency declaration in the prescribed form may be made in relation to an Aboriginal place or Aboriginal object:

(a) by:

(i) an inspector appointed under section 21R; or

(ii) the Minister;

whether after an application is made to him or her by a local Aboriginal community or any person or on his or her own motion; or

(b) by a magistrate on an application by a local Aboriginal community;

if the inspector, Minister or magistrate has reasonable grounds for believing that the place or object is under threat of injury or desecration of such a nature that it could not properly be protected unless an emergency declaration is made.

(2) An emergency declaration ceases to be in force at the end of 30 days after it is made or such longer period, not exceeding 44 days, after it is made as the Minister

fixes in any case unless it is sooner revoked or replaced by a temporary declaration under section 21D or a declaration under section 21E .

(3) An emergency declaration may be varied or revoked:

(a) if made by an inspector - by the inspector;

(b) if made by the Minister - by the Minister; or

(c) if made by a magistrate - by the magistrate on the application of the local Aboriginal community.

(4) If an emergency declaration is made, varied or revoked by an inspector or the Minister, the inspector or Minister shall, without delay, notify:

(a) the local Aboriginal community (if any) of the area where the Aboriginal place or Aboriginal object is found; and

(b) in the case of an emergency declaration made by an inspector - the Minister;

and shall take all reasonable steps to notify any person who is likely to be affected.

(5) If an emergency declaration is made by a magistrate on the application of a local Aboriginal community, the community shall, without delay, take all reasonable steps to notify any person who is likely to be affected.'

11. Section 21C finds its place in a distinct Pt IIA of the Act dealing with "Victorian Aboriginal Cultural Heritage." Section 21A in the same Part contains a number of definitions specifically referable to Pt IIA including the following;

*' **"Aboriginal object"** means an object (including Aboriginal remains) that is in Victoria and is of particular significance to Aboriginals in accordance with Aboriginal tradition.*

... ...

***"local Aboriginal community"** means an organisation that is specified in the Schedule.*

***"magistrate"** means a magistrate of the State of Victoria.*

***"police officer"** means:*

(a) a member or special member of the Australian Federal Police; or

(b) a member of the Police Force of the State of Victoria.

***"State Minister"** means a Minister of the Crown of the State of Victoria.'*

12. Sub-sections 3(2) and (3) of the Act provide, so far as is relevant;

'(2) For the purposes of this Act, an area or object shall be taken to be injured or desecrated if:

... ...

(b) in the case of an object - it is used or treated in a manner inconsistent with Aboriginal tradition;

and references in this Act to injury or desecration shall be construed accordingly.

(3) For the purposes of this Act, an area or object shall be taken to be under threat of injury or desecration if it is, or is likely to be, injured or desecrated.'

13. Sub-section 21B(1), in the form it was when this litigation commenced, provided for a delegation of powers by the Commonwealth Minister to;

'(a) a State Minister; or

(b) an officer of the Department; or

(c) the Chief Executive Officer of, or a member of the staff of, the Aboriginal and Torres Strait Islander Commission.'

14. Sub-sections 21B(2) and (3) in turn provided;

'(2) A State Minister to whom a power has been delegated under subsection (1) may, by writing signed by that Minister, authorise another person to exercise the power so delegated.

(3) An authority under subsection (2) may be given to:

(a) a specified person; or

(b) the person for the time being occupying or performing the duties of a position in the public service of the State of Victoria, being a position specified in the instrument by which the authority is given.'

15. It is common ground that the Inspector was duly appointed under s 21R(1) of the Act , which provides;

'The Minister may, in writing, appoint any person after consultation with a local Aboriginal community to be an inspector for the purposes of this Part if the Minister is satisfied that the person has knowledge and expertise in the identification and preservation of Aboriginal cultural property and is able to undertake the duties of an inspector under this Part.'

Does the Inspector have power to make successive emergency declarations?

16. The principal contention of the Museum in support of its application is that an inspector, after making an emergency declaration in respect of an object, cannot make a second or subsequent emergency declaration for that object in relation to the same threat of injury or desecration.

