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## ‘INHUMAN AND VERY MISCHIEVOUS TRAFFIC’

### Early measures to cease the export of Ancestral Remains from Aotearoa New Zealand and Australia

*Cressida Fforde, Amber Aranui, Gareth Knapman,  
and Paul Turnbull*

#### **Introduction**

This chapter considers 19th- and early 20th-century official measures, including legislation, to prevent the trade in, and regulate the export of, Indigenous human remains from New Zealand and Australia. It details the immediate historical context of the development of this legislation and its past and current implications for the supply and repatriation of Indigenous human remains. Museum archives reveal successful (and unsuccessful) attempts by collectors to break the law, suggesting there may be many Indigenous human remains in overseas institutions that were illegally exported from their country of origin. If so, such illegality provides holding institutions with few options than to repatriate. It is important to note that this chapter considers the ‘rule of law’ from the perspective of the settler state. Indigenous peoples have their own laws governing appropriate treatment of the deceased.

#### **New Zealand**

This section considers three legal measures to protect Māori human remains from trade and export. The first is an 1831 government order issued by the governor of New South Wales (NSW), Sir Ralph Darling, that sought to ban the import of Toi moko (preserved tattooed Māori heads) into Sydney. This order has been interpreted as banning the export of Toi moko from New Zealand generally, although it does not explicitly state this to be the case. Indeed, Darling had no jurisdiction over New Zealand at that time. The second is the Treaty of Waitangi, signed in 1840, which gave protection to Māori land, villages and property and, while not specifically designed to protect Ancestral Remains, can be interpreted to do so. The third is the Antiquities Act of 1901 and its various amendments which sought to prevent the removal from New Zealand of Māori antiquities, including Ancestral Remains.

### ***The governor of NSW's government order (1831)***

The development of legislation to cease international trade in Māori human remains from Aotearoa New Zealand can be traced to the early 1830s. At this time, New Zealand was not a colony, only becoming so in 1840 with the signing of the Treaty of Waitangi. Operating by governor decree from 1840 until 1852, the New Zealand settler government was then constituted in 1853. During this early period, and indeed since around 1810, trade in Toi moko was well established and they were reportedly frequently on sale in Sydney's George Street (e.g. *The Sun* 1948: 7) in NSW. Later commentators (e.g. Dunbabin 1923) described how, by the 1830s, supply had outstripped demand and prices had fallen in consequence. European fascination with Toi moko provided a ready market that various parties exploited, including Māori wishing to obtain guns during the 'Musket Wars', a period of intense inter-tribal warfare between 1807 and 1845. The heads of enemies were traded into this market, with reports that slaves and prisoners were killed in order to sell their heads to Europeans. Certainly, the heads of those killed in battle were bartered with settlers, scientists, travellers, and merchants all eager to obtain them for the museum and art market, and for onward sale. Toi moko obtained in this way were regularly sold in Sydney and elsewhere, and were sent to institutions around the world (see Jean, Chapter 22, this volume).

In 1831, the NSW Governor Sir Ralph Darling, via the auspices of the Colonial Secretary's Office, issued a government order that sought to stop this 'inhuman and very mischievous traffic' (see Figure 19.1).

The order is informative in a number of ways. First, it shows that Darling was disgusted at this activity and concerned at its consequence for the lives of Māori. Second, it shows that a

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(No.7.) COLONIAL SECRETARY'S OFFICE, SYDNEY, 16<sup>TH</sup> APRIL, 1831.

WHEREAS it has been represented to His Excellency the GOVERNOR, that the masters and crews of vessels trading between this Colony and New Zealand, are in the practice of purchasing and bringing from thence human heads, which are preserved in a manner, peculiar to that country; And whereas there is strong reason to believe, that such disgusting traffic tends greatly to increase the sacrifice of human life among savages whose disregard of it is notorious, His Excellency is desirous of evincing his entire disapprobation of the practice abovementioned, as well as his determination to check it by all the means in his power; and with this view, His Excellency has been pleased to order, that the Officers of the Customs do strictly watch and report every instance which they may discover of an attempt to import into this Colony any dried or preserved human heads in future, with the names of all parties concerned in every such attempt. His Excellency trusts that to put a total stop to this traffic, it is necessary for him only thus to point out the almost certain and dreadful consequences which may be expected to ensue from a continuance of it, and the scandal and prejudice which it cannot fail to raise against the name and character of British Traders, in a country with which it is now become highly important for the merchants and traders of this Colony, at least, to cultivate feelings of mutual goodwill; but if His Excellency should be disappointed in this reasonable expectation, he will feel it an imperative duty to take strong measures for totally suppressing the inhuman and very mischievous traffic in question. His Excellency further trusts, that all persons who have in their possession human heads, recently brought from New Zealand, and particularly by the schooner Prince of Denmark, will immediately deliver them up for the purpose of being restored to the relatives of the deceased parties to whom those heads belonged; this being the only possible reparation that can now be rendered, and application having been specially made to His Excellency to this purpose. By His Excellency's Command, ALEXANDER McLEAY

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Figure 19.1 Governor Darling's government order to cease the trade in Toi moko

Source: Sydney Gazette and New South Wales Advertiser, 21 April 1831, p. 1.

significant factor in Darling's wish to cease the trade was the threat it represented to the reputation of British merchants when commercial relations with New Zealand were increasingly important. Third, it shows the governor hoped the trade would cease without resort to the law – commanding Customs to keep a close eye on any imports – but, if not, he would employ 'strong measures' to ensure that it stopped. Fourth, it details what must be one of the earliest examples of an international repatriation request, and one that had support from the highest level of government at that time. Thus, the order ends with a request that all in possession of Toi moko should deliver them up so that they could be given back to relatives of the deceased. For Darling this was the 'only possible reparation that can now be rendered' and an 'application having been specially made to His Excellency to this purpose' (Darling 1831: 1).

