

**LEGAL PROTECTION OF THE
UNDERWATER CULTURAL HERITAGE:
NATIONAL AND INTERNATIONAL PERSPECTIVES**

edited by

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The cover drawing is taken from a print of the *Admella*, a small iron-screw steamer, built in Glasgow in 1857 and lost off the Australian coast in 1859 when she hit a reef in rough weather. Her loss was Australia's worst shipping disaster, as the *Admella* went down with 89 of her passengers and crew, as well as a cargo of copper and racehorses. Twenty-two survivors clung to the wreck for seven days and nights before they were rescued. The wreck site was protected under the Australian Historic Shipwrecks Act 1976 in 1983. With thanks to Bill Jeffery for providing the print and background information.

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PREFACE

So much can be learnt through the experiences that others have had in implementing legislation. Yet during my research into the legal protection of the underwater cultural heritage over the last decade, at times I have been frustrated by the difficulty of finding information about the state of law and practice in jurisdictions other than my own. The aim of this work is therefore to provide in one volume a number of different national perspectives on laws for the protection of the underwater cultural heritage, which it is hoped will provide a useful source of comparative material. Of course, a collection of essays on the underwater heritage would not be complete without some treatment of the vast areas of sea beyond national jurisdiction, especially at a time when so much attention is focussed on this zone. The volume therefore concludes with a perspective on the position of wrecks and other remains in international waters in light of the recent UNESCO initiative to draft a convention for their protection.

The contributors have been chosen for their specialist knowledge of a particular jurisdiction and include both lawyers and archaeologists, primarily from an academic or government background. They were asked to provide an exposition of the current law, its history and development; to show how the law functions in practice; and to discuss reform issues. They were also encouraged to illustrate their work with specific examples of situations which have arisen in relation to particular wrecks and other cultural remains. It is my hope that the resulting collection will be of interest not only to lawyers and archaeologists working in the field, but also to legislators, government administrators and others who may be considering revisions to law and practice in respect of the underwater heritage. As far as possible, the work takes account of developments up to 30 June 1998.

I would like to take this opportunity to thank all the contributors for their hard work, and also for their enthusiasm for the project, co-operation and patience, which have made my job as editor a pleasure. Lyndel Prott deserves special thanks for making time, in her hectic schedule, to write the foreword. I am also very grateful to Ruth Redmond-Cooper and her staff at the Institute of Art and Law for their assistance and care in typesetting the collection, and to Kluwer Law International for agreeing to publish the work. Finally, I would like to thank my husband, Michael Pont, for lending me his technical expertise in order to handle the computer files containing contributions, and also for his general advice and support.

Sarah Dromgoole
Leicester
February 1999

FOREWORD

The legal protection of the underwater cultural heritage is currently a major issue of discussion for those who follow the development of the law of the sea and for those interested in the increasing improvement of law protecting the cultural heritage.

Until the invention of SCUBA diving in the 1940s, and its popularisation as a hobby in the 1950s, relatively little had been recovered from historic shipwrecks. Sponge divers in the Mediterranean recovered some important artefacts from Classical Age wrecks and salvage efforts on some other wrecks soon after they had gone down managed to retrieve certain items of value. But systematic exploration and excavation, as well as large scale treasure-hunting, was imaginable only when these new techniques became available.

The even newer technologies exploited for the exploration of the deep seabed for oil and minerals have made it possible to reach every portion of the sea-floor, even in the deepest areas. This technology is becoming cheaper and more available for other purposes with every year that passes.

Unfortunately, while the great majority of States has taken legal measures to ensure that random ransacking of their important cultural sites on land is suppressed in favour of systematic research, the same is not true of the underwater cultural heritage. First, legislation on land sites long preceded that concerning maritime sites and was well developed before the need for such rules was evident for submarine antiquities. Secondly, complex existing legal systems such as salvage and law of the sea already related to many of the areas, if not where these antiquities lie, then at least where their hunters operate.

