

SHIP SHAPE OR ALL AT SEA? A PRELIMINARY ASSESSMENT OF AUSTRALIA'S RECENT LEGISLATIVE REFORMS CONCERNING UNDERWATER CULTURAL HERITAGE

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Abstract

The Australian Parliament's new legislation for regulating the protection of Australia's underwater cultural heritage – the *Underwater Cultural Heritage Act 2018* (Cth) – recently received assent. The Act is to commence on a date fixed by Proclamation or, if no such date is fixed, on 25 August 2019. When it commences, the Act will serve to modernise and expand upon the existing regime for protection of specific forms of underwater cultural heritage. The purpose of this article is to provide a preliminary assessment of Australia's recent legislative reforms concerning underwater cultural heritage with a view to determining whether these reforms are likely to succeed in practice. It is ultimately concluded that, for the most part, the Australian Parliament is generally to be congratulated on an Act that is well drafted, structured and easy to understand. So long as sufficient resources and funding are provided to those with responsibility for implementing and administering the Act, it is generally considered that the Act has good prospects of succeeding in practice. Whilst recognising that the new Act represents a significant improvement on its predecessor – the *Historic Shipwrecks Act 1976* (Cth) – and places Australia once more at the very forefront of domestic responses to global calls for legal protection of underwater cultural heritage, this article identifies some deficiencies or inadequacies in the new Act that could be improved, and makes some recommendations for improving those deficiencies or inadequacies.

1 Introduction

On 24 August 2018, the Australian Parliament's new legislation for regulating the protection of Australia's underwater cultural heritage – the *Underwater Cultural Heritage Act 2018* (Cth) (**UCH Act**) – received assent. Assent was also given on this date to the *Underwater Cultural Heritage (Consequential and Transitional Provisions) Act 2018* (Cth) (**UCH Transitional Act**), which addresses the consequential and transitional matters arising from the enactment of the UCH Act.

As at the date of writing, the UCH Act and UCH Transitional Act have not yet commenced. The former is to commence on a date fixed by Proclamation or, if the provisions of the UCH Act do not commence by 24 August 2019, the UCH Act will commence on 25 August 2019.¹ The substantive provisions of the UCH Transitional Act will commence at the same time that s 3 of the UCH Act comes into force.²

The UCH Act is to be underpinned by subordinate legislation known as the Underwater Cultural Heritage Rules (**UCH Rules**).³ At present, the UCH Rules have not been made and, as far as the author is aware, no draft of those rules has been, or is required to be, made publicly available for consultation.

In summary, the key aims or objectives of these UCH law reforms are to:

- a. modernise and expand upon the existing Australian legislative regime for the protection of specific forms of UCH – namely, the protection of historic shipwrecks and relics under the *Historic Shipwrecks*

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¹ *Underwater Cultural Heritage Act 2018* (Cth) s 2.

² *Underwater Cultural Heritage (Consequential and Transitional Provisions) Act 2018* (Cth) s 2.

³ *Underwater Cultural Heritage Act 2018* (Cth) s 61.

Act 1976 (Cth) (**HS Act**) – by repealing the HS Act and replacing it with the UCH Act, which has been drafted to provide for the protection of a greater variety of UCH;⁴

- b. provide a legislative framework for the identification, protection and conservation of Australia's UCH;⁵
- c. enable Australia to implement, in a cooperative manner, its 'national and international maritime heritage responsibilities',⁶ particularly those responsibilities Australia would have under the *UNESCO Convention on the Protection of Underwater Cultural Heritage* (**UNESCO Convention**)⁷ if Australia decided to ratify it;⁸ and
- d. 'promote public awareness, understanding, appreciation and appropriate use of Australia's [UCH]'.⁹

The purpose of this article is to provide a preliminary assessment of Australia's recent legislative reforms concerning UCH with a view to determining whether these reforms are likely to succeed in practice. More specifically, the preliminary assessment conducted in this article will involve examination of the following three questions, the answers to which – it is submitted – will influence the ability of the UCH Act to succeed:

1. What deficiencies or inadequacies in the existing legal regime for protection of specific types of UCH at the Commonwealth level in Australia should the UCH Act be seeking to remedy, and has the UCH Act appropriately remedied those deficiencies or inadequacies? (**Question 1**)
2. Has the UCH Act appropriately addressed the following five key issues that arise in the context of legal protection of UCH:
 - a. the definition of UCH;
 - b. the sovereign immunity of sunken warships and other State-owned vessels;
 - c. the application of the law of salvage to UCH;
 - d. the ownership and abandonment of maritime property that constitutes UCH; and
 - e. the regulation of maritime and other related activities that involve the interaction with, or use of, UCH (**Question 2**).

In order to situate the preliminary assessment conducted in this article in its proper context, this article is structured into four sections. The first section of this article provides some brief commentary on the reasons why there is a need for legal protection of UCH. The second section introduces the HS Act and other pieces of legislation that may be regarded, by inference, as applying to UCH. It then considers the reasons why the HS Act, as well as the wider legal regime for protection of specific types of UCH at the Commonwealth level in Australia, has become deficient or inadequate for protection of UCH in Australia. The third section provides a preliminary analysis of the UCH Act and UCH Transitional Act (as the case may be) with a view to determining whether these reforms are likely to succeed in practice. The structure of that preliminary analysis will not be set out, section-by-section, the content of each of these two Acts. Rather, the preliminary analysis will proceed in the following sequence:

⁴ Explanatory Memorandum, Underwater Cultural Heritage Bill 2018 (Cth) and Underwater Cultural Heritage (Consequential and Transitional Provisions) Bill 2018 (Cth), available at http://parlinfo.aph.gov.au/parlInfo/download/legislation/ems/r6095_ems_603b0427-5576-4e67-90fa-d78302d30a52/upload_pdf/668471.pdf.fileType=application%2Fpdf.

