

This Briefing Paper highlights the authors' ongoing research into the illicit antiquities trade between Australia and the South Asia and South East Asian regions. The authors note that, while attention has focused on this trade in Cambodia and Thailand, limited consideration has been given to antiquities of Vietnamese origin, particularly illicitly sourced items that appear on the Australian market. Noting the precedent set in a Federal Magistrates Court judgment, the authors contend that legislative reform is necessary to underpin enforcement actions.



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Quantifying and Describing the South and South East Asian Illicit Antiquities Trade: Australia as an Overlooked Destination?

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Introduction

The illicit antiquities trade, especially concerning smaller, portable artefacts deliberately stolen from archaeological sites, temples and museums, remains the greatest threat to the global archaeological record. To date, documenting and interdicting this trade has been severely restricted, primarily due to lax or conflicting enforcement practices, national and international laws, and an incomplete understanding of the size and scope of the market in both 'supply' and 'demand' countries. Asia, and especially South East Asia, is "on Australia's doorstep." Recent events (discussed below) suggest that Australia is an overlooked destination for illicitly obtained Asian-region antiquities. The overarching and immediate goals of this project, therefore, are to begin quantifying and describing the licit and illicit Australian antiquities market associated with the South East Asian region, as well as to collect preliminary data on the trade from one specific country - Vietnam.

In this Briefing Paper, the reasons for selecting Vietnam as a detailed study are noted, together with proposed plans for 'in country' field research. Following this, a preliminary analysis of the nature and scope of the Australian antiquities market is undertaken, including an examination of a recent case, that of *BC Galleries (Vic) Pty Ltd v Commonwealth of Australia* (BCG 2012), to illustrate deficiencies in the existing cultural heritage protection laws in Australia, and especially the current limited capacity to repatriate looted objects to their country of origin. The paper concludes with observations on the need for reform in both the area of legislation and enforcement policy to ensure Australia fulfils its national and international cultural heritage protection obligations.

The Choice of Vietnam

Within South East Asia, most antiquities trade-related research has been focused on Cambodia and Thailand, given significant wholesale looting efforts there of both temples and prehistoric burial sites, especially since the 1980s' (e.g. O'Reilly 2007; Byrne 1999; Davis 2011). Accordingly, almost all local and international efforts to combat the trade have also occurred primarily in these two countries (e.g. Heritage Watch n.d.; O'Reilly 2009). On the other hand, very little attention to date has been given to antiquities trade issues in Vietnam, where a market for real, and sometimes fake, prehistoric and historic antiquities is known from indirect observation to exist (see Figs. 1 and 2). However, the dimensions of this market are unknown, and therefore the authors have selected Vietnam as the country

case study for this project. The authors' research expertise includes a respectable network of archaeological, museum, and provincial government contacts accrued during previous trips to Vietnam, several periods of archaeological research throughout the country, and considerable language study.



Fig 1. Carnelian, gold and glass beads found in one jar burial, Lai Nghi site (c. 2200-1800 BP), Quang Nam province, Vietnam (Reinecke et al., 2003).

The most recent relevant legislation in Vietnam on antiquities – the *Law on Cultural Heritage 2001* (with a 2002 sub-decree) - sets out the parameters of protection given to both tangible and intangible objects of cultural significance (UNESCO 2013). These laws establish State ownership of all archaeological “relics,” allow for State sponsored auctions with proceeds going to the State, and furnish rules governing the ownership and transfer of ownership of registered “National Treasures” (a term not legally defined). They stipulate that a license, granted by the Ministry of Culture and Information, must be obtained to export a genuine artefact abroad for purposes of display, exhibition, research or preservation. Only artefacts belonging to public and private museums and private owners who have registered their antiquities can receive such export licenses. Strict legal guidelines exist for the production and sale of replicas, with the internal sale or international export of antiquities from “illegal” sources being prohibited. A definition of “illegal sources” is not provided, nor does the law define

what measures can be taken to prevent sale or shipment of looted items, especially if sold through a licensed antiques shop run by a Vietnamese citizen. Thus, current Vietnamese cultural heritage law allows for the excavation, auction, and private sale of antiquities given appropriate permits and registration, but does little to guarantee legal export, stipulate enforcement or anti-corruption measures, or legally define what constitutes looting.