For these reasons it is essential to find an appropriate adjustment of existing rules to the need to protect this special category of cultural heritage. As is so often asserted, a shipwreck is a 'closed deposit', a collection of objects, all of which are known to have been in existence at the same time. It can often be dated very accurately, by coins and other objects, and therefore gives land archaeologists a better time frame than they can develop from sites of continuous habitation. Shipwrecks which are partially buried in the sea floor or in very deep water often have very well preserved artefacts or portions of the ship itself – evidence of skills which is no longer available on land sites.

While the Law of the Sea Conventions of 1958 had nothing to say about underwater cultural heritage, some mention of 'archaeological and historical objects' occurred in the United Nations Law of the Sea Convention of 1982. But those provisions, drafted late in the very complex process of dealing with issues such as exploration of minerals on the seabed, freedom of transit, research for natural resources, archipelagic States and reserved fishing areas, got scant attention. Meanwhile, since 1982, the even more rapid evolution of technology and the corresponding rise in the economic exploitation of historic wrecks, with little understanding of or regard to their cultural significance, has grown to alarming proportions.

It is in this context that UNESCO (the United Nations Educational, Scientific and Cultural Organisation), together with DOALOS, the Division of Ocean Affairs and Law of the Sea of the United Nations Office of Legal Affairs, has set in place a procedure which it is hoped will result in a new legal instrument to protect the underwater cultural heritage. While archaeologists applaud this initiative, others are quick to point out the need to co-ordinate this work with the other existing areas of law which are relevant. Without going into the fairly extensive early history of this initiative, it should be noted that the first meeting of governmental experts to examine the draft instrument met from 30 June to 2 July 1998 and that a second meeting on the same topic will take place from 19 to 24 April 1999.

This shows how timely this publication, edited by Sarah Dromgoole, is. There is a great need to have easily accessible information about how different States have regulated this issue at the national level. Thirteen chapters of this book discuss the situation in thirteen States. A fourteenth looks at international legal issues. These essays provide important background to the discussion on how best to preserve the underwater cultural heritage: recovery and museum display of artefacts is one option, study and preservation *in situ* is another, reconstitution of a complete ship in a purpose-built museum is yet another. As on land sites, the worst outcome is the dispersal of an archaeological deposit without provision for its reconstitution for research and, even more dire, the destruction of the site itself without proper recording and conservation.

How this need for protection has been met varies greatly between legal systems: some have amended their salvage legislation to accord special protection to historic wrecks; some have adapted the legislation applying to land sites; other have developed rules on natural parks to create sanctuaries or reservations; and yet others have created new specific legislation on the topic. In other systems, alas, unthinking application of the rules of salvage law to a context for which they were never intended (ships no longer 'in peril of the sea' but embedded in the seabed in a natural equilibrium with the environment) has encouraged treasure hunters by in effect rewarding their commercial approach, causing serious damage to the underwater heritage and the loss of historical knowledge which could have been revealed if an opportunity had been provided for scientific exploration.

This collection of essays should be of considerable assistance in increasing knowledge of the problems and possibilities for protecting this fragile and important resource for cultural history.

Lyndel Prott
Paris
February 1999

LIST OF ABBREVIATIONS

ADU	Archaeological Diving Unit
AIMA	Australian Institute for Maritime Archaeology
ANCODS	Australian and Netherlands Committee on Old Dutch Shipwrecks
ASA	Abandoned Shipwreck Act (USA)
CFT	Comhairle Fo-Thuinn (The Irish Underwater Council)
CNRAS	National Council for Archaeological Research
CRM	Cultural Resource Management
CZMA	Coastal Zone Management Act (USA)
DCMS	Department for Culture, Media and Sport
DETR	Department of the Environment, Transport and the Regions
DOALOS	United Nations Division of Ocean Affairs and Law of the Sea
DPR	Decree of the President of the Republic
DRASSM	Department for Marine and Underwater Archaeological Research
DSR	Deep Sea Research
EEZ	Exclusive Economic Zone
EC	European Community
EEC	European Economic Community
EU	European Union
FAP	Federal Archaeological Program
GCI	Goods of Cultural Interest
ICOMOS	International Council on Monuments and Sites
ILA	International Law Association
INA	Institute of Nautical Archaeology
IUART	The Irish Underwater Archaeological Research Team
KML	Cultural Monuments Act 1987 (Sweden)
MOD	Ministry of Defence
NMI	National Museum of Ireland
NMSA	National Marine Sanctuaries Act (USA)
NOAA	National Oceanic and Atmospheric Administration
RCHME	Royal Commission on the Historical Monuments of England
SMR	Sites and Monuments Record
STAS	Technical Service for Underwater Archaeology of the Ministry for Cultural and Environmental Heritage
UCH	Underwater cultural heritage
UK	United Kingdom
UN	United Nations
UNESCO	United Nations Educational, Scientific and Cultural Organisation
USA	United States of America
US	United States
VOC	Vereenigde Oostindische Compagnie (Dutch East India Company)