⁵ *Underwater Cultural Heritage Act 2018* (Cth) s 3(a).

⁶ *Underwater Cultural Heritage Act 2018* (Cth) s 3(b).

⁷ *Convention on the Protection of Underwater Cultural Heritage*, opened for signature 11 February 2001, 41 ILM 40 (entered into force 2 January 2009) ('*UNESCO Convention*').

⁸ Australia is not a party to the *UNESCO Convention* and has not ratified it. However, in the Minister's Second Reading Speech introducing the Underwater Cultural Heritage Bill 2018 (Cth), the Minister indicated that much of the content of the Bill resulted from 'Australia's consideration of ratification of the [*UNESCO Convention*]'. The Minister's Second Reading Speech did not go further to suggest that the purpose of the Bill was to ratify the *UNESCO Convention*. Further, in the Explanatory Memorandum to the Bill, it was also not stated that the purpose of the Bill was to ratify the *UNESCO Convention*; instead it was said that the Bill 'modernises the regulatory framework to protect Australia's underwater cultural heritage and includes measure to align the legislation with current international best practice standards for the protection and management of underwater cultural heritage as defined by the [*UNESCO Convention*]'.

⁹ *Underwater Cultural Heritage Act 2018* (Cth) s 3(c).

- a. provide an introduction to each of the five key issues that are identified in Question 2 above, so as to enable an understanding of each of those issues to be developed;
- b. analyse how the UCH Act and the UCH Transitional Act (as the case may be) have addressed each of those five key issues; and
- c. analyse whether the UCH Act and the UCH Transitional Act (as the case may be) have appropriately remedied the deficiencies or inadequacies of the HS Act, as well as the wider legal regime for protection of specific types of UCH at the Commonwealth level in Australia (as per Question 1 above).

The fourth section of the article provides some concluding remarks in relation to the matters discussed in the earlier sections of the article, and summarises the key findings reached in this article.

2 Why Is There A Need for Legal Protection Of UCH?

In order to answer the question of why there is a need for protection of UCH, one must first have an appreciation of what UCH means. The task of defining UCH is often a difficult and controversial one.¹⁰ For the purposes of the discussion which follows in *this section* of this article only, the following (broad and refined) definition of UCH articulated by O'Keefe will be adopted as a *working* definition: 'the [UCH] consists of traces of human activity from past epochs [that are located underwater]'.¹¹

UCH has existed in the world's seas and oceans for centuries.¹² The main form of UCH that exists in the world's seas and oceans is shipwrecks and the cargoes associated with those wrecks, although UCH can also take other forms.¹³

Until the latter half of the 20th century, it was generally the case that the only body of law that applied to UCH was maritime law and, more specifically, the laws of salvage and derelict (or finds).¹⁴ The laws of salvage and derelict are well explained elsewhere in the literature.¹⁵ It suffices here to briefly summarise the essence of each of these areas of maritime law.

First, in relation to the laws of salvage, the notion of salvage, at its core, involves the 'rendering of assistance to vessels and their cargo in distress at sea, whether afloat, shipwrecked or sunken'.¹⁶ The overarching objective of salvage and the law that regulates it is to 'encourage persons to render prompt, voluntary, and effective service to ships at peril or in distress by assuring them compensation and reward for their salvage efforts'.¹⁷ Having regard to the harmonised legal regime for salvage created by the *International Convention on Salvage 1989 (1989 Salvage Convention)*¹⁸ and the existing common law position in Australia, it is evident that there are five essential elements for being able to successfully establish a claim of salvage:

¹⁰ Craig J S Forrest, 'Defining 'underwater cultural heritage'' (2002) 31 *International Journal of Nautical Archaeology* 3, 3.

¹¹ Patrick J O'Keefe, 'Protecting the underwater cultural heritage: The International Law Association Draft Convention' (1996) 20 *Marine Policy* 297, 297.

¹² For a useful overview of the forms of UCH that have been identified in different periods of human history, see generally Hance Smith and Alastair Couper, 'The management of the underwater cultural heritage' (2003) 4 *Journal of Cultural Heritage* 25.

¹³ See Smith and Couper, above n 12, 25-29.

¹⁴ The law of finds is commonly referred to in the United States, whereas the law of derelict is referred to in Australia and the United Kingdom: see Michael White, *Australian Maritime Law* (Federation Press, 3rd ed, 2014) 456.

¹⁵ On the law of salvage and derelict generally, see, eg, William Tetley, *International Maritime and Admiralty Law* (International Shipping Publications, 2002) ch 8 (written from an international and comparative law perspective) and Martin Davies and Anthony Dickey, *Shipping Law* (Thomson Reuters, 4th ed, 2016) ch 20 and 21 (written from a predominantly Australian perspective). For a detailed explanation of the interaction between laws addressing salvage, finds and UCH, see, eg, Sarah Dromgoole, *Underwater Cultural Heritage and International Law* (Cambridge University Press, 2013) 167-209 and Craig Forrest, *International Law and the Protection of Cultural Heritage* (Routledge, 2010) 287-361.