17. Support for that contention was derived from the three-tiered scheme of preservation erected by ss 21C, 21D and 21E of the Act . Section 21D provides;

> *'(1) If a local Aboriginal community decides, whether after an application is made to it or on its own motion, that:*
>
> *(a) a place or object in the community area is an Aboriginal place or Aboriginal object; and*
>
> *(b) that place or object is under threat of injury or desecration;*
>
> *the community may advise the Minister that it considers a temporary declaration of preservation should be made.*
>
> *(2) On receiving advice under subsection (1) or determining on his or her own motion that a temporary declaration of preservation should be made, the Minister:*
>
> *(a) shall, within 14 days, cause notice of the advice or determination to be given to any person who is likely to be affected by the making of a declaration; and*
>
> *(b) shall give any such person an opportunity to be heard.*
>
> *(3) After notice is given under subsection (2) and any objections are heard and the Minister has consulted with any State Minister whose responsibility may be affected by the making of a declaration, the Minister shall:*
>
> *(a) if the Minister considers that, in all the circumstances of the case, it is reasonable and appropriate that a temporary declaration be made for the preservation of the place or object—make the declaration in writing, and, in the declaration, specify the terms of the declaration and the manner of preservation to be adopted in relation to the place or object, including prohibition of access to, or interference with, the place or object; or*
>
> *(b) refuse to make the declaration.*
>
> *(4) The Minister may, at any time, on the application of the local Aboriginal community or on his or her own motion, vary or revoke a temporary declaration or any matters specified in it.*
>
> *(5) The Minister shall cause appropriate notice to be given of the making, variation or revocation of a temporary declaration.*
>
> *(6) A person affected or likely to be affected by the making, variation or revocation of a temporary declaration of preservation may request the Minister to appoint an arbitrator to review the Minister's decision.*
>
> *(7) If the Minister refuses to make, or revokes, a temporary declaration of preservation or makes or varies a declaration, the local Aboriginal community may request the Minister to appoint an arbitrator to review the Minister's decision.*

(8) The Minister shall, after receiving a request under subsection (6) or (7), appoint an arbitrator, being a person whom the Minister considers to be in a position to deal with the matter impartially.

(9) Subject to section 21F , a temporary declaration of preservation ceases to be in force at the end of 60 days after it is made, or such longer period, not exceeding 120 days, after it is made as the Minister, on the advice of the local Aboriginal community, fixes unless it is sooner revoked or replaced by a declaration under section 21E .'

18. It will be observed that sub-s 21D(2) provides for a temporary declaration to have a life of 60 days or a longer period up to 120 days fixed by the Minister on the advice of the local Aboriginal community. By contrast, an inspector or magistrate who makes an emergency declaration under s 21C has no power to specify that it should have a life other than that of 30 days stipulated in s 21C (2) . The only power to extend an emergency declaration is reposed in the Minister and permits an extension only to a maximum of a further 14 days. An inspector who has made an emergency declaration can affect its life only by revoking it under s 21C(3) .

19. As well as having a longer minimum and maximum life than an emergency declaration, a temporary declaration under s 21D is expressed by s 21D(9) to come to an end upon revocation or being replaced by a declaration of preservation under s 21E . Section 21E provides;

'(1) If a local Aboriginal community decides, whether after an application is made to it or on its own motion, that:

(a) a place or object in the community area is an Aboriginal place or Aboriginal object; and

(b) it is appropriate, having regard to the importance of maintaining the relationship between Aboriginals and that place or object, that a declaration of preservation should be made in relation to that place or object;

the community may advise the Minister that it considers a declaration of preservation should be made.

(2) On receiving advice under subsection (1) or determining on his or her own motion that a declaration of preservation should be made, the Minister:

(a) shall within 14 days cause notice of the advice or determination to be given to any person who is likely to be affected by the making of a declaration; and

(b) shall give any such person an opportunity to be heard.

(3) After notice is given under subsection (2) and any objections are heard and the Minister has consulted with any State Minister whose responsibility may be affected by the making of a declaration, the Minister shall:

(a) if the Minister considers that, in all the circumstances of the case, it is reasonable and appropriate that a declaration be made for the preservation of the place or object—make the declaration and, in the declaration, specify the terms of the declaration and the manner of preservation to be adopted in relation to the

place or object, including prohibition of access to, or interference with, the place or object; or

(b) refuse to make the declaration.

(4) The Minister may, at any time, on the application of the local Aboriginal community or on his or her own motion, vary or revoke a declaration or any matters specified in it.

(5) A person likely to be affected by the making, variation or revocation of a declaration of preservation may request the Minister to appoint an arbitrator to review the Minister's decision.