NOTES ON CONTRIBUTORS

Thomas Adlercreutz holds a law degree (jur. kand) from Uppsala University (1971). He has served as a judge at several district courts in Sweden, at the Svea Court of Appeals and at the Stockholm Court of Administrative Appeals. He has been a legal adviser at several Swedish ministries and, since 1988, has been legal counsel for the Central Board of National Antiquities, the Swedish government's cultural heritage agency. He had leave from 1994 to 1996 to draft legislation for the government's Cultural Heritage Enquiry (publications *SOU 1995:128* and *SOU 1996:128*). His publications in English include 'The Protection of the Cultural Heritage' in *Swedish National Reports to the XIIIth International Congress of Comparative Law* (1990); *Legal Protection of the Cultural Heritage in the USA* (1991); *Four Issues of Cultural Heritage Law in Six European Countries (France, Germany, Hungary, Italy, Sweden and United Kingdom)* (1993); 'Civil Liability for Costs for Archaeological Investigation Necessitated by Criminal Negligence - A Swedish Supreme Court Case' in *International Journal of Cultural Property* (1997). He is the Swedish correspondent for the same journal and a member of the ICOMOS Committee on Legal, Financial and Administrative Issues. Currently, he is working on a commentary to the Swedish Cultural Monuments Act.

Esther Zarza Álvarez has been a practising lawyer in Madrid since 1991. Since 1992 she has worked in the Spanish law firm Abogados Marítimos y Asociados, which specialises in maritime law. She holds an LLB degree from the University of Madrid School of Law and an LLM on legal aspects of marine affairs from the University of Wales College of Cardiff (UWIST). She is member of the Iberoamerican Institute of Maritime Law and the Spanish Maritime Law Association and has been Lecturer in Maritime Law at the Spanish Maritime Institute.

Janet Blake has been a Leverhulme Research Fellow in the School of Law at the University of Glasgow since 1996, working on a research project in international cultural heritage law. From 1993 to 1994 she worked for the Council of Europe in the Cultural Heritage Division and had specific responsibility for the European Plan for Archaeology, which included a programme relating to the underwater archaeological heritage of Europe. Her PhD, awarded in 1995 by the University of Dundee, was concerned with the international legal protection of underwater archaeological sites and related artefacts and included a case study of Turkey. She is currently working on a revised version of her doctoral thesis for publication and otherwise retains a strong research interest in the international legal protection of the underwater cultural heritage. Her publications on the subject include 'The Protection of Turkey's Underwater Archaeological Heritage - Legislative and Other Approaches' in *International Journal of Cultural Property* (1994) and 'The Protection of the Underwater Cultural Heritage' in *International and Comparative Law Quarterly* (1996). Since 1994, she has been an Expert Consultant to the Council of Europe for various programmes relating to archaeology, including the underwater archaeological heritage.

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subcommittee to develop a treaty to protect the *Titanic*. In addition to her work at the Department of Justice, she serves as a Professorial Lecturer for the Heritage Resources Law course at the American University's Washington College of Law. She is also a frequent lecturer on heritage resources law at Suffolk University School of Law in Boston, Massachusetts. Prior to joining the Department of Justice, she was a litigation associate in the San José, California branch office of the San Francisco-based law firm, McCutcheon, Doyle, Brown & Eiersen. She graduated, *cum laude*, in 1989, from the American University's Washington College of Law.