¹⁶ J Ashley Roach, 'Shipwrecks: Reconciling Salvage and Underwater Archaeology' in Myron H Nordquist and John Norton Moore (eds), *Oceans Policy: New Institutions, Challenges and Opportunities* (Martinus Nijhoff Publishers, 1999) 305, 314.

¹⁷ *RMS Titanic Inc v Haver*, 171 F 3d 943, [23] (4th Cir, 1999).

¹⁸ *International Convention on Salvage*, opened for signature 28 April 1989, 1953 UNTS 194 (entered into force 14 July 1996) ('1989 Salvage Convention'). Australia is a party to the *1989 Salvage Convention*. For a comprehensive review of this international convention, see generally Nicholas Gaskell, 'The 1989 Salvage Convention and the Lloyd's Open Form (LOF) Salvage Agreement 1990' (1991) 16 *Tulane Maritime Law Journal* 1, 1-76 and Edgar Gold, 'Marine Salvage: Towards a New Regime' (1989) 20 *Journal of Maritime Law and Commerce* 487, 497-502.

1. salvage services can only be performed in respect of maritime property,¹⁹ including a ship (or wreck) itself, its cargo or freight;²⁰
2. the salvage act performed must be voluntary in the sense that it is not performed as part of some public or contractual duty,²¹ and the owner of the maritime property must not expressly reject the salvage services that are offered;²²
3. the salvage operation must involve an element of danger, not only in the sense that salvage is performed in respect of maritime property in peril at sea, but also that the salvage operation itself is dangerous;²³
4. subject to some limited exceptions in the case of environmental salvage,²⁴ the salvor must be successful in saving the maritime property that is in danger or contribute towards that success;²⁵ and
5. the maritime property that is salvaged must be in a location that is subject to salvage law and Admiralty jurisdiction.²⁶

Having regard to these essential elements of the law of salvage, one may well question whether it can ever be said that articles of UCH, in the form of historic shipwrecks and cargoes that have been located on the seabed for centuries, are in peril at sea such that, if the other elements of salvage are satisfied, the salvor is entitled to recompense or reward for their efforts.²⁷

The general maritime law that has been developed by many courts exercising Admiralty jurisdiction in the United States, the United Kingdom and Australia has recognised that historic shipwrecks can be subject to salvage operations and claims.²⁸ In the cases decided by these courts, vessels that have sunk to the bottom of the sea or have been broken up have been recognised as salvable maritime property.²⁹ Advocates of this position (who are also generally advocates of the application of salvage to UCH) contend that such maritime property is salvable because a wreck, even if on the seabed for centuries, still remains in a state of peril in that it can be lost through the actions of the elements of the sea.³⁰

By contrast, opponents of this position (who are also generally opponents of the application of salvage to UCH) contend that a wreck on the seabed is no longer in a state of peril.³¹ Such opponents go further by pointing out that the very operation of attempting to salvage such a wreck (and its associated articles) actually puts the wreck into a state of peril.³² This is so for several reasons, including:

1. the conduct of salvage activities has, at least traditionally, involved professional salvors utilising the most efficient methods to remove maritime property which may constitute UCH in order to minimise the costs of salvage³³ (which is unquestionably an expensive endeavour);³⁴

¹⁹ 1989 *Salvage Convention*, art 1. See also Tetley, above n 15, 328.

²⁰ Davies and Dickey, above n 15, 864.

²¹ 1989 *Salvage Convention*, arts 5 and 6. See also *The Neptune* (1824) 1 Hagg Adm 227.

²² See generally Davies and Dickey, above n 15, 884-886.

²³ 1989 *Salvage Convention*, art 1. See also *The Phantom* (1866) LR 1 A & E 58, 60.

²⁴ 1989 *Salvage Convention*, art 14.

²⁵ 1989 *Salvage Convention*, art 12. See also *The Mbashi* [2002] 2 Lloyd's Rep 602, 607.

²⁶ 1989 *Salvage Convention*, art 2. See also Tetley, above n 15, 333.

²⁷ This is a matter that has previously been subject to much discussion in the literature: see, eg, Ole Varmer, 'The Case Against the "Salvage" of the Cultural Heritage' (1990) 30 *Journal of Maritime Law and Commerce* 279, 280-281; Craig J S Forrest, 'Has the Application of Salvage Law to Underwater Cultural Heritage Become a Thing of the Past?' (2003) 34 *Journal of Maritime Law and Commerce* 309, 329-331 and Ben Juvelier, "'Salvaging" History: Underwater Cultural Heritage and Commercial Salvage' (2017) 32 *American University International Law Review* 1023, 1038-1041.

²⁸ See Davies and Dickey, above n 15, 905 and Juvelier, above n 27, 1038-1039.

²⁹ See, eg, *Morris v Lyonesse Salvage Co* [1970] 2 Lloyd's Rep 59 (salvage of derelict which was 260 years old) and *Robinson v Western Australian Museum* (1977) 138 CLR 283 (salvage of derelict which was over 300 years old).

³⁰ Juvelier, above n 27, 1039; White, above n 14, 498.

³¹ Varmer, above n 27, 280-281.

