

FOR KEEPING OR FOR KEEPS? AN AUSTRALIAN PERSPECTIVE ON CHALLENGES FACING THE DEVELOPMENT OF A REGIME FOR THE PROTECTION OF UNDERWATER CULTURAL HERITAGE

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[Early next year the international community will hold the latest in a series of meetings to consider a pressing issue concerning the world's cultural heritage — the Draft Convention on the Protection of the Underwater Cultural Heritage ('Draft Convention'). The Draft Convention, which is being negotiated under the sponsorship of United Nations Educational, Scientific and Cultural Organisation, is directly concerned with the abundance of shipwrecks and other archaeological objects lying beneath the seas of the world. Many of these objects carry a wealth of historical information by virtue of their state of preservation and having lain undisturbed. However, despite their significance, no effective regime of protection exists for these objects. The Draft Convention is an attempt to remedy this situation, and Australia's contribution to its development has increased markedly over the last few years. Nevertheless a number of significant issues are yet to be resolved: the definition of underwater cultural heritage, the demarcation of jurisdiction between coastal, port and flag states regarding underwater cultural heritage activities, and the application of salvage law. Australia has particular issues concerning, for example, the underwater cultural heritage of indigenous peoples and the status of certain pre-existing domestic legislation such as the Historic Shipwrecks Act 1976 (Cth). While these issues await resolution, the advancing tide of technology swiftly increases the vulnerability of the very objects the Draft Convention seeks to protect.]

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I INTRODUCTION

The world is becoming increasingly aware of the wealth of history, in the form of shipwrecks and archaeological objects, which lies beneath its seas and oceans. With advances in technology this history is becoming increasingly accessible. However, as access to these sites increases, so too does their vulnerability to physical destruction. By its very nature, underwater cultural heritage with a strong historical or cultural link to particular modern states may be located in international waters far from its place of origin. The issue is therefore very much one of international concern. With this in mind, the international community is currently negotiating, under the sponsorship of the United Nations Educational, Scientific and Cultural Organization ('UNESCO'), its first multilateral treaty specifically concerned with the protection of underwater cultural heritage. The *Draft Convention on the Protection of the Underwater Cultural Heritage* ('*Draft Convention*')¹ sets out states' obligations and rights in this area, and provides an annex which establishes a charter of rules or archaeological standards for the conduct of these activities.² With the *Draft Convention* most recently considered in July 2000,³ the challenge is to reach a finalised outcome in time to appropriately balance the opposing issues of protection and exploitation — a challenge in which Australia is playing an increasing role.

II THE AUSTRALIAN CONTEXT

Australia, alongside 83 other states,⁴ recently participated in the July 2000 consideration of the *Draft Convention* — the Third Meeting of Governmental Experts on the Draft Convention on the Protection of Underwater Cultural Heritage — held in Paris in July 2000. Australia was not recorded as having played a significant role in the first and second meetings of governmental experts, nor as having proposed amendments to the relevant drafts of the *Draft*

¹ UNESCO Doc CLT-96/CONF.202/5 Rev 2 (July 1999 version), reproduced at ProSEA, 'Draft Convention on the Protection of the Underwater Cultural Heritage' <http://prosea.org/articles-news/unesco/july99_draft_unesco_conv.html> at 12 December 2000. Unless otherwise indicated, all references to the *Draft Convention* will refer to this particular version of the *Draft Convention*.

² Sarah Dromgoole and Nicholas Gaskell, 'Draft UNESCO Convention on the Protection of the Underwater Cultural Heritage 1998' (1999) 14 *International Journal of Marine and Coastal Law* 171, 175–6; Patrick O'Keefe, 'Protecting the Underwater Cultural Heritage: The International Law Association Draft Convention' (1996) 20 *Marine Policy* 297, 300.

³ The third meeting of governmental experts to discuss the *Draft Convention* took place in Paris on 3–7 July 2000. A revised *Draft Convention* and report will be submitted to the 31st session of UNESCO's General Conference at the end of 2001. A fourth meeting is planned to take place during the first six months of 2001.

⁴ UNESCO, 'Close of Governmental Experts Meeting on Convention to Protect Underwater Cultural Heritage', UNESCO PRESS, Press Release No 2000–65 (7 July 2000) <<http://www.unesco.org/opi/eng/unescopress/2000/00-65e.shtml>> at 10 December 2000.

Convention prior to these meetings.⁵ Prior to the July meeting, Australia's involvement increased, particularly in the context of inter-sessional meetings and negotiations between especially interested parties.