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Sarah Dromgoole has been a Lecturer in Law at the University of Leicester since 1990. She was formerly a Lecturer in Commercial Law at the Centre for Commercial Law Studies, Queen Mary and Westfield College, University of London and, prior to that, a research assistant at the Institute of Maritime Law, University of Southampton. Her PhD, awarded in 1993 by the University of Southampton, was concerned with the legal protection of the United Kingdom's underwater cultural heritage and she maintains a strong research interest in the area of law and the underwater cultural heritage. She has written extensively on this topic, her publications including 'Interests in Wreck' (with N. Gaskell) in N. Palmer, E. McKendrick (eds.), *Interests in Goods* (2nd edn., 1998). She is a member of the Joint Nautical Archaeology Policy Committee, which comprises representatives of a wide variety of bodies with an interest in marine archaeology in the UK and which liaises with UK government departments on law, policy and practice in the field. She is also Assistant Editor of the journal *Art, Antiquity and Law* (published by Kluwer Law International) with special responsibility for contributions on the maritime heritage.

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Ole Varmer is an attorney-advisor presently in the US Department of Commerce, National Oceanic and Atmospheric Administration (NOAA) Office of the General Counsel for International Law. He has been at the Commerce Department since 1987, and for eight years provided counsel on marine environmental and historic preservation law including the National Marine Sanctuaries Act, the Abandoned Shipwreck Act, and related cases against treasure salvors. He has worked on designation of several sanctuaries, and drafted the regulations and policies for the protection and management of the underwater cultural heritage in the Florida Keys Sanctuary. He has represented NOAA's environmental and historic preservation interests in various state, national and international forums. He has written several publications on historic preservation law and the protection and management of the underwater cultural heritage and has lectured on the law pertaining to the underwater cultural heritage at Suffolk Law School in Boston and the American University Law School in Washington, D.C., and on law courses offered by the Department of Justice Office of Legal Education.

EDITOR'S INTRODUCTION

In the broadest of terms the underwater cultural heritage may be said to comprise all traces of human existence to be found underwater. Primarily these 'traces' are composed of shipwrecks dating from prehistoric to modern times. Some of these vessels contain treasures of considerable commercial value including porcelain, gold and silver coins, and bullion; others, are of little commercial but great historical value. Other remains evidencing human existence may also be found underwater, such as submerged ports, harbours and settlements, and a few coastal States have major archaeological sites of this kind. Whatever their type, underwater remains tend to be better preserved than land-based remains and are therefore of particular value for the information they can provide about our past. This volume of essays provides a number of national and international perspectives on the legal protection of this heritage. Generally speaking, the essays concentrate upon the marine zone, since the law governing remains found there tends to be rather different from that governing remains found on land and in inland waters.

Undoubtedly there must have always been some interference with wrecks by treasure seekers and souvenir hunters, but in recent years commercial treasure hunters have become highly active in many parts of the world, and they are now able to make use of the latest underwater technologies to search for, and exploit, wrecks. The challenges that such activities pose to those concerned to protect the underwater heritage have nowhere been better explored than in the USA. Its south-east coast has been renowned for several decades as a centre of treasure-hunting activities and often protracted legal battles have arisen in the US courts over ownership and salvage rights. A recent decision which has particular significance, that of the US Supreme Court in the *Brother Jonathan* case, is discussed by Ole Varmer and Caroline Blanco in their contribution on US law. Courts and legislators in other parts of the world will soon be facing their own challenges, since it is clear that the operations of the treasure salvage industry are becoming increasingly global. Some indication of the impact this development may have is provided by two contributors, Porter Hoagland and Bill Jeffery, in the context of south-east Asian and Australasian waters.