³² See, eg, Anastasia Strati, 'Protection of the Underwater Cultural Heritage: From the Shortcomings of the UN Convention on the Law of the Sea to the Compromises of the UNESCO Convention' in Anastasia Strati, Maria Gavouneli and Nikos Skourtos (ed), *Unresolved Issues and New Challenges to the Law of the Sea* (Martinus Nijhoff Publishers, 2006) 21, 42; Varmer, above n 27, 280-281.

³³ Robert Miller, 'Charting the Future of Historic Shipwreck Legislation in California: Application of the English Model in the Salvage of the *Brother Jonathan*' (1994) 17 *Hastings International and Comparative Law Review* 793, 796.

³⁴ Geoffrey Brice, 'The Law of Salvage: A Time for Change? "No Cure-No Pay" No Good?' (1999) 73 *Tulane Law Review* 1831, 1834-1835.

2. the most efficient method for removing maritime property of this nature is through the use of techniques such as 'blasting, dredging, winching, and blow torching',³⁵ and the employment of such techniques could have the effect of seriously or irreparably damaging any maritime property that is to be salvaged, or actually place it in marine peril;³⁶ and
3. further, because such maritime property is likely to have already adapted to its new underwater environment, any attempt to move the wreck from that environment will threaten its stability due to exposure to the water column and oxygen.³⁷

It is notable that Admiralty jurisdictions in States such as Canada, Finland, Singapore and the Republic of Ireland have taken the view that wrecks of an historic nature located on the seabed are not in a state of peril.³⁸

It is not necessary to resolve, for the purposes of this article, the question of whether – as a general proposition – maritime property that may constitute UCH, such as historic shipwrecks, should be regarded as being in a state of peril at sea. Much has been written on that subject already.³⁹ Rather, the point that should be appreciated for the purposes of the discussion that follows in this article is that Admiralty jurisdictions both within and between States have answered the question in different ways. Given this, it seems highly desirable (if not essential) for domestic legislation to circumvent the conflicting observations made in the general maritime law in response to the question by definitively adopting a position, one way or the other, as to whether or not the law of salvage applies to UCH, either with respect to UCH generally or UCH that meets particular criteria warranting protection under law. In section 4 of this article, the issue of how the Australian Parliament has chosen to address this question in its recent UCH law reforms will be considered.

Secondly, in relation to the law of derelict (or finds), a finder of maritime property will lay claim to that property on the basis that the property has either never been owned by anyone or has been abandoned by the owner.⁴⁰ In the latter case, the finder (who is often a treasure hunter) will generally allege that the owner has no intention of returning the claim the abandoned property.⁴¹ Thus, in contrast to salvage law, where the intention of the salvor is to obtain recompense or reward for the efforts expended in saving maritime property, the intention of a finder is, in accordance with the law of derelict, to obtain legal title to the maritime property that has been found.⁴²

It cannot be disputed that the laws of salvage and derelict are not concerned with advancing what is almost invariably a primary goal of UCH law: that is, the *in situ* protection of UCH.⁴³ Rather, each of these areas of maritime law are concerned with returning maritime property into the stream of maritime commerce.⁴⁴ In light of this, then, it may readily be accepted that, until early forms of UCH law emerged in the latter half of the 20th century, there was no body of law that existed which promoted or required the *in situ* protection of UCH. But why was the emergence of a body of laws for *in situ* protection of UCH necessary?

The answer to this question was (and remains) relatively simple: in the absence of a body of laws designed to give effect to *in situ* protection of UCH, there was a significant risk that vast amounts of UCH could be pillaged or destroyed through the maritime activities (lawful, moral or otherwise) of living generations of humans which, in turn, serves to diminish the knowledge and understanding of both living and successive future generations of humans about how members of past generations lived and interacted with the sea.⁴⁵ Of course, the maritime activities that give rise to this risk are not just limited to salvage or treasure hunting activities. Examples of

³⁵ Miller, above n 33, 796.

³⁶ Varmer, above n 27, 280-281.

³⁷ Ibid.

³⁸ See Juvelier, above n 27, 1038-1041 and cases discussed therein.

³⁹ See, eg, Varmer, above n 27 and Forrest, above n 27.

⁴⁰ See, eg, Gerard J Mangone, *United States Admiralty Law* (Kluwer Law International, 1997) 226 and Anastasia Strati, *The Protection of Underwater Cultural Heritage: An Emerging Objective of the Contemporary Law of the Sea* (Martinus Nijhoff Publishers, 1995) 45.

⁴¹ Mangone, above n 40, 226.

⁴² Ibid.

⁴³ At its highest, it can be contended that the law of salvage has, on occasion, been adapted to require the application of UCH retrieval techniques that respect the historical or similar values of UCH: see, eg, Geoffrey Brice, 'Salvage and the underwater cultural heritage' (1996) 20 *Marine Policy* 337 and David J Bederman, 'Historic Salvage and the Law of the Sea' (1998) 30 *Inter-American Law Review* 99. However, neither Brice nor Bederman contend that the law of salvage promotes *in situ* protection of UCH; indeed, the law of salvage is antithetical to *in situ* protection.

⁴⁴ Forrest, above n 27, 344-346.

⁴⁵ O'Keefe, above n 11, 297.

maritime activities giving rise to the risk of destruction of UCH include the disposal of waste into the marine environment, resource developments on the seabed and other anthropogenic uses of the world's oceans and seas.