Given this legal leeway for an illicit market to exist within Vietnam, efforts to quantify the current state of this market, as well as raise public awareness regarding the nature and impact of both the terrestrial and maritime antiquities trade within Vietnam itself, are still in their infancy (e.g. Boom 2012; Thanh Van 2012). Much more baseline data is required on the nature of the Vietnamese antiquities market to better understand how the abovementioned laws can or are being broken, and whether or not reform will effect changes in enforcement practices (e.g. An 2013). Specifically, more needs to be known about what role each of the varied, and sometimes conflicting, stakeholders have in fostering an illicit trade; for example, as Kersel (2011) has recently done in regards to the licit and illicit antiquities markets in Israel and Palestine via ethnographic fieldwork amongst looters, middlemen, dealers, and collectors.

Securing adequate funds to conduct on-the-ground research in Vietnam remains a challenge. However, assuming such funds can be obtained, fieldwork will include conducting in-depth interviews with representatives of all major constituencies involved in both promulgating and regulating the antiquities trade. Interview subjects are planned to include villagers living near known archaeological sites, museum officials, government and Customs officials, dealers and collectors. The interview methodology will be structured but conversational (see Kersel 2009), and general questions will include: a) What are the needs and concerns

of customs agents and police charged with enforcing existing cultural property legislation and investigating smuggling? b) How are these authorities supported, or not, by existing legislation? c) With what degree of urgency do they view the problem of looting? d) What resources do they have available to seize artefacts? e) What would they like to see done in the future? Aside from interview data, photographs of exemplary artefacts for sale at each gallery visited will be obtained with permission, as well as dealer records – the latter to provide insight regarding the number of dealers involved in the supply chain.

An important goal of this exploratory ethnographic fieldwork will be to understand better the increasing purchasing power of middle-upper class Vietnamese in terms of driving the current market, as well as estimating Vietnam’s overall contribution to the South East Asian and Australian antiquities trade. For this reason, most interviews will be conducted with informants in Hanoi and Ho Chi Minh City (Saigon) since



Fig 2. Genuine (and fake?) Dong Son Iron Age (c. 2500-1800 BP) bronzes, Hanoi “souvenir” shop, 2011 (image courtesy of DH).

these cities are key transit points for both Vietnamese citizens and tourists. These cities also contain the majority of antiquities shops, representing the final internal destination (within Vietnam) of most antiquities looted or accidentally discovered in rural areas.

The final phase of the planned study will involve data analysis, translation and/or

transcription of interviews, and preparation for publication in both archaeological and criminological journals. A more practical and operationally focussed report of the study findings will also be prepared. This report will be translated into Vietnamese for use by local authorities, while the English version will be targeted at customs agents, as well as the International Council of Museums (ICOM) and INTERPOL, to assist in the creation of a "Red List," i.e. a compilation of textual descriptions and visual examples of the most commonly trafficked categories of artefact from a specific country or region (see, for example, ICOM 2012). A significant component of the dissemination of these results will also include engagement with local Vietnamese media, cultural, and educational institutions.

Research Underway: Assessing the Australian Antiquities Market

While no systematic or single source of information exists at present regarding the dimensions of the Australian market for antiquities, especially relating to artefacts sourced from South and South East Asia, there has been a quite lengthy history of collecting such artefacts (Anderson 2007). Many of the collections have found their way into public museums and galleries across the country (see, for instance, the collections listed by the Australasian Society for Classical Studies n.d.) although there remain significant but largely undocumented collections in the hands of private individuals and bodies.

At the public level, several of the major Australian museums and galleries have accumulated significant collections of Asian artefacts, including the country's National Art Gallery (NGA) located in Canberra, as well as the Art Gallery of New South Wales (AGNSW) in Sydney and the National Gallery of Victoria (NGV) in Melbourne. The NGV Asian art collection commenced as early as 1862, while the AGNSW collection was launched in 1879 with a gift of ceramics and bronzes by the Government of Japan

(see NGA n.d.; AGNSW n.d. and NGV n.d.). Each of these institutions continues to acquire cultural objects of interest from the region, largely, it would seem, from overseas based sources including auction houses and dealers.