While the most manifest threat to the underwater heritage arises from those that seek to systematically plunder underwater sites, harm may also be caused by many of the other human activities that take place in the marine zone. Pressure on coastal environments throughout the world is increasing from land reclamation schemes, the building of marinas and tourist resorts, oil and gas exploration and exploitation, pipeline and cable-laying, dumping and dredging, fishing, and recreational pursuits such as diving and underwater tourism. In many of the essays in this collection, reference is made to the threat posed by such activities. For example, Janet Blake discusses the particular problems that have arisen in Turkey as a result of the enormous expansion in tourism and Wojciech Kowalski refers to the rapid increase in recreational diving that has taken place in Polish waters as a direct consequence of the relaxation of border controls after the break-up of the Soviet block. While the precise circumstances vary in different countries and regions, the general story remains the same: underwater cultural heritage throughout the world faces all kinds of perils and action must be taken if serious damage and destruction is to be avoided.

General consciousness of the underwater cultural heritage and its potential value from an archaeological, and commercial, point of view appears to have arisen in the late 1950s and 1960s when SCUBA became widely available, and diving became a popular recreational activity. In coastal areas where the waters were particularly inviting, such as in the Mediterranean region, the extent of the destruction of sites which took place at this time was devastating, but it is clear that

even in less hospitable waters, such as those of the north-east Atlantic and Baltic Sea, considerable damage also took place. Legal mechanisms to control diving activities had not generally been needed until this time, but suddenly they became urgently required. Some States had general cultural protection laws which – while not designed with the protection of underwater remains in mind – could be applied to the marine environment and provided some level of protection. However, as commented upon by several authors, there have been difficulties in interpreting such legislation, and applying it, in the context of the marine environment. In other States the only applicable legislation was that relating to wreck and salvage, which was designed to encourage the recovery of property from recent maritime casualties and to reunite it with its owners. Such laws were clearly inappropriate for applying to material from historic wrecks. In reaction to the sudden accessibility of the underwater heritage, several countries – including the UK and Australia – introduced special legislation for the protection of underwater sites. However, at a time when marine archaeology lacked respectability even in the archaeological world, it is not surprising that the aims of the legislation were limited and focussed on controlling diving activities on certain wreck sites of particular importance in order simply to regulate excavation operations.

Marine archaeology is now, of course, an established and recognised discipline throughout the world, and marine archaeological remains are generally recognised as being of equal importance to remains on land and as requiring the same standard of legal protection as terrestrial remains. However, exactly how this can be achieved is a question which has no easy answer. For a number of reasons, archaeological remains in the marine environment have different needs from land-based heritage and protective measures have to be designed with this in mind. For example, the interaction of the protective laws with maritime laws has to be taken into account, as has the absence at sea of the equivalent of a landowner or occupier who is able to exercise a strong degree of control over an archaeological site. Esther Zarza Álvarez refers to the fact that the most efficient measures for the protection of Spain's archaeological heritage are those related to the town and country planning system, which are generally unsuitable to the marine environment, and this particular point is echoed in other essays. Where general monuments legislation is used to protect marine remains, there is a danger that the special needs of the underwater heritage may be catered for simply as an after-thought, without sufficient consideration being given to how the measures will work in practice. Some authors have also pointed out that where general legislation is used, there may be inadequate awareness of the underwater heritage amongst those that administer the legislation and consequently it may be afforded a lower priority than its land-based counterpart. On the other hand, separate legislation may not be ideal either. Its provisions may well be drafted without reference to those for land-based remains so that there is no parity or alignment between them and they may be administered by different government departments and agencies. Moreover, such legislation may not carry with it the same level of government funding as land-based heritage legislation. In the late 1980s, quite a number of States introduced new legislation and it is interesting to examine the general structure and approach of these relatively recent measures. For example, while France opted for specific legislation to protect its maritime heritage, Ireland incorporated provisions catering for the underwater heritage into its existing general monuments legislation, and Sweden introduced a new statute which 'seamlessly' integrates protective measures for underwater remains with its provisions for the terrestrial heritage.