The significance of the risk of UCH being pillaged or destroyed through maritime activities was heightened in the four decades following World War II.⁴⁶ During this period, technological advances in ocean exploration, recreational diving and other areas exacerbated the threat of maritime activities conducted by humans destroying or harming UCH.⁴⁷ Treasure hunters and salvors were equipped with technologies far more advanced than ever before to venture into depths of the ocean and seabed that were previously unexplored in order to salvage or recover maritime property, a development that was underscored by the discovery of the wreck of the *RMS Titanic* in 1985.⁴⁸ It was also during this period that the new scientific discipline of maritime archaeology emerged,⁴⁹ which had as its subject the study of 'the material remains of human activities on the seas and interconnected waterways'.⁵⁰ The emergence of this new scientific discipline provided impetus for the development of laws to protect UCH *in situ*.⁵¹ Unlike treasure hunters and other stakeholders with commercial motives, maritime archaeologists wished to utilise technological advancements for gaining 'greater access to maritime archaeology, scientific knowledge, and preservation techniques'.⁵²

Laws for the protection of UCH were developed during the four decades following World War II, both internationally (in the form of articles 149 and 303 of the *UN Convention on the Law of the Sea (LOSC)*)⁵³ and domestically (such as the HS Act in Australia), although the development of such domestic laws was generally quite patchy.⁵⁴ It was not until 2001 that an international convention dedicated to protection of UCH – i.e. the UNESCO Convention – was adopted.⁵⁵ Both before and after the finalisation of the text of the UNESCO Convention, numerous key issues concerning the scope and purpose of UCH law have been discussed in the academic literature. These issues will be considered in section 4 of this article in the context of analysing the provisions of the UCH Act and associated laws addressing UCH at the Commonwealth level in Australia.

3 Deficiencies and Inadequacies of the Historic Shipwrecks Act⁵⁶ and the Wider Legal Regime

3.1 Overview of Existing UCH Law at the Commonwealth Level in Australia

The HS Act is the only piece of legislation at the Commonwealth level in Australia that expressly addresses the protection of UCH, albeit only specific types of UCH. Other legislation that may, by inference, be regarded as addressing UCH includes: the EPBC Act, the *Navigation Act 2012 (Cth) (Navigation Act)*, the *Australian Heritage Council Act 2003 (AHC Act)*, the *Aboriginal and Torres Strait Islander Heritage Protection Act 1984 (ATSHP Act)* and the *Protection of Moveable Cultural Heritage Act 1986 (PMCH Act)*.⁵⁷ The substantive

⁴⁶ See Yoshiaki Kaoru and Porter Hoagland, 'The value of historic shipwrecks: Conflicts and management' (1994) 22 *Coastal Management* 195, 195.

⁴⁷ Forrest, above n 15, 27.

⁴⁸ See generally Cynthia Furrer Newton, 'Finders Keepers? The *Titanic* and the 1982 Law of the Sea Convention' (1986) 10 *Hastings International and Comparative Law Review* 159, 159-164.

⁴⁹ Through pioneering works such as those of Muckelroy: see Keith Muckelroy, *Maritime archaeology* (Cambridge University Press, 1978) 4-6.

⁵⁰ David Gibbins and Jonathan Adams, 'Shipwrecks and maritime archaeology' (2001) 32 *World Archaeology* 279, 279.

⁵¹ See, eg, Craig Forrest, 'A New International Regime for the Protection of Underwater Cultural Heritage' (2002) 51 *International and Comparative Law Quarterly* 511, 512-513.

⁵² Guido Carducci, 'New Developments in the Law of the Sea: The UNESCO Convention on the Protection of Underwater Cultural Heritage' (2002) 96 *American Journal of International Law* 419, 421.

⁵³ *United Nations Convention on the Law of the Sea*, opened for signature 10 December 1982, 1833 UNTS 398 (entered into force on 16 November 1994). Articles 149 and 303 of this convention have been subject to much commentary and analysis. For a more detailed account of the provisions, see, eg, the material cited in Forrest, above n 51, 513 (fn 14) and Tullio Scovazzi, 'The Law of the Sea Convention and Underwater Cultural Heritage' (2012) 27 *International Journal of Marine and Coastal Law* 753.

⁵⁴ See, eg, Dromgoole, above n 15, 67 et seq (for discussion of early examples of domestic legislation).

⁵⁵ This article will not provide a detailed account of the *UNESCO Convention*. That has been done elsewhere: see, eg, Forrest, above n 51; Sarah Dromgoole, '2001 UNESCO Convention on the Protection of the Underwater Cultural Heritage' (2003) 18 *International Journal of Marine and Coastal Law* 59 and Markus Rau, 'The UNESCO Convention on Underwater Cultural Heritage and the International Law of the Sea' in J A Fowein and R Wolfrum (eds), *Max Planck Yearbook of United Nations Law* (Martinus Nijhoff Publishers, Volume 6, 2002) 387. Rather, relevant provisions in the *UNESCO Convention* will be examined, for the purposes of comparative analysis, in discussing the provisions of the UCH Act in the third section of this article.

⁵⁶ For general commentary on the *Historic Shipwrecks Act 1976 (Cth)*, see Davies and Dickey, above n 15, 916-919; Bill Jeffery, 'Historic Shipwrecks Legislation' in Mark Staniforth and Michael Nash (eds), *Maritime Archaeology: Australian Approaches* (Springer, 2006) 123, 125-127; and White, above n 14, 305-306.