A *Australia's Interest in Underwater Cultural Heritage Sites*

In terms of underwater cultural heritage concerns, Australia's situation is quite particular. Australia is a relatively isolated island state surrounded by oceans and with few close neighbours — the closest being Papua New Guinea and Indonesia to the north. Its exploration and settlement by western cultures is relatively recent, taking place for the most part in the 18th and 19th centuries. However, Australia has also been occupied by its indigenous peoples (including the Aboriginal and Torres Strait Islander peoples) for thousands of years. The underwater cultural heritage sites of potential interest to Australia reflect both its history and location. Sites have resulted from ships travelling in the vicinity of Australian waters for the purposes of, for example, trade. Most notable in this regard are the ships of the 'Vereenigde Oostindische Compagnie' ('VOC') or Dutch East India Company, which were involved in the spice trade between Europe and what was then the East Indies. Wrecks of four of these ships, lost in the 16th and 17th centuries, are located off the coast of Western Australia.⁶ Underwater cultural heritage sites, again in the form of shipwrecks, have also resulted from the exploration and settlement of Australia in relation to ships travelling to and from Australia for the purposes of trade and the carriage of passengers. Additional sites, particularly along the coastlines of Tasmania and the southern portion of mainland Australia, have resulted from other maritime activities such as those of the colonial whaling industry.⁷ Historical cultural deposits also exist in relation to coastline activities and structures (for example, wharves) which are now submerged.⁸ Significant among these are aboriginal occupation sites, particularly those located in the waters between Australia and New Guinea or between the Australian mainland and its islands, which became submerged about 10,000 years ago as a result of a major rise in sea levels.⁹ In addition, a strong cultural attachment to the sea may include attention to spiritual sites over ocean areas.

⁵ UNESCO, *Report of the Meeting of Governmental Experts on the Draft Convention for the Protection of the Underwater Cultural Heritage* (29 June–2 July 1998) UNESCO Doc CLT-98/CONF.202/7 (1998) [16] ('*First Report*'); UNESCO, *Report of the Second Meeting of Governmental Experts on the Draft Convention for the Protection of the Underwater Cultural Heritage* (19–24 April 1999) UNESCO Doc CLT-99/CONF.204 (1999) [1] ('*Second Report*').

⁶ The wrecks of the 'Batavia', 'Vergulde Draeck', 'Zuytdorp' and 'Zeewyk' all lie off the coast of Western Australia: *Historic Shipwrecks Act 1976* (Cth) sch 2.

⁷ See the catalogue of ships listed in Australian Institute for Maritime Archaeology, 'Australian National Shipwreck Database' <<http://dbase.mm.wa.gov.au/WEBFM/Shipwrecks/shipsearch.html>> at 12 December 2000.

⁸ Australian Institute for Maritime Archaeology, 'What is Maritime Archaeology?' <http://www.aima.iinet.net.au/frames_no/maritarch/aimama.html> at 7 December 2000.

⁹ William Jeffery, 'Australia' in Sarah Dromgoole (ed), *Legal Protection of the Underwater Cultural Heritage: National and International Perspectives* (1999) 2.

B *Bilateral Agreement between Australia and the Netherlands*

While actively involved in the current negotiations of an overarching multilateral treaty, Australia has already made some significant provision for protection of certain aspects of its underwater cultural heritage. Specifically, Australia, with the Netherlands, has entered one of the few bilateral agreements protecting specific underwater cultural heritage. The *Agreement between the Netherlands and Australia concerning Old Dutch Shipwrecks* ('*Netherlands-Australia Agreement*')¹⁰ was signed by and entered into force between the governments of Australia and the Netherlands on 6 November 1972. The *Netherlands-Australia Agreement* is solely concerned with wrecked vessels of the VOC 'lying on or off the coast of the [Australian] State of Western Australia'.¹¹ The reach of the treaty is not further defined in relation to its application to, for example, the territorial sea, the continental shelf or the exclusive economic zone ('EEZ').¹² Under the *Netherlands-Australia Agreement*, the Netherlands, which is identified as the successor to the property and assets of the VOC, transfers all title to, and Australia accepts all title in, the wrecked vessels and articles (being any part of the vessels that have become detached or removed, as well as fittings, goods and other property installed or carried on the vessels, wherever situated).¹³ However, Australia also recognises that the Netherlands has a continuing interest in the articles recovered from the wrecks. To accommodate this interest, the *Netherlands-Australia Agreement* provides for the establishment of a committee, by Australia, to determine the disposition and subsequent ownership of the recovered articles. Attached to the *Netherlands-Australia Agreement* is a second document, the 'Arrangement', which sets out the principles for distributing recovered articles between the parties. These principles incorporate archaeological considerations and include an acknowledgment that the collective importance of an archaeological site far outweighs the value of the individual pieces and that a major part of the historical value of individual objects is their relationship within a site. Particular mention is made of statistical samples and unique or rare objects. In addition, the aim of deliberations regarding the distribution of articles is stated to ensure sufficient representative samples are deposited in the museums of the two parties and to ensure that research is not impeded by over-fragmentation. The *Netherlands-Australia Agreement* has been specifically noted in the context of the UNESCO negotiations of the *Draft Convention* as well as recommended as a basis for other, similar interstate agreements.¹⁴

¹⁰ ATS 1972 No 18 (entered into force 6 November 1972).