The national perspectives in this collection illustrate that there is a clear distinction in approach between States with a common law tradition, such as the UK, USA and Australia, and those with a civil law tradition, such as France, Spain, Greece and Italy. The former tend to pay much more regard to the private interests of owners and salvors, providing for the protection of certain remains of particular importance, and adopting systems allowing for the recovery of material; those with a civil law background tend to favour the public, cultural, interest over private interests, and take a much more protectionist approach, adopting a blanket form of protection aimed at preserving remains *in situ*. This division is reflected in attitudes towards private and public

ownership; issuing of permits; application of salvage law and payment of rewards; and enforcement, including severity of penalties and the bringing of prosecutions. There are, of course, exceptions which cannot be so categorised: the approach of South Africa, discussed here by Hilton Staniland, is interesting since its laws have been influenced by both traditions.

The accessibility of shipwrecks and other archaeological sites lying in coastal waters for a period of some four decades has meant that much of this heritage has already been plundered or destroyed. In more recent years, technological advances have made accessible wrecks on the deepest of ocean floors and there are now fears that these wrecks will suffer the same fate unless urgent action is taken. Patrick O'Keefe reviews the current legal position in international waters and discusses the current UNESCO initiative to create an international convention to protect underwater cultural heritage beyond established territorial limits. However, it is clear that some considerable time is likely to elapse before any new multilateral agreement comes into force and, in the meantime, a number of countries are taking unilateral action. Some of this action is based on the two articles relating to the underwater heritage in the 1982 Law of the Sea Convention. Sweden has enacted certain provisions aimed at fulfilling its duties under article 149 in respect of archaeological and historical objects found in the 'Area', as defined in the Convention. A number of other States have extended their jurisdiction to control activities affecting the underwater heritage beyond the generally accepted twelve mile territorial limit and some have based this extension on article 303(2), which allows coastal States to exercise control over a 24-mile contiguous zone. France has already extended its jurisdiction on this basis and Italy is in the process of doing so. Others, including Australia, Ireland, Spain and China, have extended their jurisdiction even further, presumably relying on the possibility that customary international law might afford their actions a legal basis. Other States, especially the UK and US, take a very different attitude, fearing that such extensions of State jurisdiction might result in an unravelling of the Law of the Sea agreement and provide an excuse for extensions of State jurisdiction in respect of other matters. Nonetheless, the US provides the wreck of the *Monitor*, which lies beyond its territorial limit, with some legal protection as a national marine sanctuary and the UK has also adopted measures to protect wreck sites in international waters. These include participation in, and implementation of, bilateral or interstate agreements in relation to specific wrecks.

Be it on the national or international level, attempts are being made to update laws and revise their implementation in order that they may reflect the latest developments in archaeological thought and practice. It is now widely accepted that the underwater cultural heritage must be treated as a non-renewable resource requiring systematic and non-intrusive assessment, appropriate management and protection *in situ* wherever possible. Those concerned to protect the underwater heritage are also recognising that they need to have an appreciation of the significance of laws other than heritage protection laws and wreck and salvage law. The potential impact of national legal rules on good faith acquisition is referred to by Thomas Adlercreutz in his essay on Sweden and Maria Clelia Ciciriello's essay on Italy gives some indication of the importance that EC/EU law is likely to have in relation to the trading of artefacts between Member States, and between Member States and Third Countries. These matters are complex and difficult to grasp by the non-specialist, but they must not be ignored. Lax national controls on the trading of artefacts, or generous rules on good faith acquisition, may encourage plundering of sites and provide salvors with a forum of convenience in which to dispose of material.

Alongside the increasing recognition of the archaeological viewpoint that is taking place, there is also growing recognition of the need to take into account the interests that others have in the underwater heritage, and indeed of the benefits that may arise from so doing. As the UNESCO draft Convention makes clear, the underwater heritage is to be preserved for the benefit of 'humankind'. As several authors point out, there can be little such benefit if only archaeologists are allowed to have access to the heritage and the results of their research remain unpublicised and uninterpreted. If the public is to have the full benefit of the heritage it must be educated to

appreciate the archaeological value of shipwrecks and other remains. Public education will also provide benefits for the heritage itself. Several authors comment on the income-generating possibilities that arise from harnessing the public's natural interest in shipwrecks and Anastasia Strati, in her essay on Greece, points out that education of the public may prove more effective in encouraging compliance with legal restrictions than the enactment of draconian enforcement measures. The interests of sportsdivers have been referred to by most authors, who have emphasised the valuable role that they can play in reporting discoveries, policing restrictions, and – if appropriately trained – providing an enthusiastic workforce in archaeological operations. The creation of underwater archaeology parks and site grading systems are methods which have been adopted, or are being considered, to accommodate the interests of amateur divers and Nessa O'Connor discusses the activities of a body that has been set up in Ireland for the purpose of co-ordinating the contribution of sportsdivers to legitimate archaeological work.