⁵⁷ See also Jeffery, above n 56, 130-131.

content of each of these Acts, as potentially relevant to UCH, is briefly summarised in section 3.1 before exploring, in section 3.2, the reasons why reform was needed.

3.1.1 Historic Shipwrecks Act

The HS Act generally protects a range of historic shipwrecks and relics located in Australia's territorial sea and in waters above the continental shelf of Australia that are of historic significance.⁵⁸ Pursuant to proclamations made under s 2(1), the HS Act applies to the waters adjacent to the coasts of all States and territories, including external territories.⁵⁹

The HS Act was, for the most part, a response to the decision of the High Court in *Robinson v Western Australian Museum* (1977) 138 CLR 283, where a majority of the Court held that it was, for constitutional reasons, beyond the legislative power of Western Australia to legislate in respect of historic shipwrecks located in the territorial sea of Australia, which Western Australia had attempted to do through the passing of the *Maritime Archaeology Act 1973* (Cth).⁶⁰ In order to respect the *Constitution's* division of legislative power between the Commonwealth and the States, the HS Act does not apply above the landward limits of Australia's territorial sea.⁶¹ Rather, the State and Territory Acts addressing protection of historic shipwrecks and relics (either specifically or generally) apply to such UCH located above the low-water mark or any proclaimed baseline.⁶² The respective roles and responsibilities of the Commonwealth, the States and the Northern Territory in protecting and managing Australia's UCH have been further clarified by the Australian UCH Intergovernmental Agreement that was agreed in 2010.⁶³

In terms of the scope of 'historic shipwrecks' that are protected under the HS Act, it is apparent that, when one has regard to the multiple relevant definitions contained in s 3 of the HS Act, the 'historic shipwrecks' subject to the HS Act are the remains of any ship:

1. lying off the coast of Western Australia which had belonged to the old Dutch East India Company;
2. of special significance to Papua New Guinea which the Minister has declared to be a 'Papua New Guinea shipwreck';
3. which is at least 75 years old, lies off the coast of Australia which the Minister has declared to be a historic shipwreck; and
4. of historical significance lying off the coast of Australia which the Minister has declared to be a historic shipwreck.⁶⁴

Davies and Dickey have accurately noted that, in effect, the definition of 'historic relic' in the HS Act captures any article from a 'historic shipwreck', or from a ship that is at least 75 years old, which has been declared to be a historic relic.⁶⁵

In terms of substantive provisions and protections, the HS Act has the following key elements:

1. The conferral of a power to declare UCH meeting the definition of an 'historic shipwreck' or 'historic relic' under the HS Act to be protected under the HS Act either permanently or provisionally,⁶⁶ as well

⁵⁸ See generally *Historic Shipwrecks Act 1976* (Cth) s 5(1) and s 3(1) (definition of 'Australian waters').

⁵⁹ *Historic Shipwrecks Act 1976* (Cth) s 3.

⁶⁰ For a useful discussion of the case, see Patrick J O'Keefe, 'Maritime archaeology and salvage laws: Some comments following *Robinson v The Western Australian Museum*' (1978) 7 *International Journal of Nautical Archaeology and Underwater Exploration* 3, 3-7.

⁶¹ Davies and Dickey, above n 15, 916.

⁶² See *Historic Shipwrecks Act 1981* (SA); *Maritime Archaeology Act 1973* (WA); *Heritage Act 1977* (NSW), Pt 3C; *Heritage Act 2017* (Vic), Pt 4; *Queensland Heritage Act 1992* (Qld), Pt 9; *Historic Cultural Heritage Act 1995* (Tas), Pt 9; *Heritage Act* (NT).

⁶³ Australian Government, *Australian Underwater Cultural Heritage Intergovernmental Agreement* <www.environment.gov.au/heritage/publications/australian-underwater-cultural-heritage-intergovernmental-agreement> (accessed 23 September 2018).

⁶⁴ See also Davies and Dickey, above n 15, 917.

⁶⁵ *Ibid.*

⁶⁶ *Historic Shipwrecks Act 1976* (Cth) ss 5 and 6. In this regard, it is noted that, in 1993, the Minister administering the *Historic Shipwrecks Act 1976* (Cth) made a declaration of 'blanket protection' for all shipwrecks that are at least 75 years old and their associated articles, and articles (associated with a ship) that entered Australian or Commonwealth waters at least 75 years ago: see Australian Government,

as the power to declare an area containing such protected UCH to be a 'protected zone' under the HS Act.

2. The creation of a prohibition which makes it an offence for any person to engage in conduct which, in effect, harms, damages or interferes with an 'historic shipwreck' or 'historic relic' that is protected under the HS Act,⁶⁷ unless a permit has been obtained from the Minister.⁶⁸
3. The creation of a prohibition⁶⁹ that makes it an offence for any person to take salvage or exploration equipment into, or engage in certain activities within, a 'protected zone',⁷⁰ unless a permit has been obtained from the Minister.⁷¹
4. An obligation on any person who finds, in a fixed position, the remains of any ship or any articles from a ship, either in Australian waters or on Australia's continental shelf, to provide the Minister with information about the discovery as soon as practicable.⁷²
In accordance with the other provisions of the HS Act, the Minister may decide to declare the article or wreck to be protected under the HS Act. The Minister may also declare that ownership of the discovered maritime property is vested in the Commonwealth, a State, or a specified country, authority or person, as the Minister considers appropriate.⁷³ If a declaration of ownership as to the discovered maritime property is so made, and results in the acquisition of property from a person within the meaning of s 51(xxxi) of the *Constitution*,⁷⁴ the Commonwealth is liable to pay compensation to that person.⁷⁵