The involvement of British ships in two separate incidents involving Toi moko in 1830, both of which received public attention, were influential in Darling's decision to issue the order. The first occurred in November 1830, when the *Elizabeth* under Captain Stewart took a group of nearly 200 Ngāti Toa men, led by Te Rauparaha and Te Hiko-o-te-Rangi, to Akaroa to raid Tamaiharanui at Kaiapoi in retaliation for the death to Te Hiko-o-te-Rangi's father Te Pehi Kupe and others at the hand of Tamaiharanui earlier that year (Evison 1993: 53). Following the capture of Tamaiharanui, the settlement at Takapuneke was raided, with many captured and killed before the settlement was set alight. According to an eyewitness, Toi moko or newly severed heads were taken back to Kāpiti Island (off the south west coast of New Zealand's North Island) on board the *Elizabeth* to contribute to the trade in Sydney (*Cairns Post* 1951: 4; Evison 1993: 55; McNab 1913: 30). Stewart was implicated in the massacre because his ship entered Akaroa under the pretence of trading muskets for flax (Evison 1993: 53).

The second incident took place during the latter part of the same year when Captain Jacks, master of the *Prince of Denmark*, purchased a number of Toi moko from Tauranga following a battle in which many men from the Bay of Islands were slain (Thomson 1859: 263). While on its way back to Sydney the ship stopped at the Bay of Islands. A number of Māori boarded the ship and were shown the heads when Jacks 'poured them out of a sack on the ship's deck' (Robley 1896: 179). This was not well received, as many of the dead were recognised. Jacks was fired upon and forced to retreat. When he reached Sydney he was visited by a chief from the Bay of Islands who saw the Toi moko in his possession. The chief informed Reverend Samuel Marsden, with whom he was staying, and sought redress. The 'application' to Governor Darling mentioned at the end of the 1831 government order was made by Marsden on the chief's behalf and formed part of Marsden's attempts to persuade Darling to rein in the reprehensible behaviour of European crews.<sup>1</sup> Marsden had himself acquired Toi moko a decade earlier but by the 1830s was a staunch campaigner for Māori rights. On 18 April 1831, he described events in a letter to Mr Dandeson Coates of the Church Missionary Society, which is noteworthy both for the historical context it provides and for the detail that Māori leadership travelled to Sydney to seek redress for at least the actions of crew aboard the *Prince of Denmark*, and perhaps those of European crews generally.

I lament to say that there are many Europeans now in New Zealand whose conduct is most scandalous. I had two interviews with Governor Darling last week on this subject, and have written to him today. Copies of my representation I propose to forward to the Society, unless some effectual measures can be adopted here to restrain the infamous acts of the Europeans.

I have two chiefs with me now – one from the Bay of Islands, who is come at the request of the chiefs to seek redress; the other was taken away by force from the Middle (South) Island. I have no doubt but Governor Darling will do all in his power to

afford them protection. Whether the law as it now stands will enable the Governor to do them justice appears a matter of doubt.

You will have heard of the conduct of Captain Brind; he has been the cause of much bloodshed. Many have been killed to the southward in consequence of what took place at the Bay of Islands, and the heads of the chiefs have been brought to Port Jackson by the Europeans for sale. When the chief who is with me went on board the *Prince of Denmark* he saw fourteen heads of chiefs upon the table in the cabin, and came and informed me. I waited on the Governor, stated the circumstance, and requested His Excellency to use every means to recover them in order that they might be sent back to their friends. The chief knew the heads; they were his friends; when he retired he said, 'Farewell my people, farewell my people!' The circumstances to the southward are more fully explained in my statements to the Governor. I intend to call upon His Excellency again in a day or two.

(Marsden to Coates, 18 April 1831, reproduced in Elder 1932: 497–499)

Contemporary newspaper coverage of the government order repeated Darling's concerns that the trade impacted negatively on commerce with New Zealand. At this time, commerce was essential not only for economic purposes but for commencing and maintaining international relations. An editorial in the same edition of the *Sydney Gazette* in which the order was published emphasised the importance of ceasing the trade in order to maintain good relations with Māori (who in the majority, it stated, also thought the trade 'odious and insulting'), and hoped that news of the order would 'alarm our traders, and induce them to relinquish a practice so brutal, so revolting to the best feelings of our nature, and so full of peril to a lucrative and most promising commerce' (*Sydney Gazette and New South Wales Advertiser* 1831: 2). Interestingly, like the order, the editorial sympathised with Māori concerns for their deceased relatives, noting,

Deceased kindred and friends are with them the objects of veneration, and even supposing the heads bought and sold to be those of the very lowest of the people, the lowest have their friends and relatives as well as the highest, and sooner or later the horrid trade will bring on some fatal convulsion.

(*Sydney Gazette and New South Wales Advertiser* 1831: 2)

Recognising the limited jurisdiction of Darling's powers, the *Sydney Herald* of 25 April made the point that 'though excellent in itself', the order could not legislate against the export of human remains from New Zealand, but only their *import* into Australia, for

it must be admitted that the Government is limited in its power over crimes committed in New Zealand, as it is neither a colony nor a dependency of the Crown, but is considered, with very little propriety, as a sovereign and independent state. We may, therefore, regulate our own imports; but the law of nations, it is supposed, gives us no authority over their exports.

(*Sydney Herald* 1831: 1)

The impact of the order on the trade in Toi moko to Sydney appears to have been significant. Thus Wilkes, reporting on a purchase of two Toi moko in 1840 (see below) wrote 'So effectively has the fine prevented this traffic, that it is an extremely difficult matter to obtain a head; they are as rare now as they have been common heretofore' (Wilkes 1844: 400). It is unclear whether the order was thought to extend further than imports to the NSW colony. Certainly, British ships