(6) If the Minister refuses to make, or revokes, a declaration of preservation or makes or varies a declaration, the local Aboriginal community may request the Minister to appoint an arbitrator to review the Minister's decision.

(7) The Minister shall, after receiving a request under subsection (5) or (6), appoint an arbitrator, being a person whom the Minister considers to be in a position to deal with the matter impartially.

(8) The making, variation or revocation of a declaration under this section:

(a) shall be done by notice published in the Gazette*; and*

(b) comes into operation on the date of publication or such later date as is specified in the notice.'

20. No period is specified during which a declaration of preservation under s 21E is to remain in force but the Minister has a general power to revoke it under s 21E(4) subject to the right of an affected person to have the revocation reviewed by an arbitrator; s 21E(5) .

21. The scheme discernible from ss 21C, 21D and 21E when read together suggests that an ascending degree of permanence has been accorded to the emergency declaration of preservation under s 21C , the temporary declaration of preservation under s 21D and the open-ended declaration of preservation under s 21E . Moreover, the scheme suggests that the making of each declaration in the tier is conceived as being in aid of the next declaration. In other words, the making of an emergency declaration under s 21C is envisaged as allowing the Minister the time and opportunity to consider whether to make a temporary declaration. The making of a temporary declaration in turn is conceived as allowing the time and opportunity, free of any threat of intervening injury or desecration to the area or object, for the making of a declaration of preservation and, if necessary, its review by an arbitrator. This view of the effect of a temporary declaration is reinforced by the stipulation in s 21D(9) that a temporary declaration is to come to an end before the expiration of the maximum life fixed by or pursuant to that sub-section if "sooner .... replaced by a declaration under s 21E ."

22. Another feature of the statutory scheme which tends to confirm the intention which I have imputed to the legislature is that the emergency declaration can be varied or revoked only by the inspector, Minister or magistrate who made it; s 21C(3) ; and there is an obligation upon the making of an emergency declaration to take all reasonable steps to notify any person who is likely to be affected; s 21C(4) . That requirement for notice is presumably to allow the affected person to

make representations in support of, or opposing, a temporary declaration under s 21D or a declaration of preservation under s 21E and, if necessary, to seek a review by an arbitrator of a decision made under one or other of those sections. Significantly, no provision is made for any form of arbitral or other review of a decision to make an emergency declaration of preservation under s 21C . That argues strongly in favour of the construction that s 21C is intended as a holding provision to allow the lengthier mechanisms for determination contemplated by ss 21D and 21E wi th their attendant obligations to accord procedural fairness, to be put in train.

23. I also consider that support for the construction of s 21C which I prefer is derived from the nomenclature "emergency declaration of preservation" which is repeatedly ascribed to the form of protection for which that section provides. When that is read in conjunction with the label "temporary declaration of preservation" which recurs throughout s 21D , the inference becomes extremely strong that Parliament intended that s 21C should afford a shorter, more urgent form of protection than that to be administered directly by the Minister or his or her delegate under s 21D . It is also contemplated, I consider, by s 21C(2) that the life of an emergency declaration of preservation should be finite and not capable of extension, even by the Minister, beyond the maximum life of 44 days ascribed by that sub-section.

24. It was submitted by Ms Kenny, who appeared for the Inspector, that the implied prohibition on the making of successive emergency declarations of preservation of an object in response to the same threat of injury or desecration, which I have discerned in the scheme of Div 2 of Pt IIA of the Act , is excluded by s 33(1) of the *Acts Interpretation Act 1901* (Cth) . That sub-section provides;

> *'Where an Act confers a power or imposes a duty, then, unless the contrary intention appears, the power may be exercised and the duty shall be performed from time to time as occasion requires.'*