The person who discovered the relevant maritime property may be rewarded.⁷⁶

5. The conferral of various powers on the Minister to ascertain the location of historic shipwrecks and relics,⁷⁷ and to give directions in relation to a person's possession, custody or control of part of a historic shipwreck or a historic relic.⁷⁸
6. The maintenance of a Register of Historic Shipwrecks that records the particulars of all known historic shipwrecks and relics protected by the HS Act and any notices of protected zones declared under the HS Act.⁷⁹
7. The creation of a compliance and enforcement regime.⁸⁰

3.1.2 Environment Protection and Biodiversity Conservation Act

The EPBC Act is the main environmental statute at the Commonwealth level in Australia.⁸¹ The EPBC Act takes the approach of identifying a series of matters that are considered to be of 'national environmental significance' (NES).⁸² Any matter that is recognised as a matter of NES is afforded protection by the EPBC Act on the basis that the legislation prohibits persons from taking any action that has, will have or is likely to have a significant impact on a matter of NES.⁸³ That prohibition may, however, be lifted in circumstances where a

Australia's Maritime Heritage – Review of the Historic Shipwrecks Act 1976 and consideration of the requirements arising from the UNESCO 2001 Convention for the Protection of the Underwater Cultural Heritage (Discussion Paper, June 2009) 10.

⁶⁷ *Historic Shipwrecks Act 1976* (Cth) s 13.

⁶⁸ *Historic Shipwrecks Act 1976* (Cth) s 15.

⁶⁹ *Historic Shipwrecks Act 1976* (Cth) s 14(1)(a) and *Historic Shipwrecks Regulations 2018* (Cth) r 8(1)(a).

⁷⁰ As to which, see *Historic Shipwrecks Act 1976* (Cth) s 7.

⁷¹ *Historic Shipwrecks Act 1976* (Cth) s 15.

⁷² *Historic Shipwrecks Act 1976* (Cth) s 17(1).

⁷³ *Historic Shipwrecks Act 1976* (Cth) s 20.

⁷⁴ For an explanation of s 51(xxxi) of the *Constitution*, see generally George Williams, Sean Brennan and Andrew Lynch, *Blackshield and Williams Australian Constitutional Law and Theory: Commentary and Materials* (Federation Press, 7th ed, 2018) 1298-1327.

⁷⁵ *Historic Shipwrecks Act 1976* (Cth) s 21.

⁷⁶ *Historic Shipwrecks Act 1976* (Cth) s 18.

⁷⁷ *Historic Shipwrecks Act 1976* (Cth) s 10.

⁷⁸ *Historic Shipwrecks Act 1976* (Cth) s 11.

⁷⁹ *Historic Shipwrecks Act 1976* (Cth) s 12.

⁸⁰ See generally *Historic Shipwrecks Act 1976* (Cth) ss 23-29.

⁸¹ Gerry Bates, *Environmental Law in Australia* (LexisNexis Butterworths, 9th ed, 2016) 181.

⁸² *Environment Protection and Biodiversity Conservation Act 1999* (Cth) Ch 2, Pt 3.

⁸³ *Environment Protection and Biodiversity Conservation Act 1999* (Cth) ss 67 and 67A.

person applies for,⁸⁴ and obtains,⁸⁵ authorisation under the EPBC Act to carry out an action that has such an impact. The grant of such an authorisation would only take place after an environmental assessment and consultation process is followed.⁸⁶

When one reads the provisions of the EPBC Act addressing matters of NES, it is evident that UCH may fall within the purview of the EPBC Act.⁸⁷ For example, 'National Heritage places' located on the National Heritage List maintained under the EPBC Act are categorised as matters of NES.⁸⁸ At the time of writing, it is apparent that there is one UCH site that is afforded protection as a matter of NES under the EPBC Act on account of it being listed on the National Heritage List – i.e. the *Batavia* Shipwreck Site and Survivor Camps Area 1629 – Houtman Abrolhos.⁸⁹

3.1.3 Navigation Act

Chapter 7 of the Navigation Act addresses the topic of wrecks and salvage. The word 'wreck' is given a very broad definition in the Navigation Act,⁹⁰ and embraces derelict or abandoned vessels, and jetsam, flotsam and lagan.⁹¹ However, the Navigation Act also contains a definition of a more narrow species of 'wreck' – that is, an 'historic wreck'. The phrase 'historic wreck' is defined in s 14 of the Navigation Act to mean either an historic shipwreck or relic within the meaning of the HS Act.