A further interest group is, of course, the treasure salvage industry. How far its interests should be legally recognised and protected is an extremely contentious issue. Porter Hoagland, in his essay on China, explains that from an economic point of view the value of an archaeological resource can be optimised by policies which encourage the realisation of the value of both the public and private 'attributes' of the resource, in other words, the public heritage value and the private commercial value. As means of achieving this, he refers to the possibility of, for example, auctioning duplicate artefacts and replicas, and 'fair share' agreements. However one views such arrangements, the careful balancing of all interests involved is undoubtedly one of the keys to successful legislation, at either national or international level.

Considerable attention is now focussed on the subject of the underwater cultural heritage and legal mechanisms for its protection. Many encouraging developments are taking place and general awareness of the importance of the underwater heritage is growing rapidly. At the present time, the question at the forefront of many minds is how to provide legal protection for wrecks in international waters, but a number of States are also in the active process of revising laws for the protection of underwater heritage in their coastal waters. In fact, national and international legislative processes have much to learn from one another. International initiatives can have a positive influence on domestic laws, as illustrated by Gwenaëlle Le Gurun, who refers to the strong influence that Council of Europe Recommendation 848 had on the 1989 French legislation and, equally, there is much that those involved in formulating international law can learn from the experiences of States in implementing domestic legislation. While there are clearly many challenges ahead, the material in this collection leads me to believe that the outlook for the underwater heritage at this juncture, between the twentieth and twenty-first centuries, is promising.

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Chapter 1

AUSTRALIA

Bill Jeffery

1. Background to, and Development of, the Law

1.1 Australia's territorial sea

Australia is made up of six states, the Northern Territory and seven external territories.¹ In European terms, prior to 1st January 1901 these states were colonies of Great Britain but after that date they united to form the Commonwealth of Australia (hereafter called Australia) with an Australian Constitution. This is generally referred to as the time of Federation.

In 1973 the Australian government proclaimed the Seas and Submerged Lands Act 1973 which contains two Schedules incorporating the Convention on the Territorial Sea and the Contiguous Zone and the Convention on the Continental Shelf agreed at the United Nations on 29th April 1958. The Act declares Australian sovereignty in the territorial sea (twelve nautical miles), contiguous zone (a further twelve nautical miles out from the territorial sea) and the continental shelf (to a distance of 200 nautical miles from the territorial sea baseline). The low-water mark is the normal baseline for measuring the territorial sea but in some cases where the coastline is deeply indented a line drawn across some bays and joining some islands is used as the baseline. The Schedules, amongst other things, assist in defining the baselines and the nature of the territorial sea, contiguous zone and continental shelf.

The Australian states had held the view for some time that they had sovereignty over three nautical miles of the territorial sea. In 1975 the six states contested the validity of the Seas and Submerged Lands Act 1973 and the outcome on 17th December 1975 was in favour of Australia.² This meant that from low-water mark, or from the closing lines of bays or joining islands (baselines), right around Australia the territorial sea, contiguous zone and continental shelf were deemed to be under the jurisdiction of Australia and not the states. In addition, the sea to the landward side of the baselines is referred to as internal waters and Australia has sovereignty in respect of these waters, with the exception of "waters within the limits of the states" which remain the sovereignty of the states. The effect of the Seas and Submerged Lands Act 1973 and its test in the High Court was that Australian legislation is required for the protection of cultural heritage sites in the territorial sea and internal waters. The Australian states require their own legislation for waters within the limits of the state.