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continued to purchase Toi moko after 1831 and took them to Europe and beyond. For example, in January 1834 Captain Richard Bayley Mann of the brig *Eleanor* purchased a Toi moko from Kāpiti Island. Upon his return to England, Mann gifted it to the Scarborough Museum (Meadley 1890: 122), where it was to remain until its return to New Zealand in 1998. Another example of illegal acquisition took place in 1840s in the Bay of Islands, around the time of the signing of the Treaty of Waitangi, New Zealand's founding document. The US South Seas Exploring Expedition, headed by Lieutenant Charles Wilkes, was to regroup in the Bay of Islands, and during their time there, members of the crew obtained two Toi moko from the steward of an unnamed missionary vessel (Wilkes 1849: 399–400). These were destined to become part of the collection at the Smithsonian Institution until 2016 when they were repatriated. It is clear from the account that the crew members knew it was an illegal purchase (see Fforde, Turnbull, Carter and Aranui, Chapter 16, this volume) of which a 50 guinea fine applied, suggesting that legislation had followed Darling's 1831 order. Wilkes's account is the earliest yet located that references legislation, although the specific Act has not yet been located. General Robley, who himself acquired a large collection of Toi moko in the latter half of the 19th century, and wrote extensively on Māori tattooing and Toi moko, described the 1831 order and then noted:

This humane and courageous effort to stop the abominations of the traffic in heads, was shortly followed by an Act which passed into law before New Zealand became a separate colony; and Governor Darling had the satisfaction of imposing a fine of £40 as well as publishing the names of those concerned. Public feeling ultimately supported the cause of humanity, and the trade faded away.

*(Robley 1896: 181)*

### **1840 Treaty of Waitangi**

The Treaty of Waitangi is the founding document of New Zealand. It was signed in 1840 by representatives of the British Crown and of Māori iwi (tribal group) and hapu (subtribe) throughout the country – though not all chiefs signed the document. The Treaty consists of three articles: the first outlines the rights to govern the land by the Queen; the second guarantees Māori chieftainship over land, villages and property; and the third gives assurance that the Crown would give Māori the rights and protections accorded to all British subjects. In relation to the collection of Māori and Moriori skeletal remains, it is Article Two that is relevant:

Her Majesty the Queen of England confirms and guarantees to the Chiefs and Tribes of New Zealand and to the respective families and individuals thereof the full exclusive and undisturbed possession of their Lands and Estates Forests Fisheries and other properties which they may collectively or individually possess so long as it is their wish and desire to retain the same in their possession; but the Chiefs of the United Tribes and the individual Chiefs yield to Her Majesty the exclusive right of Pre-emption over such lands as the proprietors thereof may be disposed to alienate at such prices as may be agreed upon between the respective Proprietors and persons appointed by Her Majesty to treat with them in that behalf.

*(State Services Commission 2006: 7)*

Contrary to the protection afforded by the treaty to 'Lands and Estates Forests Fisheries and other properties which they may collectively or individually possess so long as it is their wish and desire to retain the same in their possession', the collection of human remains from sacred

burial grounds and caves took place without the consent of the individuals, family, hapū, or iwi who regarded the remains as sacred and not to be tampered with or removed. The treaty was not widely recognised by Europeans during the 19th century, and thus gave little protection to Ancestral Remains at that time. Today, however, kōiwi tangata (Māori skeletal remains) and Toi moko are regarded as taonga to be protected under the Treaty (Waitangi Tribunal 2011). In the Rangitāne Treaty Claim, it was claimed that the Crown breached the treaty by not protecting burial grounds from which over fifty sets of remains were removed by the Canterbury Museum from the 1940s (Waitangi Tribunal 2004).

While they are unlikely to have been aware of the protections accorded by the Treaty, it is clear that those removing remains *were* aware of Māori prohibition against such actions. A well-known example is Andreas Reischek, an Austrian ornithologist, naturalist, and taxidermist who, in the 1870s obtained several mummified remains from limestone burial caves in the King Country (see O'Hara, Chapter 23, this volume). Another example is provided by Dr Batty Tuke, an Englishman based in Scotland who travelled to New Zealand in 1857 and became a resident doctor in the Rangitikei district (Wilson 1914). In 1859, he was attached to the 65th Regiment, where he served as a medical officer during the Māori Land Wars until 1863 ('Obituary: Sir John Batty Tuke' 1913: 1045). In 1861, Tuke was part of a coastal voyaging expedition on board the schooner *Tyne*, which visited Kāpiti Island in October 1861. It was here that Tuke collected six skulls from the island, which were later presented to the University of Edinburgh upon his return. Tuke, in his notes, described the following regarding his time on Kāpiti:

We were driven by stress of weather under the lee of this Island, which was at the time uninhabited, except by two white men in charge of a small cattle station. Two of the skulls (the females?) were found with their skeletons buried under ledges of rock, the others in a cave, the descent to which was by a narrow shaft, and which was filled with human bones, the amount of which it was quite impossible to compute. I sunk to my waist in them, and would have gone further if not supported, the lower strata being quite disorganised. The cave was a burying place of a hapu or family of the Ngati-rankawa Tribe, living at Waikanai and Otaki on the mainland about eight miles distant. All such burying places are strictly held 'tapu' or sacred, so that is beyond suspicion that any of these could be possibly European skulls. Had there been natives on the island it would have been impossible to have secured these specimens. As it was, great difficulty was experienced from the superstition of the English sailors of the schooner. I had been given to understand by competent authorities that no white man had ever been in that cave before.

(Turner 1884: 76–77)

Another example relates to the collecting of kōiwi tangata from the Hawke's Bay settlement of Waimārama. Between April and June 1876, eighteen sets of Māori Ancestral Remains (including five skeletons and thirteen crania) were taken from the sand hills along the coast of Waimārama in an area of land farmed by Frederick Huth Meinertzhagen. The eighteen ancestors were then sent to the Canterbury Museum at the request of Director Julius von Haast, and, subsequently, some were exchanged with institutions in Italy, Sweden, and Austria.<sup>2</sup> Meinertzhagen, born in London, was part of a prosperous banking family who immigrated to New Zealand in the 1860s (Starzecka et al. 2010). At the age of twenty-three, he and a business partner, Walter Lorne Campbell, leased approximately 35,000 acres at Waimārama. Meinertzhagen was also a keen ornithologist and conchologist, as well as a collector of taonga Māori (Māori treasures, artefacts or objects) (Grant 1977: 40). Correspondence between Meinertzhagen and Haast from

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January 1875 to November 1879 shows that the former had been collecting specimens for the Canterbury Museum during that period, as well as prior to 1875. In relation to the collection of the *kōiwi tangata*, Meinertzhagen notes in a letter to von Haast that, due to having more than 200 Māori living on his run, he could not afford to 'run counter to their prejudices. You doubtless know how they respect the bones of their dead' (Meinertzhagen 1879: 1). These are just three of many similar examples that show collectors were aware their actions were against the wishes of Māori.