¹¹ *Ibid* art 1.

¹² Although the 'general tenor' of the agreement has been interpreted as indicating that it extends to any subject wrecks on the continental shelf off Western Australia: see, eg, Patrick O'Keefe, 'International Waters' in Sarah Dromgoole (ed), *Legal Protection of the Underwater Cultural Heritage: National and International Perspectives* (1999) 225.

¹³ *Netherlands-Australia Agreement*, above n 10, arts 1, 2.

¹⁴ Anastasia Strati, *Draft Convention on the Protection of Underwater Cultural Heritage: Commentary*, UNESCO Doc CLT-99/WS/8 (drafted April 1999) 97 ('*Commentary*').

C Domestic Legislation and UNCLOS

In addition, Australia has enacted noteworthy domestic legislation concerned with the protection of underwater cultural heritage on its continental shelf. The *Historic Shipwrecks Act 1976* (Cth) ('*Historic Shipwrecks Act*'), which incorporates the *Netherlands-Australia Agreement*, has wider application than that agreement. The Act enables the appropriate Minister to declare all remains of a ship which are 'situated in Australian waters or waters above the continental shelf of Australia' and at least 75 years old to be 'historic shipwrecks' and to declare a protected zone around a historic shipwreck or historic relics.¹⁵ The legislation therefore purports to extend Australia's control of historic shipwrecks to Australia's continental shelf. This raises questions regarding the relationship between the *Historic Shipwrecks Act* and the *United Nations Convention on the Law of the Sea* ('UNCLOS').¹⁶

The UNCLOS regime contains no specific provision regarding the treatment of underwater cultural heritage on the continental shelf and, it would appear, does not include matters concerning underwater cultural heritage in the activities subject, directly or indirectly, to coastal state sovereignty. Part VI of UNCLOS grants a range of sovereign and other rights and entitlements to coastal states in relation to specific activities on the continental shelf, none of which expressly includes underwater cultural heritage. Of the activities listed, the only activity that might possibly incorporate underwater cultural heritage is the exploration and exploitation of 'natural resources' recognised in article 77. Article 77(4) of UNCLOS defines 'natural resources' as including 'mineral and other non-living resources of the seabed and subsoil together with living organisms belonging to sedentary species'. Further, in 1956, the International Law Commission considered the meaning of 'natural resources' in relation to a draft article for UNCLOS dealing with the continental shelf, and concluded that it did not apply to 'objects such as wrecked ships and their cargoes'.¹⁷ The view has also been expressed that the history of article 303 of UNCLOS indicates an intention not to grant to coastal states rights regarding underwater cultural heritage on the continental shelf.¹⁸

¹⁵ *Historic Shipwrecks Act 1976* (Cth) ss 4A, 7; see also *Navigation Act 1912* (Cth) s 302(b), which requires persons finding or taking possession of a wreck outside Australian territory and bringing it to Australia to notify the receiver of the wreck; s 308 provides that the Commonwealth is entitled to any unclaimed wrecks found in Australia.

¹⁶ Opened for signature 10 December 1982, 183 UNTS 3, 21 ILM 1261 (entered into force 16 November 1994); see, eg, Patrick O'Keefe and James Nafziger, 'Report — *The Draft Convention on the Protection of the Underwater Cultural Heritage*' (1994) 25 *Ocean Development and International Law* 391, 397.

¹⁷ *Yearbook of the International Law Commission* (1956) vol II, 298; see also Moritaka Hayashi, 'Archaeological and Historical Objects under the UNCLOS' (1996) 20 *Marine Policy* 291, fn 9.

¹⁸ Hayashi, above n 17, 294–5; see also *Second Report*, above n 5, [8].

III ISSUES CONFRONTING RESOLUTION OF THE *DRAFT CONVENTION*A *Definition of 'Underwater Cultural Heritage'*

Despite such active consideration of the *Draft Convention*, a number of significant issues impede its final resolution. Issues that have been raised include the definition of 'underwater cultural heritage'. Currently, the definition of 'underwater cultural heritage' makes reference to articles which:

- constitute a trace of human existence: article 1(1)(a);
- have been underwater for at least 100 years (or have been designated by a state party in whose jurisdiction the object is located as underwater cultural heritage): article 1(1)(a);
- are found at sea: article 2(1); and
- are not a warship, aircraft or other state vessel for non-commercial purposes: article 2(2).