Recent disclosures surrounding the arrest of New York City based dealer Subhash Kapoor suggest that some of the recent acquisitions made by Australian museums may have dubious ownership histories. Thus both the NGA and the AGNSW were reported to be among a number of prominent museums and galleries around the globe who had obtained objects from Kapoor that were possibly looted from various locations (see Morgan 2012; Pogrebin and Flynn 2012; Jenkins and Ramanathan 2012). The NGA acknowledged purchasing 21 objects from Kapoor and, following revelations about his alleged involvement in looting, the NGA released a statement indicating that the Gallery had commenced a comprehensive re-examination by a panel of experts into the provenance of works it had acquired from him. Former Getty Museum Director, Michael Brand, who took the helm of the AGNSW in June 2012, said that, while the gallery had purchased six objects from Kapoor, no one had made any suggestions that they were stolen or that there were any issues regarding provenance. More recently, Director Brand has announced a revision of the AGNSW acquisition policies and the adoption of guidelines based on international best practice (Boland 2013).

While drawing attention to this aspect of the Kapoor affair and its impact in Australia, this particular research project is concerned with the acquisition practices and procedures of Australia, South and South East Asia based dealers in portable and prehistoric antiquities. Not surprisingly, given Australia's comparatively small population of 22 million persons, the number of specialist dealers involved in the antiquities trade pales in comparison to Europe and North America. Similarly, while major international auction houses like Sotheby's and Christies maintain branch offices and conduct auctions in Australia, their activities are much less extensive than

they are in other parts of the Asian region, i.e. Singapore, Hong Kong and mainland China.

Aside from Sotheby's and Christie's auction houses, a number of smaller auction houses with both local and international clientele also operate in Australia. These various bodies occasionally auction estate collections containing South and South East Asian antiquities and ethnographica. For example, the Melbourne auction house Mossgreen Auctions sold several purportedly authentic South and South East Asian derived antiques and antiquities within the larger category of "Chinese & Asian Arts and European Antiques" as recently as 22 November, 2012 (Mossgreen Auctions 2012). Occasionally, confiscation and repatriation of sensitive material such as human remains have occurred before an auction took place (Sydney University Museums 2012).

Within this operational framework there are also several private dealers in operation, almost entirely located in Sydney and Melbourne, who maintain an active presence in the national and international market. Preliminary research has identified eleven such businesses. This total includes three dealers with online presences who indicate that they have a particular interest or specialty in Asian and/or Oceanic antiquities or antiques (Tregaskis Oriental Antiques 2009; Gandhara n.d.; Guy-Earl Smith n.d.). Furthermore, the four dealers who operate as generalist dealers of antiquities, antiques, and ethnographica (including BC Galleries) all include in their respective catalogues at least occasional South and South East Asian material. One self-purported Gandharan specialist (Gandhara, n.d.) appears to conduct all business transactions online, with no indicated storefront at all, while another is located in Sydney with all sales arranged by appointment only. One of the most prominent independent dealers known on the Australian market is BC Galleries (BCG) which, according to its website, has been in operation in Melbourne since 1976 (BCG n.d.).

BC Galleries: Antiquities Business

While a listed private company registered in Victoria, the principal proprietor and founder of BCG would appear to be Frank Bottaro, now 65 years of age and a Melbourne resident, although he is believed to also maintain an art and antiquities business presence in Bangkok, Thailand. In earlier press interviews, Mr. Bottaro is reported to have stated that, from an early age he had a passion for archaeology and following a successful career as a taxidermist, he commenced his current art and antiquities business, travelling to Egypt in search of ancient artefacts. By 2002 he had more than 70 people sourcing antiques and art for him around the Middle East, China and New Zealand.

An itemization and quantitative analysis by the authors of all antiquities and objets d'art listed in the BCG online catalogue is ongoing. Specifically, the regions of South and South East Asia (from Afghanistan to Indonesia) are the foci of this analysis, and nothing listed as younger than the 19th century has been included, as such antiques (not antiquities) are much more likely to have well-documented and complete ownership histories and not be the subject of archaeological site looting. Preliminary analysis has revealed a total of 567 objects from the South Asian region (under the catalogue headings of "Tibetan & Nepalese Art & Antiquities," "South Asian Art & Antiquities," and "Gandharan Art & Antiquities"). The combined price of all listed artefacts is AUD 1,156,859.00, with items ranging in price from AUD 46.00 (for a Kushan coin) to AUD 87,465.00 (for a c. 7th century Gupta period sandstone sculpture of a deity and attendants). Under the catalogue heading of "South East Asian Art & Antiquities," 298 antiquities were listed, worth a total price of AUD 483,852.00; items ranged in price from AUD 51.00 to AUD 49,392.00 (the latter being described as a c. 12th century Khmer sandstone carving of a male divinity).