***The Māori Antiquities Act 1901***

At the turn of the 20th century, there was a growing concern by both Māori and Pākehā at the rate that *taonga* (objects or artefacts) were leaving the country. This concern led to the announcement by James Carroll, the Native Minister, that legislation was to be drafted 'with the aim of "preserving all Māori works of art"' (McCarthy 2007: 53). In October of 1901, Carroll presented The Māori Antiquities Act to Parliament. The initiation of this Act was also linked with the idea of building a national museum to house material purchased by the government under the terms of the Act (White 2007). The purpose of the Act was to 'prevent the Removal from the Colony of Māori Antiquities' (The Māori Antiquities Act 1901: 38), defined as:

Māori relics, articles manufactured with ancient Māori tools and according to Māori methods, and all other articles or things of historical or scientific value or interest and relating to New Zealand, but does not include any private collection not intended for sale, nor botanical or mineral collections or specimens.

*(The Māori Antiquities Act 1901: 38)*

Human remains fall under the category 'other articles or things'. Section Four of the Act also stated that it was illegal to remove objects from the colony without first offering them for sale to the government or gaining consent from the colonial secretary for export. Subsequent amendments to the Act did not change the overall purpose. Consequences of export without permission were added to the 1904 amendment in the form of a fine not exceeding 100 pounds (The Antiquities Act Amendment 1904: Section 3.1), although this was extracted from the 1908 version. According to Sir J.G. Ward, the fine was necessary to help prevent the export of antiquities (White 2007: 2). Because of its receipt of government funding, a relationship between the Dominion Museum (now The Museum of New Zealand Te Papa Tongarewa) and the Department of Internal Affairs was formed in the early 1900s and the museum was to play an advisory role when applications to export were received by the Department. The correspondence between them has provided a paper trail of requests to export from museums and private collectors throughout New Zealand. This correspondence also demonstrates that some collectors exported objects although their request to do so had been declined.

Henry H. Travers provides an excellent example of the blatant disregard collectors had for the Māori Antiquities Act 1901. Travers was probably the most prolific collector of Moriori *kōimi tangata* (Moriori Ancestral Remains) in New Zealand, and he openly writes about obtaining Moriori skulls (Travers 1868: 176). In December 2014, twenty-four *kōimi tangata* were repatriated from the American Museum of Natural History in New York; all but three are known to have been collected by Travers in 1871–1872 and 1904–1905. Eleven Moriori skulls and six skeletons obtained by Travers in the latter collecting trip were sent to J.F.G. Umlauff in Hamburg in 1906 and were later purchased by the American Museum of Natural History. Records from Te Papa's archive (which include those of its predecessor, the Dominion Museum) show that

although Travers did seek permission to export the Moriori remains in June 1906, his request was declined by the Colonial Secretary James Carroll on 30 August of the same year (Dominion Museum 1909). Nonetheless, Travers sent the remains anyway. It is highly likely that this was not the only occasion in which Ancestral Remains left New Zealand without the required export permit. For example, although an exchange occurred between the Otago Museum in Dunedin and the Smithsonian Institute in Washington, DC, no record of a permit, or a request for one, can be found in the Otago Museum exchange records or in the records of the Department (Aranui 2016).

Although there was legislation to stop or regulate the export of human remains from New Zealand in place as early as 1831, Ancestors continued to be removed and sent overseas. While the Government Order and its reported subsequent legislation suppressed the open trade in Toi moko, examples show that traffic occurred and simply became more discreet. In the latter half of the 19th century, the Treaty of Waitangi had no bearing on the theft of skeletal remains and their subsequent transfer (by sale, exchange, or donation) to museums in New Zealand and overseas, as such export occurred on a grand scale, involving both private collectors and New Zealand museum officials. Thus, Thomas Cheeseman, director of the Auckland Museum, was responsible for sending over a hundred Māori remains to museums abroad as part of extensive exchange relationships with European institutions (see Fforde and Hubert 2006; Tapsell 2005). The Māori Antiquities Act of 1901 also failed to stop Māori and Moriori remains from leaving New Zealand. Some did so legally with the permission of the colonial secretary and others did so illegally. Receiving institutions and collectors appear little concerned with the legality of the transaction. At the time, there were little real security measures in place to prevent people like Travers from illegally exporting remains. Today, technology is far more advanced and the laws framed around protecting human remains and taonga from leaving New Zealand are more enforceable.

The 1908 Antiquities Act was replaced in 1962 with the Historic Articles Act. This was itself replaced by the 1975 Protected Objects Act, which identified newly discovered Māori objects as becoming the property of the Crown. Current legislation comes under the Protected Objects Act of 1975, which was amended in 1993, and has finally become the Heritage New Zealand Pouhere Taonga Act 2014. Over successive amendments to this legislation, slight changes were made, including in 1993 the replacement of the term 'antiquities' with 'taonga tūturu',<sup>3</sup> and the creation of a further nine categories to define protected New Zealand objects (White 2007). It also became law in 1976 (under the Protected Objects Act 1975) that all taonga and collectors of taonga must be registered, so that taonga are traceable, helping to prevent them from leaving the country.

## Australia

During the 19th and early 20th centuries, thousands of Aboriginal and Torres Strait Islander Ancestral Remains were removed from Australia to institutions and private collections across the globe. At the beginning of the 20th century, fears that such actions were depriving Australian scientists of research material (*The Age* 15 January 1913, p. 8) – in particular prompted by the much-reported removal to Germany of multiple Ancestral Remains by Herman Klaatsch (see *The Age* 18 September 1905, p. 6) – led Professor Baldwin Spencer and others to lobby the federal government to stop uncontrolled and indiscriminate export (Spencer 1913, letter to A. Hunt, 31 May).