Negotiations have raised the question of whether the *Draft Convention* should be limited to underwater cultural heritage that is 'archaeologically or culturally significant'.¹⁹ However, such a criterion would create difficulties in terms of how such a standard would be measured before excavation and, therefore, before it was known whether to treat the objects in accordance with the *Draft Convention* or not.²⁰ There has also been discussion about whether the *Draft Convention* should extend to 'cultural landscapes'.²¹ This term refers to natural sites and landscapes of significance to the understanding of history or of cultural interest. It has been noted that the management of such landscapes would require strategies different from those currently found in the *Draft Convention's* charter and that other international instruments may already be relevant to this area.²²

Also raised during negotiations on the *Draft Convention* was the issue of whether the underwater cultural heritage of indigenous peoples should be included in the draft, an issue particularly raised by Australia.²³ For Australia, issues of underwater cultural heritage involve aboriginal subaquatic archaeology, and an acknowledgment of the significance placed on the sea by Australian aboriginal peoples. In recent times, land claims by indigenous peoples have

¹⁹ *Second Report*, above n 5, [17].

²⁰ *Commentary*, above n 14, 16.

²¹ *Ibid.*

²² *Ibid.* For example, see art 2 of the *Convention concerning the Protection of the World Cultural and Natural Heritage*, opened for signature 23 November 1972, 1037 UNTS 151, 11 ILM 1358 (entered into force generally and for Australia 17 December 1975), which includes in its definition of 'natural heritage'

geological and physiographical formations and precisely delineated areas which constitute the habitat of threatened species of animals and plants of outstanding universal value from the point of view of science or conservation.

²³ *First Report*, above n 5, [10].

extended beyond resource uses to include spiritual sites over oceans.²⁴ The ocean floor (including the continental shelf) may also have significant heritage value for indigenous people in relation to ancient occupation sites that are now submerged.

B Draft Convention's *Regime of State Rights and Obligations*

One of the major stumbling blocks confronting final resolution of the *Draft Convention* is the demarcation of jurisdiction between coastal states, port states and flag states with regard to underwater cultural heritage and underwater cultural heritage activities. The extent of disagreement is reflected in the existence of three alternative options in the current draft dealing with these matters,²⁵ all of which focus on the actions of individual states to provide protection for underwater cultural heritage, as opposed to establishing a specialised organisation or regime for this purpose. Each of these options creates a regime of states parties'²⁶ rights and obligations in relation to the protection of underwater cultural heritage that balances those rights and obligations differently between coastal states, port states and flag states. The options place different onuses on states parties and also provide different degrees of regulation. They all incorporate compliance with the rules set out in the annex in some way.

Option 1 reflects the position of experts in favour of the jurisdiction of coastal states in the EEZ and the continental shelf. Article 5(1) of Option 1 provides:

States Parties shall require that any discovery relating to underwater cultural heritage occurring in their exclusive economic zone or on their continental shelf be reported to their competent authorities.

The most controversial section of Option 1 is article 5(2), which specifically allows coastal states to 'regulate' underwater cultural heritage in their exclusive economic zone and on their continental shelf. Earlier drafts gave the coastal state the additional power to also 'authorise' underwater cultural heritage activities.

The views of opponents of such coastal state jurisdiction beyond the 'contiguous zone'²⁷ find voice in Option 2, in particular article 5, which requires coastal states to 'take account of the need to protect underwater cultural heritage' when exercising their sovereign rights in relation to the EEZ or continental shelf. This more limited coastal state jurisdiction is not compensated by any significantly greater obligations of port states or flag states.

²⁴ See, eg. *Wellington per the Dariwal People* [1997] NNTTA 29 (Seaman QC, 29 July 1997) <<http://www.austlii.edu.au/au/cases/cth/NNTTA/1997/29.html>> at 12 December 2000 [3], in which a claim over the sea floor was made; section 62(2)(c) of the *Native Title Act 1993* (Cth), under which that application was made, refers only to 'waters'.

²⁵ *Second Report*, above n 5, [32].

²⁶ 'States parties' refers to states that have consented to be bound by the *Draft Convention* and for which the *Draft Convention* will be in force: *Draft Convention*, above n 1, art 1(2).

²⁷ The contiguous zone is defined as an area that extends no further than '24 nautical miles from the baselines from which the breadth of the territorial sea is measured': *UNCLOS*, above n 16, art 33(2).

Option 3 represents a compromise position, and was presented by the Chairman of the working group at the second meeting concerning the *Draft Convention*.²⁸ This option gives coastal states a more passive role by requiring that such states be ‘notified of any activity or discovery relating to underwater cultural heritage occurring in its exclusive economic zone or on its continental shelf’.²⁹ More rights and obligations are attributed to states parties generally including, for example, authorisation of ‘protective interventions and scientific research’³⁰ of discovered underwater cultural heritage, and obligations to ensure compliance with the annex.³¹ To date, Australia is yet to formally express a position on this issue. However, as previously noted, Australia already has legislation which claims jurisdiction over underwater cultural heritage in the form of shipwrecks on its continental shelf.³²

Table 1 summarises each option’s different distribution of states’ rights and obligations in various ocean areas dealt with by the *Draft Convention*.³³

C Application of Salvage Law

1 Current Position

Another of the most controversial issues confronting resolution of the *Draft Convention* is whether the law of salvage should apply to underwater cultural heritage.³⁴ As the *Draft Convention* currently stands, no mention is made regarding this issue. However, there are those who take the view that underwater cultural heritage should not be subject to the law of salvage.³⁵ In the absence of an explicit statement in the *Draft Convention*, it is unclear if salvage law applies to underwater cultural heritage.