The total quantity of artefacts in this preliminary case-study assessment was calculated until March 2013, with new

additions recorded in the database as they appeared, and the reservation or sale of specific items being noted as they occurred. The majority of objects from both regions were advertised for amounts below AUD 10,000. In the case of the South Asian material, only 27 of 567 listed artefacts (4.7%) have listed prices above that benchmark while, for the South East Asian material, only 9 of 298 (3%) have markedly expensive prices. As investigation of BC Galleries (and other dealers) continues, the above data will serve as a base-line and comprehensive 'snapshot' of a prominent 'player' on the Australian market.

BC Galleries: Raid, Seizures and Court Proceedings

In March 2010, apparently relying upon a tip off, Australian federal law enforcement officials conducted a raid on the Melbourne premises of BCG and seized various artefacts which were believed to have been illegally exported from Cambodia, China and the Philippines, unexpectedly including sets of corroded late prehistoric bronze bangles still containing bones of the individuals buried wearing them (Fig. 3). These artefacts were being offered for sale in Australia and abroad, both through eBay and the BCG website. Under the provisions of the *Commonwealth Protection of Moveable Cultural Heritage Act 1986 (PMCHA 1986)* items believed to be illegally exported protected objects of a foreign country imported into Australia may be seized by authorities and returned to their rightful owners. However, before an object can be forfeited in this manner, the importer may seek to challenge the seizure and recover it from Australian authorities. In 2012, such a challenge occurred in the Federal Magistrates Court in Melbourne, following the 2010 BCG seizures (BCG 2012).

Remarkably, given the period during which the *PMCHA 1986* has been in existence, the BCG case would seem to be the first occasion in Australian legal history that such a recovery proceeding has been initiated by an owner of a seized object. Reliable statistics do not exist concerning the number of seizures by the Commonwealth of this type made over the period from

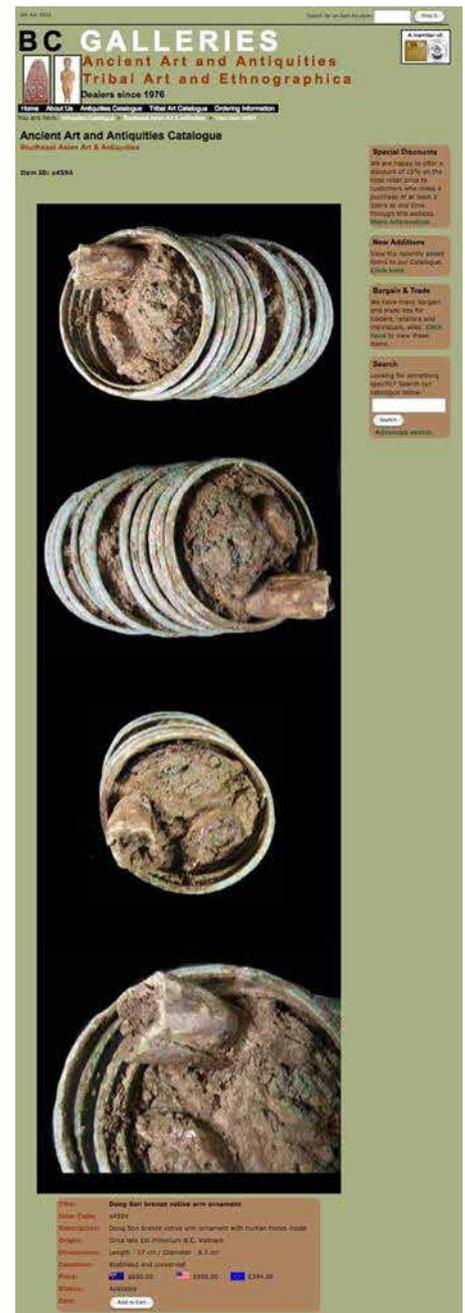


Fig 3. Cambodian Iron Age (c. 2500-1500 BP) bronze bangles with in-situ soil and human remains; for sale on-line by BC Galleries in 2010

1986 to 2012. However, in 2012, the Minister then responsible for the Australian Commonwealth Department of Environment, Water, Heritage and the Arts (DEWHA) indicated that, since 2000, 19 seizures involving 43 objects had been effected, none of which had been challenged in court, and 34 of these objects had been successfully returned to their countries of origin (Alexander 2012). It was into this uncharted legal territory that the BCG case

sailed in June 2012 when the matter came before the Federal Magistrate’s Court for a hearing. What follows in this section is based upon a review of the subsequent published judicial decision in the case (BCG 2012), and one author’s (DC) participation in the hearing, along with other expert witnesses, called to testify by the Commonwealth.