Prior to becoming the director of the National Museum of Victoria, Spencer had outlined his fears that Aboriginal Australia's material culture and human remains were being lost to Europe. On 28 December 1898 he wrote to his friend Henry Balfour, director of the Pitt Rivers Museum in Oxford, 'You have probably a better lot of Australian things there than we have out



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here which is not saying very much for you I am sorry to say and now our chance has passed by' (Spencer 1898: 7). As director of the museum, he often refused to send material overseas. Thus, the Chicago Field Museum reported that Spencer had 'refused many offers of exchange' because of 'the extreme rarity of Australian artefacts' (George Dorsey memo, 23 June 1909, personal papers of Gareth Knapman). Spencer was not alone in his views. Walter Howchin, chairman of the Museum Committee in South Australia, accused exporters of being disloyal to Australia and harming Australia's national interests, writing in a letter to the editor published in the *Adelaide Register* on 10 February 1911:

There are . . . worse offenders who, from their positions and from their knowledge, are perfectly well aware of the local requirements but who yet prefer – it may even be said of some of these that they are allowed – to adopt a course so unpatriotic and so detrimental to national interests and sentiments.

*(Howchin 1911: 6)*

The idea that people were exporting for profit and preference was for Howchin a national humiliation:

It is because of this want of consideration, or want of patriotic sentiment – call it what one will – that we in Australia find ourselves in the humiliating position which makes it necessary to seek in the museums of Great Britain and of the continent relics of our own aborigines that find no counterpart or equivalent in the country of their origin.

*(Howchin 1911: 6)*

Lobbying led to a government proclamation issued in 1911 (see Figure 19.2) that prohibited the 'exportation of any skeleton, or part of the skeleton, of an Australian or Tasmanian aboriginal, unless its exportation is approved by the Minister for Trade and Customs' (Commonwealth of Australia 1911: 1448).

However, it appears that this Proclamation was largely ineffectual (perhaps not enforced or widely advertised) as its existence was largely unknown by scientists gathering at the fourteenth meeting of the Australasian Association for the Advancement of Science (AAAS) two years later (see *The Age* 14 January 1913, p. 9).

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Whereas by the Customs Act 1901–1910 it is enacted that the Governor General may, by Proclamation, prohibit the exportation of the any goods, the exploitation of which would, in his opinion, be harmful to the commonwealth, and that the power to prohibit the exportation of goods shall extend to authorize the prohibition of the exportation of the goods either absolutely or so as to allow of the exportation of the goods subject to any conditions of restriction: And whereas in the opinion of the Governor-General the exportation of skeletons, or parts of skeletons, of Australian or Tasmanian aboriginals is harmful to the Commonwealth, except as permitted by this Proclamation; Now therefore I, William Humble, Earl of Dudley, the Governor-General aforesaid, acting with the advise of the Federal Executive Council, do hereby prohibit the exportation of any skeleton, or part of the a skeleton, of an Australian or Tasmanian aboriginal, unless its exportation is approved by the Minister for Trade and Customs.

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*Figure 19.2* The 1911 export legislation

Source: Commonwealth of Australia *Gazette* (National: 1901–1973), Saturday 20 May, No. 39, p. 1448.

At the AAAS meeting, held in Melbourne in January 1913, the continuing export of Ancestral Remains was discussed at length by the Ethnology and Anthropology Section. Newspaper coverage summarises these discussions, recording the outrage felt by members of the section at their loss of research material. On 11 January 1913 (p. 15), the *Age* reported how

objection to the indiscriminate export of specimens of scientific interest is being raised by members of the ethnology and anthropology section [and that] advantage is being taken of the congress to hold a meeting, with the object of deciding on a line of action to restrict these exports, which are felt to be carried on to the prejudice of museums and of scientific institutions in Australia.

Interestingly, in the same article the *Age* noted that 'the movement is not connected with the actual official work of the congress, but is regarded with sympathy by many members', and that 'any opposition would probably be from the standpoint that there would be a danger of preventing a proper exchange of specimens with scientists in other parts of the world'. Members did not wish to 'put unreasonable difficulties in the way of scientists abroad in procuring specimens; but it is pointed out that skulls, boomerangs and many other objects of peculiar scientific interest are being shipped abroad, when their value merits their preservation in Australian museums' (*The Age* 11 January 1913 p. 15). The *Age* later reported (14 January 1913 p. 9) that the anthropological committee had made a plea for

uniform legislation throughout the Commonwealth to regulate the exportation of specimens, so that there will be no further indiscriminate traffic in them, such as has been alarming scientists of late. Since then, however, investigations have resulted in the discovery of the existing law, and the committee now intends to urge that it should be put into immediate operation. Members discussed the whole question again yesterday, and a strong protest was voiced against any further depletion of the stock of anthropological specimens. It was stated that the exportation of aborigines' skulls had been going on at an alarming rate, and the opinion was expressed that all further traffic should be rigidly regulated by some accredited museum authorities.

The resolution carried by the anthropology and ethnology section is recorded in the official proceedings of the AAAS meeting (Hall 1914: 452) and reads as follows:

It is approved that such steps be taken as is deemed necessary to enforce the existing law with regard to the exportation of anthropological material, and, further, to prevent the indiscriminate exportation of other anthropological and ethnological specimens from any part of the Commonwealth.

The views of the section were quickly communicated to the relevant Minister, as it was reported in various newspapers that

The Science Congress complained to the Minister for Trade and Customs today of the trade in aboriginal skulls, and instanced a case where aboriginal skeletons had brought £70 in Europe. Mr. Tudor promised to rigidly enforce the prohibition of the exportation of aboriginal skulls.