Negotiations between the Australian and state governments after the outcome of the Seas and Submerged Lands Case resulted in an offshore constitutional settlement in which jurisdiction and proprietary rights and title were 'returned' to the states in the coastal waters – within the territorial sea and internal waters – adjacent to the states for a distance of three nautical miles.³ This came about through the proclamation of the Coastal Waters (State Powers) Act 1980 which

¹ The external territories are Norfolk Island; the Territory of Heard and McDonald Islands; the Australian Antarctic Territory; the Territory of Cocos (Keeling) Islands; the Territory of Christmas Island; the Coral Sea Islands Territory; and the Territory of Ashmore and Cartier Islands. See Fig. 1, p.17.

² *New South Wales v. The Commonwealth* [1975] 135 C.L.R. 337.

³ *Port MacDonnell Professional Fisherman's Association v. The State of South Australia* [1989] 168 C.L.R. 340.

gave extra-territorial powers to the states as provided by section 51 (xxxviii) of the Australian Constitution. In relation to legislation affecting certain types of underwater cultural heritage sites, namely shipwrecks, the Australian and state governments agreed to continue to apply the Historic Shipwrecks Act 1976, with amendments proclaimed in 1980 that would allow a state to request to cease its operation in that state if it so desired.⁴

There is an exception to this situation. When the colonies were established in the eighteenth and nineteenth centuries certain Imperial Statutes and Letters Patents defined their limits of jurisdiction. In only one case, i.e. the province of South Australia, did jurisdiction extend to include any sea, being "bays and gulfs".⁵ The limits of all the other colonies were restricted to land. There are only two gulfs, being Spencer Gulf and Gulf St. Vincent and the Australian and South Australian governments agreed upon four South Australian bays as 'historic bays' under the jurisdiction of this state.⁶ This situation makes it necessary for South Australia to proclaim separate state legislation to protect underwater cultural heritage sites located in these waters.⁷ In regard to the other states there are waters within the limits of these states and most have their own state legislation to protect underwater cultural heritage sites. In Victoria, Tasmania, New South Wales and Queensland this is through a general heritage act which also covers terrestrial archaeological sites and buildings.⁸

1.2 Types of sites

The types of cultural heritage sites that are located in Australian territorial waters vary from sites related to the first inhabitants to the present day. While only a little work has been done in regard to investigating aboriginal sites underwater the potential is evident, particularly in the now submerged areas – the major sea level rise began about 10,000 years ago – between Australia and New Guinea, and the mainland and the many islands, such as Tasmania and Kangaroo Island,⁹ as well as in inland waters.¹⁰ Sites associated with the later discovery, exploitation and settlement of the country include the remains of eighteenth and nineteenth century vessels from the port of Macassar in southern Sulawesi;¹¹ the remains of seventeenth and eighteenth century European merchant ships and their cargoes, e.g. the Dutch wrecks;¹² seventeenth – nineteenth century whalers;¹³ and post European settlement (after 1788) remains such as shipwrecks, jetties and wharfs; through to World War II vessels,¹⁴ and aircraft;¹⁵ and present day vessels and aircraft. The oldest shipwreck known to be located in Australian territorial waters is the *Trial*, an English whaler wrecked off the north-western coast in 1622.¹⁶

4 K. Gurney *Maritime Heritage Legislation – Compliance and the Public Interface* (unpublished).

5 Letters Patent 19 February 1836.

6 Commonwealth of Australia *Gazette* 31 March 1987.

7 See (South Australian) Historic Shipwrecks Act 1981, No. 76 of 1981.

8 Victoria: Heritage Act 1995; Tasmania: Historic Cultural Heritage Act 1995; New South Wales: Heritage Act 1977; Queensland: Heritage Act 1992 and Cultural Record (Landscape Queensland and Queensland Estate) Act 1987.

9 N. Tindale and H.A. Lindsay *Aboriginal Australians* (1963) pp. 13-22.

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15 S. Jung 'Archaeological investigations of the Catalina wreck sites in East Arm, Darwin Harbour' (1996) 20 *The Bulletin of the Australian Institute for Maritime Archaeology* pp. 23-40.

16 J.N. Green *Australia's Oldest Wreck: The loss of the Trial, 1622* (1977) BAR Supplementary Series 27.