25. The considerations which I have outlined at [17]-[22] above have led me to conclude that the Act ev inces an intention contrary to the interpretation that the power conferred on an inspector by s 21C (1) can be exercised repeatedly or "from time to time as occasion requires." The contrary intention to which s 33(1) of the *Acts Interpretation Act* refers need not be expressed but can be gathered by implication from the four corners of the Act requiring interpretation when that Act is read as a whole. In any event, I doubt whether the repeated exercise of the power by the Inspector in the present case has been "as occasion requires" within the meaning of s 33(1) of the *Acts Interpretation Act.* The "occasion" for the exercise of the Inspector's power under s 21C(1) arose upon his having reasonable grounds for believing that the objects were under threat of injury or desecration of such a nature that they could not properly be protected unless an emergency declaration were made. If, as I assume, the Inspector gave the notice required by s 21C(4) to the local Aboriginal community, the Minister and any person who was likely to be affected by the emergency declaration, he should have expected, if the threat of injury or desecration were continuing, that the Minister would extend the emergency declaration for the further 14 days allowed in s 21C(2) an d set in motion the machinery for making a temporary declaration under s 21D . In the light of that expectation the Inspector could not have had reasonable grounds for believing that the objects could not properly be protected unless a further emergency declaration were made. Accordingly, if the construction of Div 2 of Part IIA of the Act which I prefer is correct, once the 30 day life ascribed to the emergency declaration of preservation had expired, there was no "occasion" requiring another exercise of the power to preserve the same objects from the same threat of injury or desecration.

26. Ms Kenny sought to argue that s 18 of the Act negates the implication that the power to make an emergency declaration under s 21C is to be exercised once and for all. Sub-sections 18(1) and (3) provide;

> *'(1) Where:*
>
> *(a) at any time, an authorized officer is satisfied that:*
>
> *(i) an area is a significant Aboriginal area, an object is a significant Aboriginal object or a class of objects is a class of significant Aboriginal objects;*
>
> *(ii) the area or object is, or objects are, under serious and immediate threat of injury or desecration; and*
>
> *(iii) in the case of an area—the circumstances of the case would justify the making of a declaration under section 9, but the injury or desecration is likely to occur before such a declaration can be made; and*
>
> *(b) no declaration has been made under this section in relation to the area, object or objects within 3 months before that time by reason of a threat that is substantially the same as the threat referred to in subparagraph (a)(ii);*
>
> *the officer may make a declaration for the purposes of this section.*
>
> ... ...
>
> *(3) A declaration under subsection (1) may be revoked or varied at any time, by instrument in writing, by the Minister or any authorized officer.'*

27. The argument is, as I understand it, that the drafter of s 21C had a form of words readily to hand in s 18(1) if he or she had wished to preclude an inspector, the Minister or a magistrate from making, within a specified period, a further emergency declaration in response to a threat of injury or desecration to an object that is "substantially the same" as the threat which prompted the original emergency declaration.

28. However, by contrast with s 18 , ss 21C, 21D and 21E constitute a comprehensive code dealing with preservation of Aboriginal places and objects beginning with the emergency limited form of preservation prescribed by s 21C and ending, after appropriate provisions for hearing affected persons and arbitral review, with a permanent or indefinite declaration of preservation under s 21E . As well, there is the facility for compulsory acquisition of Aboriginal cultural property which is afforded by s 21L . In the light of that conspectus of the sections and their interrelation, there was no need for the drafter to search for models imposing an express limitation on the ability of an inspector to make successive, fresh declarations of emergency preservation after the process begun by an initial emergency declaration had been put in train.

29. For these reasons, and especially bearing in mind the insertion in 1987 at the request of the Victorian Government of Part IIA of the Act as a self-contained prescription for the preservation

of the Aboriginal cultural heritage in Victoria, I decline to call s 18 in aid of interpreting s 21C in the way for which the Inspector contends.

30. It was next submitted on behalf of the Inspector that s 21C has been framed deliberately to enable the maker of an emergency declaration of preservation to re-examine at relatively short intervals whether there is a need for a continuation of the declaration. One instance of such a need was postulated as occurring because "the processes required of the Minister under ss 21D and 21E may not have been completed at the time an emergency declaration is due to expire." That argument, in my view, does not take due account of the power given to the Minister by s 21C(2) to extend an emergency declaration for a further period of up to 14 days or the Minister's power recognised by sub-ss 21D(2)(3)(4) and (5) to make a relatively peremptory temporary declaration after affording the opportunity to be heard which is required by s 21D(2)(b) . Such a temporary declaration is, of course, subject to variation or revocation by the Minister under s 21D(4) and reviewable by an arbitrator pursuant to s 21D(6) and (8).