In relation to general salvage law, the issue appears to hinge on whether an historic shipwreck constituting underwater cultural heritage can be considered to be in marine peril or in danger. In such circumstances, salvage law requires a wreck or cargo to be saved. Opponents of the application of salvage law argue that because underwater cultural heritage protected under the *Draft Convention* has remained underwater for more than 100 years, it will be in equilibrium with its environment, at which point decomposition reduces and there is little further deterioration.³⁶ It is therefore argued that such matter can no longer be in peril.³⁷

²⁸ *Second Report*, above n 5, [32].

²⁹ *Draft Convention*, above n 1, Option 3 art 5(1).

³⁰ *Ibid* art 5(4).

³¹ *Ibid* art 5(4)(a).

³² *Historic Shipwrecks Act 1976* (Cth): see above, Part II(C).

³³ See below, Table 1.

³⁴ *Second Report*, above n 5, [17], [27].

³⁵ For example, an express provision to this effect was included in an earlier draft convention which greatly influenced the initiation and drafting of the current *Draft Convention*: *Buenos Aires Draft Convention on the Protection of the Underwater Cultural Heritage*, Resolution 8 of 66th Conference of the International Law Association (1994), appended in O’Keefe, ‘Protecting the Underwater Cultural Heritage’, above n 2, 303.

³⁶ *Commentary*, above n 14, 15.

Indeed, disturbance of the wreck through salvage may be likely to cause the greater damage. Conversely, it is argued that immobilisation of a wreck is a category of endangerment.³⁸ In addition, the domestic law of different states differ in their categorisation of circumstances of endangerment.³⁹

2 *Rationale for the Exclusion of Salvage Law*

Apart from the issue of whether salvage law does apply to underwater cultural heritage, there is the question of whether such a legal regime *should* apply to underwater cultural heritage. The chief arguments against this application arise from concern about conflicts between commercial interests (held by salvors) and historical interests (inherent in underwater cultural heritage protection). There is concern that a salvor motivated to retrieve objects for commercial gain is less likely to be concerned with heritage protection and preservation, particularly as the main principle of underwater cultural heritage protection, as enshrined in the annex, is *in situ* preservation.⁴⁰ The *Draft Convention* itself seems concerned with the impact of commercial motivations: it requires states parties not to apply internal laws or regulations which provide commercial incentives or reward for underwater cultural heritage excavation and removal.⁴¹

Concern has been expressed at the appropriateness and ability of private law courts applying salvage law to properly understand what will best serve underwater cultural heritage protection and determine if a salvor has acted properly.⁴² Conversely, it has been noted that salvors, because they are commercially motivated and funded, make a significant contribution to the location and retrieval of submerged objects that may not otherwise be discovered. The strength of this argument is influenced by whether the focus of underwater cultural heritage protection is discovery and retrieval or preservation. Concern has also been expressed that the prohibition of salvage operations will remove the professionally equipped and regulated salvor from the scene only to be replaced by the 'piratical adventurer',⁴³ increasing the potential for damage to or loss of valuable articles.

It has been argued that an approach that includes salvage law and balances it with underwater cultural heritage protection is more likely to receive acceptance, thereby hastening the introduction of an effective protection regime.⁴⁴ However, exclusion of salvage law does not necessarily exclude salvage operations in relation to all underwater cultural heritage. Depending on the historical

³⁷ *Ibid.*

³⁸ Geoffrey Brice, 'Salvage and the Underwater Cultural Heritage' (1996) 20 *Marine Policy* 337, 337, referring to a category of danger recognised in English law.

³⁹ Dromgoole and Gaskell, above n 2, 188.

⁴⁰ *Draft Convention*, above n 1, annex, art 1.

⁴¹ *Ibid* art 12(2).

⁴² O'Keefe, 'Protecting the Underwater Cultural Heritage', above n 2, 304.

⁴³ Brice, above n 38, 342.