(*Bathurst Times 1913: 2*)

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Such reporting makes it clear that members did not wish to ban the export of Ancestral Remains entirely, but to have it controlled and regulated. It is interesting to surmise whether or not this view was argued for, or against, by the section president, William Ramsay Smith, as he was probably the single greatest supplier of Ancestral Remains to an overseas institution, providing the remains of hundreds of individuals to the Department of Anatomy at the University of Edinburgh. In correspondence with Professor Cunningham in Edinburgh, it is clear that Ramsay Smith had a dim view of Australian science and scientists and of Baldwin Spencer in particular:

Spencer was saying it was a pity to let such specimens leave Australia. I told him that all I had collected had been going to waste for want of someone to gather and describe them, and that where specimens were given to museums in Australia nobody took any interest in them until some German or other foreigner came along with scarcely a 'thank you'. Spencer showed me a 'rare condition of the tooth in the lower jaw' which he has never seen referred. It was one of our old and common friends – 'dislocated tooth'. He had not seen a third trochanter in the aboriginal until I directed his attention to a beautifully marked instance in the femur of a skeleton which he used for teaching purposes. Now what can one do in anthropological work with such people?

*(Smith 1908)*

By November 1913, a new proclamation had been issued that widened the scope of the original to 'all aboriginal anthropological specimens, including articles of ethnological interest' and placed restrictions on who was eligible to apply for a permit (Governor-General 1913). After 1913, exports were only legal if undertaken 'by the accredited representative of an officially-recognised scientific institution' and with the permission of the Minister for Trade and Customs (see Figure 19.3):

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WHEREAS by the *Customs Act* 1901–1910 it is enacted that the Governor-General may, by proclamation, prohibit the exportation of any goods the exportation of which would, in his opinion, be harmful to the Commonwealth, and that the power to prohibit the exportation of such goods shall extend to authorize the prohibition either absolutely so as to allow of the exportation of the good' object to any condition or restriction.

And whereas it is desirable to prohibit the exportation from the Commonwealth of all aboriginal anthropological specimens, including articles of ethnological interest, unless the exportation is by the accredited representative of an officially-recognised scientific institution and the permission of the Minister for Trade and Customs is obtained to such exportation.

Now therefore I, Thomas, Baron Denman, the Governor-General aforesaid, acting with the advice of the Federal Executive Council, do hereby prohibit the exportation from the Commonwealth of all aboriginal anthropological specimens, including articles of ethnological interest, unless the exportation is by the accredited representative of an officially-recognised scientific institution and the permission of the Minister for Trade and Customs is obtained to such exportation.

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*Figure 19.3* 1913 Proclamation concerning export of 'anthropological specimens'

*Source:* Commonwealth of Australia *Gazette* 22 November: 3062.

As part of a process of consultations prior to the second proclamation, the Secretary for the Department of External Affairs, Atlee Hunt, wrote to each of the state museum directors asking

for their suggestions about what form any prohibitions to the export of Aboriginal artefacts and remains should take. For example:

The Customs Authorities point out that the prohibition could be made either absolute or subject to any prescribed conditions or restrictions, but before any action towards prohibition of the exportation be taken, they suggest that an expression of opinion be obtained from the curator of the principle Australian museums with regard to the necessity for such action, and if such action be deemed necessary, what form it should take, i.e. absolute prohibition or allowance of exportation only under conditions to be named.

*(Hunt 1913: 2)*

Responses generally favoured a restriction and cited experiences in other countries. Thus, R. Hamily-Harris, the director of the Queensland Museum, wrote:

In giving expression to this desire to restrict the exportation of scientific material, I am strengthened by the attitude of the authorities in various other countries. Thus several of the European Governments prohibit exportation, without special permits, of articles of prehistoric ethnological and artistic interest, Italy being a marked case in point. South Africa affords an instance which is still more analogous. In response to the protests of scientific bodies and the Directors of museums the Union Government is introducing before Parliament a bill the object of which is to prevent the taking away from South Africa of all relics of the native population.

*(Hamily-Harris 1913)*

Baldwin Spencer of the National Museum of Victoria responded:

I beg to say that during the past year large numbers of very valuable ethnological objects have been exported from Australia, and it is urgent that measures be taken to prevent the further exportation of Australian aboriginal antiquities and skeletons. It is, in my opinion, advisable to allow of exportation only under conditions to be named; and the general plan adopted in New Zealand (Māori Antiquities Act 1901, no. 21) might with advantage be adopted in Australia.

*(Spencer 1913: 170)*

### ***'It cut down the value': illegal export and reaction to the proclamations***

The proclamations did have an effect on 'indiscriminate' export. Although the National Museum of Victoria continued to pay similar prices for Ancestral Remains in the period after 1913, at least one private collector believed that the proclamations had led to a substantial decrease in the domestic price, leading those collecting in the field for profit to reduce, or even stop, their activities. Thus, Alexander Williams, a Victorian-based collector and dealer in Aboriginal artifacts and Ancestral Remains, complained that before the law came in, he had

some hundreds of farmers here and on the Loddon and Goulburn district collecting for me but that law has stopped a good many from collecting for it cut down the value of those held by quite half.

*(Williams 1914)*

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Albert Owen (who wrote under the nom de plume of Perrywinkle) saw the proclamations as a conspiracy by Baldwin Spencer and the AAAS to prevent rural workers from making extra money:

I notice that the Science Congress objects to the exportation of aboriginal bones. The fiat has gone forth, as it did years ago in New Zealand regarding Māori heads, that the purveying of old bones shall be stopped. Even the Minister for Customs, radical as we accept him to be, is determined to encourage the conservative spirit. He will not allow John Rabbiter<sup>4</sup> to turn an honest penny.

*(Perrywinkle 1913: 32)*

In a similar vein, others queried why so much attention was being paid to the remains of Aboriginal people, rather than caring for the living. Thus, an article carried in the *Evening News* shortly after the AAAS meeting read:

The bones, of course, should not be obtained in any way that would hurt the feelings of living aborigines, but where this blackfellow is extinct the bones become available for the collector. This view may possibly shock many persons to whom a grave, even of a blackfellow, is under a sort of sacred taboo. But that seems carrying of sentiment a trifle too far. It would have been more to the purpose to have respected the aborigine better when he was living than to take such elaborate care about the few poor bones he has left behind him.