31. It was next submitted on behalf of the Inspector that to read the power conferred by s 21C as subject to an implied limitation that it cannot be exercised immediately or subsequently upon the expiration of the life of a first emergency declaration made in response to the same threat of injury or desecration raises a number of consequential questions to which the answers are not immediately or uniformly apparent. Central to those questions is whether the making of an emergency declaration precludes the making for all time of a further emergency declaration in relation to the same area or object. That question is, I consider, to be answered by the assumption to which I have already referred that the processes envisaged by ss 21D and 21E will be enlivened by the threat of injury or desecration which prompted the making of the emergency declaration in the first place. If those processes result in the making of a declaration of preservation or a decision that no such declaration should be made to preserve the area or object from that threat, then an inspector or magistrate could not, in good faith, make a further declaration in response to the same threat because the threat would no longer be "of such a nature that [the object] could not properly be protected unless an emergency declaration is made."

32. The same reasoning provides the answer to the related question posed rhetorically by the Inspector which is whether the exercise by one of the persons enumerated in s 21C(1)(a) and (b) of the power conferred by s 21C(1) precludes its subsequent exercise by another of those persons. The answer is that if there is an extant emergency declaration under s 21C by, eg, an inspector, it would not be open to a magistrate or the Minister to make a parallel emergency declaration because he or she would not have reasonable grounds for believing that the threat of injury or desecration was of such a nature that the object could not properly be protected unless a second emergency declaration were made.

33. Likewise, if the Minister had taken advantage of the interim preservation afforded by an emergency declaration to consider and, if appropriate, take, the steps leading to a temporary declaration, the ground for believing that proper protection against the threat was unavailable which is necessary to found a further emergency declaration would be lacking.

34. It was also argued on behalf of the Inspector that, because the Act is to be regarded as beneficial legislation, it "should be construed so as to give the fullest relief which the fair meaning of its language will allow"; *Bull v Attorney-General (NSW)* (1913) 17 CLR 370 at 387 . However, in the same sentence Isaacs J cautioned that "the true signification of the provision should not be strained or exceeded." Although the beneficial or remedial purpose of Pt IIA of the Act may be conceded, it is

clear from a close reading of the Part as a whole that it is intended to strike a balance between the preservation of Aboriginal cultural property and the interests of persons likely to be affected by that preservation.

35. For the reasons which I have explained, the construction for which the Inspector contends strains the apparent signification of ss 21C, 21D, 21E and 21L and, by permitting successive emergency declarations unreviewable by an arbitrator and irrevocable except by the maker of the declaration or the making of a declaration under s 21D or s 21E , would tend to distort the balance which, I infer, the legislature was concerned to strike.

36. I find unpersuasive the suggestion advanced on behalf of the Inspector that "as soon as [an emergency] declaration is no longer in force, the objects will be transported to the United Kingdom, rendering ineffective any decision by the Minister to make a permanent declaration of preservation, or compulsorily acquire the objects, if he so decides." That result, if it occurs, will flow, not from a construction of Pt IIA, which limits the effective life of an emergency declaration, but from the failure of the Minister or the relevant local Aboriginal community to take the steps provided by s 21D or 21E including, if necessary, activating the arbitral review for which provision is made by ss 21D(7), 21E(6) and 21F .

37. Consideration of the contentions outlined above, and particularly the construction which, I consider, is compelled by the arrangement and language of Pt IIA of the Act have led me to conclude that the Inspector lacked the power to make a second or subsequent emergency declaration for an object in relation to the same threat of injury or desecration.

Has there been a change in circumstances to warrant the making of a second or subsequent declaration?

38. Counsel for the Inspector contended that even if, contrary to her principal submission, the construction advanced by the Museum were adopted, there have been changed circumstances since the making of the first emergency declarations which support the making of the later declarations. Reference was made to an affidavit by the Inspector in which he deposed to having made the declaration of 18 June 2004 because he considered that;

> *'The removal of these cultural objects to overseas institution again is not in accordance with Dja Dja Wurrung or Japagalk tradition or customs. Our people believe that the act of removing constitutes a real desecration and injury to cultural objects.'*

39. It was then said that, in making the emergency declaration of 18 July 2004, the Inspector had relied on additional matters including an indication by a representative of the British Museum that the bark etchings and the ceremonial piece had not been on exhibition in Britain and there was no intention to exhibit them there in the future. As well, the Inspector pointed to the fact that representatives of the Aboriginal community, at a meeting with the Minister on 15 July 2004, had applied for a declaration of preservation and compulsory acquisition in respect of the objects. Accordingly, the Inspector deposed, he formed the view that;