⁴⁴ *Ibid.*

significance of the particular underwater cultural heritage, those archaeological standards may allow other types of exploration and retrieval.⁴⁵

3 *Application to Specific Cases*

If salvage law is to be applied to underwater cultural heritage, ancillary practical issues need to be addressed. These include the issue of whether to incorporate heritage preservation considerations into the determination of a salvage reward, for example, by considering the preservation skills or efforts of the salvor. This is desirable to encourage salvors to be mindful of protection issues and to counterbalance the commercial interest. However, issues then arise as to whether courts applying salvage law have the knowledge to determine such matters. It also has been noted that most evidence in this regard will be adduced by the salvors, and that these judgments will be made after the site has been salvaged and thus any damage has already occurred.⁴⁶ Another issue is the protection of a salvor's rights against third parties, especially during salvage operations over a long period involving a wreck on the seabed. In *RMS Titanic v Haver*⁴⁷ such a situation caused a domestic court to believe it had the jurisdiction to forbid the world at large from visiting the wreck site and, in support of this, to cordon off an area of the high seas for the exclusive access of the salvor.⁴⁸ Consideration would also have to be given as to whether and how to give regard to preferential rights of states such as the state of origin, cultural origin or historical and archaeological origin of the wreck, and how such rights can be balanced with those of a salvor.

D *Regional Agreements*

A number of states have also argued strongly for the *Draft Convention* to allow states to enter regional or bilateral agreements for the preservation of common cultural heritage. This proposal has been supported to the extent that the current draft of the *Draft Convention* includes tentative provision for such agreements.⁴⁹ Provision for regional agreements has been particularly argued for by Mediterranean states such as Italy, which share a common cultural heritage with neighbouring states as well as ocean areas containing objects relating to this cultural heritage.⁵⁰ This issue is, therefore, of less relevance to states such as Australia, although it is plausible that such an arrangement may be of use for the waters between, for example, Australia and Indonesia.

⁴⁵ O'Keefe, 'Protecting the Underwater Cultural Heritage', above n 2, 301.

⁴⁶ Brice, above n 38, 339; O'Keefe, 'International Waters', above n 12, 228.

⁴⁷ (1999) 38 ILM 796.

⁴⁸ This aspect of the decision was overturned by the United States Court of Appeal in *RMS Titanic v Haver* (1999) 38 ILM 796, 816.

⁴⁹ *Draft Convention*, above n 1, Option 1 (art 5(4)); Option 2 (art 2 ter); Option 3 (art 2 ter).

⁵⁰ UNESCO, *Second Meeting of Governmental Experts to Consider the Draft Convention on the Protection of Underwater Cultural Heritage — Synoptic Report of the Comments on the Draft Convention on the Protection of the Underwater Cultural Heritage*, UNESCO Doc CLT-99/CONF.204/5(1999) 5.

While it would appear that the concept of regional agreements has gained some acceptance,⁵¹ two issues have arisen regarding the finalisation of such a provision. Firstly, views differ as to the nature of the states to be included in a regional arrangement. The provision currently in the *Draft Convention* identifies the subject of regional agreements to be the preservation of 'common' underwater cultural heritage and suggests that the agreements be open to states of cultural origin and states of historical and archaeological origin.⁵² Alternatively, such agreements could be open to any state with a general interest in underwater cultural heritage. Proponents of regional agreements may argue that such a broadening of the concept compromises its original purpose. Secondly, the extent to which such regional agreements are to be compatible with both the *Draft Convention* and *UNCLOS* must also be determined. Option 1 article 5(4), Option 2 article 2 ter, and Option 3 article 2 ter of the *Draft Convention* all allow the adoption of rules and regulations 'more stringent than those adopted at global level'.

E *Exclusion of Warships*

The exclusion of warships from application of the *Draft Convention*⁵³ was included to respect the sensitivity attached to warships after it was concluded that many countries exclude their warships from salvage operations.⁵⁴ It has also been noted that many states regard their ownership and control of such wrecks to subsist, despite the passage of more than 100 years.⁵⁵ It was felt that the issue of warships raised complex issues of sovereign immunity beyond the scope of the *Draft Convention*.⁵⁶

The current legal position regarding ownership of sunken warships and government ships is uncertain. While it seems clear that warships and public vessels on the high seas are solely subject to flag state jurisdiction, having complete immunity from the jurisdiction of any other state, such ships potentially occupy a different position once sunk.⁵⁷ On one view, the sunken warship loses its particular standing as a warship and is to be regarded in the same way as any other wreck.⁵⁸ Another view is that, as with all vessels, sinking does not destroy ownership and abandonment must be proved before a vessel loses its status as

⁵¹ *Second Report*, above n 5, [35].

⁵² *Draft Convention*, above n 1, Option 5 art 1.

⁵³ *Draft Convention*, above n 1, art 2(2).

⁵⁴ Etienne Clement, 'Current Developments at UNESCO concerning the Protection of the Underwater Cultural Heritage: Presentation Made at the First and the Second National Maritime Museum Conferences on the Protection of the Underwater Cultural Heritage' (1996) 20 *Marine Policy* 309, 316, appending *Preliminary Study on the Advisability of Preparing an International Instrument for the Protection of the Underwater Cultural Heritage*, UNESCO General Conference, 28th Session, Provisional Agenda Item 7.6, Doc 28 C/39 (4 October 1995).