At the hearing BCG contended from the outset that the onus of proof, on the balance of probabilities, was upon the Commonwealth to show that (i) each of the objects seized was a protected object of a foreign country; (ii) that the object had been exported from the relevant foreign country; (iii) that the law of the relevant foreign country relating to cultural property prohibited the export; and (iv) that the object had been imported into Australia. Legal argument followed with the judicial officer involved in the matter, Judge Reithmuller, eventually ruling in favour of the applicant. The judge distinguished the forfeiture provisions of the *PMCHA 1986* from those contained in other associated Australian customs legislation where, once goods were seized, they were forfeited to the Commonwealth and the onus would be upon the applicant to justify their return. Here, the onus was on the Commonwealth which would have to lead its evidence first and establish each of the points made above. Acting in accord with this initial ruling, the Commonwealth then sought to establish each of the four points listed above with varying degrees of success as the court’s ultimate judgment indicates (BCG 2012).

(i) Protected object. Under the provisions of Section 3 of the *PMHCA 1986* the term “protected object of a foreign country” means “an object forming part of the moveable cultural heritage of a foreign country.” In determining whether or not the seven seized items fitted this description, the court considered the types of object within Australia which were protected by the *PMCHA 1986* as well as the definition given of such objects in Article 1 of the

1970 UNESCO Convention on the means of prohibiting the illicit import, export and transfer of ownership of cultural property.

Based on expert evidence presented at the hearing the court concluded that five of the six objects said to originate from China and described originally on the BCG website as a “Han buried stele;” “a superb Northern Qi bull;” “an important ceramic statue of a horse Northern Dynasties period;” an “Eastern Han dynasty bronze and pottery money tree;” and a “Han dynasty ceramic wall panel,” did satisfy the definition of being part of that nation’s moveable cultural heritage (BCG 2012, pp. 13-14). The sixth item, “a rare Tang dynasty stone pillar with Buddhist scenes,” was judged to be a replica or fake.

The single item said to originate from the Philippines was described by BCG as an “Ifuagao head hunter trophy skull, flanked by pig skulls” (see Fig. 4). This object was also thought by an expert to be a fake, the human skull probably being that of a Japanese soldier from World War II rather than a Philippine male (BCG 2012, p.16).



Fig 4. “Ifuagao head hunter trophy skull, flanked by pig skulls.”

(ii) Export. The court concluded that there was no question that each of the objects from China had been purchased by BCG in Hong Kong and then shipped to Australia. It was also clear that, at some point, each item had been exported from their original location, that this was some place other than Hong Kong and, on the balance of probabilities, most probably within the geographic limits of the former Han or Qi dynasties. However, the court noted that

no evidence was led as to the geographic limits of each of these dynasties, nor of the relationship between these limits and those of the present day People’s Republic of China (PRC) - accordingly the Commonwealth had failed to prove on the balance of probabilities that these objects “actually originated from within the geographic area of the PRC” (BCG 2012, p.18).

The court also found that there was no evidence to show, on the balance of probabilities, that the objects, even if they had originated from within the PRC boundaries, had crossed the border within the time frame of the operation of the PRC laws relevant to the case, namely, since 19 November 1982 (BCG 2012, p.25).

(iii) Prohibited export. In regard to the question of whether or not, under contemporary Chinese law, these objects were prohibited from export, the Commonwealth had sought at the hearing to rely upon the expert testimony of the first author. However, the court ruled that the first author was not an expert on Chinese law since he did not speak Mandarin or Cantonese, nor had he practiced law in China or made a special study of Chinese law. Thus the court, in the absence of expert testimony as to the operation of Chinese law, was left with the statutory provisions to interpret on their face as best it could.