> *'If the objects are locked away and inaccessible to our community they cannot be used to educate or perpetuate Aboriginal culture and tradition, and in the case of the ceremonial piece, it could never be used in ceremonies'*

40. In my view, those matters did not change the threat of injury or desecration which prompted the making of the first emergency declaration of 18 June 2004 in respect of the bark etchings. That threat was to remove two of the etchings to the United Kingdom. It was not relevantly changed by further information about how the objects would be treated once returned to the United Kingdom. The fact that representations had been made to the Minister to which he had responded likewise did not change the threat. It bore only on the likelihood or otherwise of the Minister's acting under s 21D , s 21E or s 21L in response to the same original threat.

41. In relation to the emergency declarations of August, September and October 2004, the Inspector has deposed that he was;

> '*...satisfied that they were necessary to prevent injury or desecration to the objects and to ensure that they remained in Australia until the Minister has made a decision under s 21E(2) of the* Heritage Protection Act. *If the declarations are not renewed I believe that the Museum will immediately return the objects to the British Museum and Royal Botanic Gardens Kew.'*

42. However, as explained in relation to the other facts identified by the Inspector in support of this argument, those statements of belief did not change the threat which remained, one of removal of the objects to the United Kingdom. Similar considerations apply to the belief formed by the Inspector in September 2004 on the basis of an affidavit sworn 13 September 2004 and filed on behalf of the Museum in the present proceedings that the objects had been repaired in the past and might be subject to further such repairs "if the items are returned to the British Museum and /or Royal Botanic Gardens, Kew." That possibility of repair might be regarded as heightening the risk posed by the threat of removal of the objects to the United Kingdom but it did not change the threat so as to permit the making of fresh emergency declarations in October 2004 if, as I have held, the power to make such a declaration had been exhausted upon the expiration of one or other of the earlier declarations. Neither the removal of the objects from the Museum's Melbourne premises to its Moreland premises nor the making of a formal application by the Wurundjeri Tribe for a declaration of preservation constituted a new threat or a threat of a different nature which I consider to be required to enliven again the power of the Inspector to make an emergency declaration in respect of the same objects.

43. There is no evidence to indicate that the Inspector considered that he had reasonable grounds for believing that the removal of the objects to the Moreland facility would impose an independent threat of injury or desecration to them. Indeed, under cross-examination, the Inspector acknowledged that he has always been prepared to support the lending of Aboriginal artefacts like the objects for display by other museums in Australia and by museums and other institutions overseas. That preparedness, he indicated, was subject to appropriate arrangements for transport, storage and preservation of the material. He personally had never seen, in their physical state, the objects with which the present litigation is concerned.

44. The Wurundjeri Tribe is a "local Aboriginal community" specified in the Schedule to the Act and therefore entitled to initiate the making of a temporary declaration under s 21D , or declaration of preservation under s 21E . However, as explained at [40] above, the making by the Tribe of an application for either form of declaration did not change the threat which had prompted the emergency declarations which were made before that of 14 December 2004. If anything, it ameliorated the continuing threat by holding out a prospect of obtaining intervention by the Minister.

45. It follows that none of the circumstances which came into existence, or came to the knowledge of the Inspector, after he made his first emergency declaration of preservation in respect of each of the objects, constituted a new or substantially different threat of injury or desecration to the relevant object so as to revive the power of the Inspector to make an emergency declaration in respect of that object. For the reasons already explained, after the expiration of 30 days from the date of the first relevant declaration, that power was exhausted in respect of the threat of injury or desecration which prompted the exercise of the power.

Did the Inspector have reasonable grounds for believing that the objects were under threat of injury or desecration?

46. In view of the conclusions reached in the earlier parts of these reasons that the second and subsequent emergency declarations in respect of each object were beyond the power of the Inspector, it is unnecessary to resolve this question which was raised by the Museum as an alternative to its principal submissions. Another reason for declining to investigate whether the Inspector had reasonable grounds for the requisite belief is that the Inspector has not been required to furnish, pursuant to s 13 of the AD(JR) Act, reasons for any of the impugned decisions. It would, I consider, be invidious to construct a set of such reasons from the affidavits filed in these proceedings, particularly as some of the impugned decisions have been made while the proceedings were pending. That is particularly so when a demonstration of the propriety of the second and subsequent decisions in respect of each object cannot save the relevant declarations from the invalidity found earlier in these reasons.