⁵⁵ *Commentary*, above n 14, 21.

⁵⁶ *Ibid*.

⁵⁷ *Ibid*; see also Dromgoole and Gaskell, above n 2, 183–4.

⁵⁸ *Commentary*, above n 14, fn 44.

public property.⁵⁹ It has also been argued that current practice suggests that public vessels used for non-commercial purposes and warships retain their status as state property so that their recovery may require the consent of the flag state.⁶⁰

One of the concerns with the current provision dealing with this issue in the *Draft Convention* is its broad nature. Article 2(2) is not limited to war vessels on military service, but includes vessels operated by a state and used for a non-government purpose. These vessels are also excluded from the ambit of the *Draft Convention* regardless of their age. Given many ancient wrecks would have been public vessels or warships, it has been suggested that this provision may exclude so many vessels from the operation of the *Draft Convention* so as to make it meaningless.⁶¹ Consideration may be given to allowing the *Draft Convention* to apply to warships and public vessels subject to the flag state's sovereign rights remaining intact or, alternatively, the flag state renouncing its rights. It has been suggested that the inclusion of warships and public vessels within the scope of the *Draft Convention* may result in their better preservation.⁶²

F *Extent of the Draft Convention's Conformity with UNCLOS*

The *Draft Convention* currently suggests a provision dealing with the relationship between it and *UNCLOS*. Article 2 bis provides that:

Nothing in this Agreement shall prejudice the rights, jurisdiction and duties of States under the Convention. [This Agreement shall be interpreted and applied in the context of and in a manner consistent with the Convention.]⁶³

However, the extent of the *Draft Convention's* compliance with *UNCLOS* is still to be resolved by the parties. In 1999, the United Nations General Assembly expressed the view that the *Draft Convention* should be 'in full conformity with the relevant provisions' of *UNCLOS*.⁶⁴ At the second meeting of governmental experts in relation to the *Draft Convention*, it was agreed that the *Draft Convention* should 'not undermine the jurisdictional regime established in *UNCLOS*'.⁶⁵ *UNCLOS* itself provides in article 303(4) that:

This article is without prejudice to other international agreements and rules of international law regarding the protection of objects of an archaeological and historical nature.

⁵⁹ Ibid.

⁶⁰ Ibid 22.

⁶¹ Ibid 22–3; see also Dromgoole and Gaskell, above n 2, 186–7.

⁶² O'Keefe, 'International Waters', above n 12, 234.

⁶³ Article 2 bis borrows the language of art 4 of the 1995 *Agreement for the Implementation of the Provisions of the United Nations Convention on the Law of the Sea of 10 December 1982 Relating to the Conservation and Management of Straddling Fish Stocks and Highly Migratory Fish Stocks*, opened for signature 4 December 1995, 34 ILM 1542 (not yet in force).

⁶⁴ Oceans and the Law of the Sea, GA Res 53/32, UN Doc A/Res/53/32 (1999) [20] <<http://www.un.org/documents/ga/res/53/a53r032.pdf>> at 10 December 2000.

⁶⁵ *Second Report*, above n 5, [25].

UNCLOS appears therefore to condone the resolution of other instruments specifically concerned with underwater cultural heritage.⁶⁶

At this stage, discussion seems to mainly concern the degree of the *Draft Convention's* conformity with *UNCLOS*, including, for example, whether it is to be full conformity or compatibility. Opponents of a broadening of coastal state jurisdiction in relation to underwater cultural heritage are expected to support the most stringent degree of conformity with *UNCLOS*. The interrelationship of these issues means that the final resolution of article 2 bis will depend on the adoption or otherwise of one of the three Options dealing with jurisdictional issues in articles 4–7.

IV CONCLUSION

Despite significant international progress and support in relation to the creation of an international instrument designed to deal with issues of underwater cultural heritage and its protection, it would seem that a number of obstacles persist. Issues relating to the responsibilities under coastal state, flag state and port state jurisdiction, and the interrelationship of other legal regimes such as private salvage law, are still under consideration. Although initially not significantly involved, Australia is adopting a greater profile in the advancement of the *Draft Convention*. Australia must also grapple with specific issues including the underwater cultural heritage of indigenous peoples and the status of its own *Historic Shipwrecks Act*, especially in relation to artefacts on Australia's continental shelf or within its EEZ. In the meantime, all parties must be cognisant of the ever-advancing technological tide which brings the world's ocean and seabed areas closer within the reach of not only historians and archaeologists, but also treasure hunters and adventurers. Perhaps underwater cultural heritage protection is an issue that cannot wait for the elegance of a perfectly negotiated solution.