*(Evening News 1913: 6)*

In 2016, the University of Cambridge returned an Ancestral Remains received from Alfred Cort Haddon because it had been exported without a permit. An audit of collections is required to determine how many institutions received remains from private individuals after 1913, as assuredly these were illegally exported also. A number of examples of such activity have already been identified. For example, in 1915, the Swedish zoologist and anthropologist Eric Mjöberg wrote of his plundering traditional burials in the Kimberley region of Western Australia in 1910–1911. He did so boasting of how he had smuggled them out of Australia (Turnbull 2017: 340–341). In 1910, the Cambridge University biologist, E. L. Grant-Watson, plundered graves in Western Australia, and packed the remains 'in a strong wooden case labelled 'Geological Specimens . . . and with the connivance of a young man, lately engaged as secretary to a Very Important Person . . . smuggled them through in the luggage of the V.I.P.' 'What was not known', Grant-Watson later observed, 'was not grieved over' (Grant-Watson 1968: 70). In late 1926, the English anatomist Frederic Wood Jones accepted the Rockefeller Chair of Physical Anthropology at the University of Hawaii. Jones had held the chair of anatomy at the University of Adelaide since 1919, and in that time had put together a personal collection of around fifty Indigenous Australian skulls. He contemplated illegally exporting the remains, writing to his mentor and fellow anatomist, Arthur Keith, the conservator of the Hunterian Museum of England's Royal College of Surgeons, 'Before I leave Australia I will break the law and send you home some material which I have hoarded. But I shall have to leave a terrible lot of stuff behind' (Jones 1926). In 1930, Jones returned to Australia to take the chair of anatomy at Melbourne University. There he remained until late in 1937, when he left Australia to take up the professorship of anatomy at Manchester University. Again, he wrote to Keith, asking whether he knew of any institution that would want his personal collection of skulls, which he assembled during his time in Melbourne. However, this time he informed Keith that he 'could easily get a permit to send

them or take them out of the country' (Jones 1936).<sup>5</sup> The chapter by Fforde, Turnbull, Carter, and Aranui (Chapter 16, this volume) provides a detailed account of the illegal export by Father Ernst Worms of Ancestral Remains from the Kimberley that were received by the Natural History Museum in Vienna in the 1930s.

Alfred Kenyon, honorary curator at the National Museum of Victoria and an amateur ethnologist, was quite open with his collecting community about methods to flout the export ban. Thus, in December 1927, the retired entomologist Daniel McAlpine wrote to Kenyon requesting instructions on how to smuggle skulls out of Australia: 'what I am writing to you now about is, if I want to send Aboriginal skulls home to Britain, can I send them without any interference by the Custom House' (McAlpine 1927). Kenyon advised lying on the customs forms and listing human remains as simply 'ethnographic object', writing 'as to export – the least said the better. If you describe the content as an aboriginal skull it is liable to be stopped. But why do more than describe an Ethnological specimens (of no value)' (Kenyon 1927a). Kenyon was also happy to encourage others to break similar laws in New Zealand. Thus, in February 1927 he wrote to E.C. Banks at the Waihi Gold Mining Company in New Zealand, and asked 'Re. your burial ground visit for which I am invoking success – could it be possible to smuggle out a skull in some way?' (Kenyon 1927b). To which Banks replied 'I will be able to add to your collection, I can get a skull easily enough – there will be hundreds in the cave – I will see about getting one over to you' (Banks 1927).<sup>6</sup>

### ***Export after 1913 – museum exchanges and the role of the Comptroller***

The proclamations did not create an outright ban on the export of Ancestral Remains but enabled the government to regulate it and to intercede and stop any exports without a permit. The initial system of application involved parties notifying the comptroller general of Customs in each state, and was the same for Ancestral Remains or cultural artefacts. For example, in September 1916, the Melbourne curiosity dealer Alexander Coles applied for a permit to export cultural artefacts on behalf of Dr Cross of the Royal Archeological Museum, Toronto, Canada, to the Victoria Comptroller General of Customs (Comptroller General 1916). While the subsequent correspondence is not available in Coles's case, the process required the comptroller general to contact the state museum for an expert opinion on whether a permit should be issued. By the late 1920s, the comptroller would have also sought the opinion of specialists at the Australian Institute of Anatomy based in Canberra (Commonwealth of Australia file).

In the 1920s, Alfred Kenyon regularly offered Aboriginal skulls for exchange purposes to overseas institutions contacting, for example, the Smithsonian Institution, the Field Museum in Chicago, the Museum of Anthropology in San Francisco, the Madrid Museum, and the Schweizerischen Landes Museum in Switzerland. He did this apparently in both his official museum and private capacities, although it is often difficult to determine which, as his extensive correspondence uses letterhead from the State Water Authority, his private residence, and the National Museum of Victoria. At least one consignment, sent by Kenyon as part of an ongoing exchange relationship with the Smithsonian Institution, was refused a permit. The consignment was sent to Colin MacKenzie at the Australian Institute of Anatomy<sup>7</sup> for an expert opinion of its national value (Keblinger 1930). MacKenzie appears to have advised that they should not be exported and instead included in the new Institute of Anatomy, as demonstrated by the comptroller of Customs' response to the American consul in Melbourne:

These specimens really belong to the nation, and it is considered desirable that they be held in trust for future generations of our own countrymen. The Australian Institute

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of Anatomy at Canberra is now the world's centre for Australian Anthropology, and occupies, in Australia, a position comparable to that of the Smithsonian Institution of the United States. The Director-General of that institution would be glad to receive the aboriginal specimens referred to, and house them at Canberra, where every facility is offered to scientists from overseas to examine any specimens and where accurate casts can always be made of any important exhibit.

The Commonwealth Government does not possess the skeleton of a York Peninsula Aborigine and the acquisition of such a one is a matter of great scientific importance.

It is considered justifiable to build up in the first instance our own national collection of skulls and skeletons before allowing export to an institution already well provided.

*(Quoted in Kablinger 1930)*

In at least this case, therefore, Kenyon was unable to export remains from Australia. Perhaps ironically, export legislation achieved largely through the efforts of the Director of Museum Victoria prohibited the efforts of a staff member to continue an exchange relationship with an overseas institution.