In fulfilling its interpretive task the court took the view that, under Chinese law, moveable cultural relics were classified into “valuable” and “ordinary” categories, and that the former category was further subdivided into three different grades (BCG 2012, p.22-23). The court seems to have also taken the view, incorrectly it is submitted, that the value of the items was a relevant factor in deciding whether or not they could be lawfully exported from China. The court observed that the genuine seized objects had each been purchased for very small amounts in Hong Kong and that “the values of the items

are not such that one could conclude on the balance of probabilities that they would be considered 'valuable' for the purposes of the Chinese laws with respect to export restrictions, particularly if the restorations or repairs were done after they left China" (BCG 2012, p.23).

In reality contemporary Chinese laws regarding the protection of the nation's cultural heritage impose a virtual blanket ban on the export of any cultural relic made before or in 1911 (see Gruber 2007; Newell 2008; and Lau 2011). The genuine objects seized were said to be from the Eastern Han (25-220 AD), Northern (400-500 AD) and Northern Qi (549- 577 AD) all dynasties which are clearly well within the prohibited range of cultural relic exports regardless of their perceived value and grade.

(iv) Import into Australia. On the final point to be established the court had no difficulty concluding that the seized objects from China had been imported into Australia by BCG.

Based on these various findings, the court ruled that the Commonwealth had failed to establish on the balance of probabilities that any of the seized objects were liable to forfeiture under the provisions of the *PMCHA 1986* and an order was made for the return of the objects to the applicant BCG. The Commonwealth elected not to appeal this decision so it now stands as an important precedent regarding the interpretation and operation of the *PMCHA 1986*, and will continue to do so, unless successfully challenged in a subsequent case or until legislative changes are made to the *PMCHA 1986* which will render it a more effective tool to deal with situations like that presented in the BCG Case. At present, an all but impossible burden of proof would seem to be placed upon the Commonwealth to show where any suspected looted seizures originated from, and at what time and under what circumstances they left their country of origin. If anyone possesses such information it is most likely to be a person associated with the illegal excavation or smuggling of an object across an international border, and they are the people least likely or willing

to disclose such facts.

Reform: Law, Enforcement and Education

Before any meaningful protection and priority can be given in the future by Australian law enforcement agencies to protected cultural heritage objects illegally exported from other countries, the *PMCHA 1986* requires amendments to overcome the serious deficiencies revealed by the decision in BCG 2012. This means placing the onus of proof firmly upon those who seek to import cultural heritage goods from elsewhere to show that they are lawfully obtained from their place of origin, and that all due diligence has been exercised to ensure items are not the product of illicit excavation or theft. Insistence on full documentation indicating the origin of goods and terms and place of purchase should also be part of the import procedures administered by the Australian Customs and Border Protection Service (ACBPS). Substantial penalties could then follow if false declarations were made (ACBPS n. d.).

There is also a need to enhance the level of public awareness and concern about the nature and scope of the illicit market in trafficked cultural heritage objects. In the longer term it is likely to be a better informed and motivated public, rather than punitive measures, that reduces demand for looted objects. A promising start to educating the Australian public about their responsibilities when considering the purchase and importation of cultural heritage objects from abroad can be found in the *Make Sure It's Above Board* campaign launched in 2011 by DEWHA's Cultural Property Section in the Office for the Arts (Office for the Arts n.d.). DEWHA produced a series of colourful and informative brochures and posters directed at Australians travelling overseas, with advice on the importance of ensuring that only legitimate cultural heritage objects which could be lawfully exported from their country of origin should be purchased. The campaign included references to the provisions of the *PMCHA 1986* and the possibility of seizure of any objects believed to have an illicit origin. Importantly, the

ongoing investigation of the BCG case at the time directly contributed to the shaping of this campaign, and a photograph of two of the seized bangles was added to the list of 'success stories.'

Another long-term goal of this project is to provide a corpus of data that Vietnamese, Australian and international governmental authorities can consult to support prosecutions and repatriation claims. As Chappell (2013) notes, those seeking to purchase and import genuinely licit antiquities face a "formidable task." It is to be hoped that the lessons learned from the BCG 2012 cases, but also additional ongoing research to quantitatively assess the 'demand' within the Australian antiquities market as a whole, will begin to provide the data needed to affect true legal reform and ensure that future repatriations, regardless of final destination, will no longer be frustrated by inadequate laws and spasmodic enforcement.

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