⁶⁶ *UNCLOS*, above n 16, art 303(1) states that '[s]tates have the duty to protect objects of an archaeological and historical nature found at sea and shall co-operate for this purpose'.

TABLE 1

**DRAFT CONVENTION ON THE PROTECTION OF THE UNDERWATER CULTURAL
HERITAGE ('UCH')**
SUMMARY OF STATES RIGHTS AND OBLIGATIONS REGARDING UCH

<i>Option 1</i>	<i>Option 2</i>	<i>Option 3</i>
In the EEZ and continental shelf (coastal state jurisdiction)		
<p>Discoveries of UCH must be reported. The coastal state is to require this: article 5(1).</p> <p>UCH may be regulated by the coastal state (and if so, compliance with the annex is to be a minimum requirement): article 5(2).</p> <p>UCH activities may be denied by the coastal state if they interfere with coastal state resource, exploitation or exploration or other <i>UNCLOS</i> rights: article 5(3).</p> <p>UCH activities by nationals or vessels of a state party should comply with coastal state laws and regulations. The state of the nationals or vessels is to take all practicable measures to ensure this: article 7(2)(b).</p>	<p>Protection of UCH is to be taken into account by the coastal state in exercising its sovereign rights: article 5.</p> <p>Discoveries must be reported. State parties shall take all practicable measures to ensure this in respect of its nationals or vessels: article 7(1).</p> <p>UCH activities by nationals or vessels of a state party contrary to the annex are not to be engaged in. State parties shall take all practicable measures to ensure this in respect of its nationals or vessels: article 7(2)(b).</p>	<p>A state party must be notified of any UCH activities or discoveries: article 5(1). States parties shall prohibit contrary activities: article 5(5)(a).</p> <p>Once reported, UCH activity and discovery information must be: assessed and regulated by the coastal state; exchanged with other interested states; be transmitted to UNESCO: article 5(2)–(3). States parties shall prohibit contrary activities: article 5(5)(a).</p> <p>‘[P]rotective interventions and scientific research’ of discovered material may be authorised by states subject to consultation with the state of the nationals undertaking the activity, compliance with the annex, and participation by experts of the coastal state: article 5(4). States parties shall prohibit contrary activities: article 5(5)(a).</p> <p>UCH activities by vessels of state parties are to be consistent with the <i>Draft Convention</i>, annex and laws and regulations of the coastal state: article 6.</p>

<i>Option 1</i>	<i>Option 2</i>	<i>Option 3</i>
In areas under the jurisdiction of a state party (including maritime ports and off-shore terminals) (port state jurisdiction)		
NB: Also includes areas under the control of a state party: article 6.	NB: Also includes areas under the control of a state party: article 6. NB: Provided no other state exercises control in the same area: article 6 (2).	NB: Only relates to areas under the 'jurisdiction' of a state party and specifically refers to the EEZ and the continental shelf: article 5(5)(b).
The use of the area to support UCH activities inconsistent with the annex are to be prohibited (by the coastal state which must 'take measures'): article 6.	The use of the area to support UCH activities inconsistent with the annex are to be prohibited (by the coastal state which must 'take measures'): article 6(1).	A state party must be notified of any UCH activities or discoveries: article 5(1). States parties shall prohibit contrary activities: article 5(5)(a). Once reported, UCH activity and discovery information must be: assessed and regulated by the coastal state; exchanged with other interested states; transmitted to UNESCO: article 5(2)–(3). States parties shall prohibit contrary activities: article 5(5)(a). [P]rotective interventions and scientific research' of discovered material may be authorised by states subject to consultation with the state of the nationals undertaking the activity, compliance with the annex and participation by experts of the coastal state: article 5(4). States parties shall prohibit contrary activities: article 5(5)(a).
In areas where no state party exercises control (flag state jurisdiction)		
—	NB: Also includes areas where no state party exercises sovereignty: article 7(2)(a).	—
UCH activities by a national or a vessel of a state party must be in accordance with the annex. The state party is to prohibit such activities: article 7(2)(a).	UCH activities by a national or vessel of a state party must not be contrary to the annex. The state party is to prohibit such activities: article 7(2)(a).	(No equivalent provision.)

<i>Option 1</i>	<i>Option 2</i>	<i>Option 3</i>
In the Area*		
UCH discoveries are to be reported to the International Seabed Authority (which is then to report them to UNESCO): article 7 bis.	UCH discoveries are to be reported to the International Seabed Authority (which is then to report them to UNESCO): article 7 bis.	UCH discoveries are to be reported to UNESCO (which is then to report them to the International Seabed Authority). States having the preferential rights listed in <i>UNCLOS</i> , article 149, are to be informed of the discovery: article 7(2).

* The 'Area' is defined as 'the sea-bed or ocean floor and subsoil thereof, beyond the limits of national jurisdiction': *UNCLOS*, above n 16, art 1(1).