## **Conclusion**

Early legal measures were taken to restrict the trade in Toi moko. Darling's 1831 Government Order is clear in both his revulsion of the trade, his concern that it cost lives, and his desire to repatriate Toi moko to their relatives. Such sentiment and concern for Indigenous views is rare in the debates and discussions surrounding why legal measures should be introduced. Debates in Australia prior to the Proclamations of 1911 and 1913 are clearly framed in terms of the loss to Australia of important scientific research material, not the impact that such export would have on the relatives of the deceased. The proclamations did not seek to stop collecting, or even to ban any export, but simply to bring it under the control of the scientific community and to end what was called 'indiscriminate collecting'. Even in Darling's Order, maintaining good commercial relations with Māori was a prime motive for banning the trade. While the Treaty of Waitangi guaranteed 'full exclusive and undisturbed possession' of Māori property, it had little influence on restricting the removal of Ancestral Remains or their provision to overseas institutions.

In Australia, the 1911 and 1913 proclamations should be viewed as part of a number of similar measures that additionally sought to regulate the export of rare native fauna. Both were preceded by similar prohibitions on the export of native birds. Thus, in March 1911, two months before the proclamation concerning Aboriginal skeletons, a proclamation was issued that banned the export of 'plumage, skins and eggs (or eggshells)' of twenty bird species (Governor-General 1911, Commonwealth of Australia Gazette, No 20, p. 881). This was suspended in April 1911 'except in regard to the skins and plumage only of non edible birds' (Lockyer 1911). A second proclamation in April 1913 reaffirmed export protection for the original twenty native birds and extended this to the plumage, skin, and eggs of a further four species. As it had with initiatives to regulate the export of Ancestral Remains, the National Museum of Victoria played a significant role in securing protection for the export of bird products. Campaigns to regulate the export of Ancestral Remains and native birds both highlighted their increasing rarity, and the threat of extinction. More broadly, the early 20th-century legislation in New Zealand and Australia can be seen as part of measures by a number of countries to stop the loss of their cultural heritage to overseas countries.

While in New Zealand and Australia the various legal measures to regulate export certainly had some impact, it is clear that many individuals sought ways, sometimes (perhaps often) successfully, to disregard the law. The extent of such illegal activity surrounding the provision of Indigenous remains to overseas institutions is yet to be determined, but illustrates the difficulties inherent in its enforcement, as well as a disrespect and disregard for the law by those set on export. As yet, no examples have been located of court action or fines following the discovery of Ancestral Remains for export without a permit. It may be, therefore, that apart from confiscation and potential harm to reputation, the proclamations offered little deterrent. A willingness to break the law also demonstrates the value placed on Indigenous remains for monetary, donation, and exchange purposes. Nonetheless, while the breaking of customary law had no influence on the removal of remains from Australia, the decrease in export of Indigenous human remains after 1913 indicates that Western law did have some impact.

It is interesting to consider the weight given to customary and Western law in repatriation claims. In the UK, the 2005 *Guidance for the Care of Human Remains in Museums* of the Department of Culture, Media and Sport (DCMS) is a document now followed by many institutions receiving repatriation requests. In its section on evidence gathering, the *Guidance* does provide that ‘The claimant group may show that remains were removed without the permission of their community, or at least outside its laws and normal practices’ (DCMS 2005: 7). However, while ‘Demonstration through some or all of the ways above, of strong continuous cultural, spiritual, or religious significance of particular human remains, will add weight to a claim’ (DCMS 2005: 7), breaking customary law is clearly not considered a deciding factor. Breaking Western law is, however, another matter. While the *Guidance* does not specifically consider the issue of human remains illegally exported from their country of origin, such activity nonetheless has relevance for repatriation campaigns as proof of illegal receipt has been shown to strengthen claims for return. A significant example is the 2015 return from the Duckworth Laboratory in the Leverhulme Centre for Evolutionary Biology at the University of Cambridge of the remains of an individual exported illegally from Western Australia by Alfred Cort Haddon.<sup>8</sup> Understanding the legal history of acquisition and export of Ancestral Remains may thus have significant implications for museums and communities involved in repatriation in the future.

## Notes

- 1 An account of the *Elizabeth* atrocities and the role of Marsden and Darling in attempts to halt the reprehensible behaviour of British crews was given in the 1837 *Report of the Parliamentary Select Committee on Aboriginal tribes (British Settlements)* produced by a Select Committee of the British Parliament (see Great Britain, Parliament 1837: 16–19).
- 2 Sally Burrage, pers. comm., 2010. *Canterbury Museum Receipts and Exchanges Information*, unpublished transcription of notes received from Sally Burrage, Canterbury Museum, regarding kōiwi tangata provenanced to Waimārama. Museum of New Zealand Te Papa Tongarewa.
- 3 Taonga Tūturu is identified as an object that relates to Māori culture and society and is more than fifty years old (Ministry for Culture and Heritage 2018).
- 4 A ‘rabbiter’ was the term used for a person who exterminated feral rabbits. Rabbits often used Aboriginal burial sites as burrows, and rabbiters therefore regularly excavated remains.
- 5 Frederic Wood Jones appears to have donated what Australian Ancestral Remains were in his possession to the College after he became its Sir William H. Collins Professor of Human and Comparative Anatomy in 1945. According to the College, Jones had obtained an export permit for these Ancestral Remains when he left Australia in 1937 (Caroline Grigson, Assistant Conservator, Royal College of Surgeons of England, pers. comm., May 1991). These Ancestral Remains were returned to Australia in the early 2000s.



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- 6 Although Kenyon seems to have been unconcerned at advising collectors to break the law he, paradoxically, was an advocate of protecting Aboriginal rights over objects. In 1927 Kenyon actively led a campaign for the return of sacred artifacts to an Aboriginal community after he believed they were illegally removed by the private collector D. H. Dureau (Kenyon n.d.).
- 7 Which was in Melbourne at the time but moved to Canberra in the early 1930s.
- 8 For details of Cambridge University repatriation policy and procedures see Cambridge University 2010.

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