Were the emergency declarations vitiated by improper purpose?

47. Considerations similar to those outlined at [46] above have dissuaded me from attempting to resolve this second alternative question raised by the Museum. It is clear from s 21H of the Act that a declaration under any of ss 21C, 21D and 21E must be framed so as to permit a finding, which can result in the imposition of severe penalties, that "the terms" of the declaration have been contravened. Sub-section (2) of s 21H provides;

> *'A person is guilty of an offence if:*
>
> *(a) the person engages in conduct; and*
>
> *(b) the conduct contravenes the terms of a declaration under this Part relating to an Aboriginal object.*
>
> *Penalty:*
>
> *(a) if the person is a natural person—$5,000 or imprisonment for 2 years, or both; or*
>
> *(b) if the person is a body corporate—$25,000.'*

48. That prescription imposes a serious obligation on an inspector, the Minister, a magistrate or an arbitrator who makes a declaration under Pt IIA to ensure that it is so expressed as to make clear what a person must do or refrain from doing to avoid contravening its terms. It is strongly arguable that in some respects the "terms and conditions" attached to the subject emergency

declarations have been framed without sufficient regard to that obligation. However, since the decisions to make the second and subsequent declarations in respect of each object must be set aside on a ground unrelated to the terms in which the declarations have been expressed, it would be undesirable to express a concluded view which may be regarded as defining to some extent the terms in which a declaration under Pt IIA should be cast.

Were unauthorised terms and conditions attached to the impugned declarations?

49. This third alternative limb of the Museum's attack on the decisions to make the subject declarations is related to the second alternative ground discussed at [47] and [48] above. Some of the "conditions" attached to the declarations appear to impose obligations which are unrelated to the preservation of the objects from any threat of injury or desecration as defined in s 3(2)(b) of the Act . That in turn raises the interesting question of whether the offending "conditions" are severable so as to preserve the operation of those terms of each declaration which unexceptionably conduce to achieving the purpose for which the power in s 21C(1) was conferred. However, the considerations outlined in the preceding section of these reasons make it unnecessary and undesirable to attempt a resolution of those questions which will not be reflected in the order disposing of the application.

Conclusion

50. As will already be apparent, I have concluded that the Inspector's decision to make an emergency declaration, other than the first such declaration, in respect of each of the objects should be set aside.

51. I have carefully considered the reasons advanced on behalf of the Inspector in support of his contention that the Court, in the exercise of the discretion under s 16(1) of the AD(JR) Act, should not set aside any of the "spent" declarations or the "extant" declaration. However, the setting aside of the "spent" declarations will make clear that nothing done during a period while one or other of them was purportedly in force can attract the penal consequences attached by s 21H(2) which is reproduced at [47] above.

52. Similarly the setting aside of the decision to make the latest or "extant" declaration will preclude any reliance on that declaration in a prosecution under s 21H(2) or as a foundation for some form of injunctive relief in respect of the objects.

53. The order setting aside each of the relevant decisions should be with effect from the date on which the particular decision found expression in a purported emergency declaration of preservation. In the circumstances, the parties should have an opportunity to speak to the form of the orders, including any orders as to costs, which ought to be made in consequence of these reasons. I shall therefore stand the application over to a mutually convenient date and time to enable the parties to bring in minutes of the orders which they contend should be made.

I certify that the preceding fifty-three (53) numbered paragraphs are a true copy of the Reasons for Judgment herein of the Honourable Justice Ryan.

Associate:

Dated: 20 May 2005

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Solicitor for the Applicant:	Arnold Bloch Leibler
Counsel for the Respondent:	Ms C M Kenny
Solicitor for the Respondent:	Maddocks
Counsel for the Intervenor:	Mr A Giles with Ms C Currie
Solicitor for the Intervenor:	Holding Redlich
Date of Hearing:	15 and 16 December 2004
Date of Judgment:	20 May 2005

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Carter v Minister for Aboriginal Affairs [2005] FCA 667 (23 May 2005) (RYAN J)

2. The applicants are all elders of the Dja Dja Wurrung people for whom the two bark etchings and the ceremonial piece, as ("the objects") referred to in my reasons for judgment published on 20 May 2005 in *Museums Board of Victoria v Carter* [2005] FCA 645