The distinction between 'wreck' generally and 'historic wreck' specifically is an important one to make in the context of the Navigation Act. On the one hand, in relation to 'wreck' generally, the Australian Maritime Safety Authority (AMSA) is vested with some rather extensive powers by s 229 of the Navigation Act. Those powers include, for example, the power to require the legal owner of a wreck to remove or mark the wreck.⁹² Yet, on the other hand, in relation to 'historic wrecks' specifically, the AMSA has a much more limited set of powers.⁹³ The main observation to be made in this regard is that the AMSA is prohibited from exercising its powers under s 229 of the Navigation Act in relation to an 'historic wreck' (as well as equivalent wrecks under State or Territory legislation) unless, in the AMSA's opinion, the exercise of those powers is necessary to either save human life, secure the safe navigation of a vessel or to deal with an emergency situation that poses a serious threat to the environment.⁹⁴

Part 3 of Chapter 7 of the Navigation Act addresses salvage. The starting position for application of the provisions contained therein is outlined in s 240(1) of the Navigation Act, which states:

- (1) Subject to subsections (2) and (3), this Part applies:
 - (a) to all vessels; and
 - (b) whenever judicial or arbitral proceedings relating to the provision of salvage operations are brought in Australia.

For the moment, subsections (2) and (3) are left aside. Focussing on the remainder of the content of s 240(1) of the Navigation Act, it is noteworthy here that s 240(1)(a) of the Navigation Act does not expressly refer to Part 3 of Chapter 7 as applying to 'wrecks'; rather, reference is only expressly made to 'vessels'. In this respect, the Navigation Act appears to clearly distinguish between vessels and *wrecks* of vessels. However, given that the definition of a 'wreck' in the Navigation Act includes 'a vessel that is wrecked, derelict, stranded, sunk or abandoned or that has foundered',⁹⁵ it is evident that the reference to a 'vessel' in s 240(1)(a) of the Navigation

⁸⁴ *Environment Protection and Biodiversity Conservation Act 1999* (Cth) s 68.

⁸⁵ *Environment Protection and Biodiversity Conservation Act 1999* (Cth) ss 130 and 133.

⁸⁶ *Environment Protection and Biodiversity Conservation Act 1999* (Cth) Ch 4, Pt 8.

⁸⁷ See also Jeffery, above n 56, 130.

⁸⁸ *Environment Protection and Biodiversity Conservation Act 1999* (Cth) ss 15B and 15C.

⁸⁹ Australian Government (Department of the Environment and Energy), *National Heritage Places – Batavia Shipwreck Site and Survivor Camps Area 1629 – Houtman Abrolhos* <<http://www.environment.gov.au/heritage/places/national/batavia>> (accessed 9 December 2018). This protected site attracts numerous tourists, and was featured in recent years in a television documentary hosted by a well-known English television actor: see Seven Network, 'Episode 2 – Segment on Abrolhos Islands', *Martin Clunes: Islands of Australia*, 14 October 2016 (Martin Clunes).

⁹⁰ Davies and Dickey, above n 15, 909.

⁹¹ *Navigation Act 2012* (Cth) s 14 (definition of 'wreck').

⁹² *Navigation Act 2012* (Cth) s 229(1)(a) and (b).

⁹³ *Navigation Act 2012* (Cth) ss 238 and 239.

⁹⁴ *Navigation Act 2012* (Cth) s 238(2).

⁹⁵ *Navigation Act 2012* (Cth) s 14.

Act could arguably be read to include 'wrecks'.⁹⁶ In respect of s 240(1)(b) of the Navigation Act, it is the case that general maritime claims relating to salvage may be brought in the Admiralty jurisdiction of the Federal Court (and also the Supreme Courts of the Australian states) under the *Admiralty Act 1988* (Cth).⁹⁷

Returning to subsections (2) and (3), subsection (2) of s 240 of the Navigation Act is irrelevant in the context of this article: that subsection is concerned with excluding the application of the law of salvage to certain forms of infrastructure that are used to engage in activities concerning the exploration, exploitation or production of mineral resources located on the seabed or its subsoil. However, s 240(3) of the Navigation Act is relevant. It relevantly provides:

(3) This Part does not apply to any salvage operation:

...

(c) to the extent that it involves property:

- (i) that is maritime cultural property of prehistoric, archaeological or historic interest; and
- (ii) that is situated on the seabed.

Three comments may be made about this provision.

First, it is clearly designed to give effect to the reservation made by Australia under Article 30(1)(d) of the 1989 Salvage Convention to the effect that Australia will not apply the 1989 Salvage Convention to the specific forms of UCH mentioned in Article 30(1)(d).

Secondly, whilst the words used in s 240(3)(c) of the Navigation Act accord with the words used in Article 30(1)(d) of the 1989 Salvage Convention with respect to making a reservation, the interaction between the types of maritime property referred to in s 240(3)(c) on the one hand, and the forms of UCH that are afforded protection by the HS Act on the other, is quite uncertain. When considering s 240(3)(c) against the protections afforded by the HS Act to particular forms of UCH, it would be reasonable to adopt the position that any historic shipwreck or relic that is protected by the HS Act will constitute 'maritime cultural property of ... historic interest'. Given the use of the disjunctive 'or' in s 240(3)(c)(i) of the Navigation Act, the fact that an historic shipwreck or relic protected under the HS Act is 'maritime cultural property of ... historic interest' will be sufficient to see the historic shipwreck or relic fall within s 240(3)(c)(i). The conjunctive 'and' is used between limb (i) and limb (ii) in s 240(3)(c) of the Navigation Act. This means that, in order for salvage operations to be rendered inapplicable to historic shipwrecks or relics protected by the HS Act, satisfying limb (i) in s 240(3)(c) is not enough; it is necessary to also satisfy limb (ii). On limb (ii), it would also be reasonable to adopt the position that, so long as the historic shipwreck or relic that is protected under the HS Act is located on the seabed, limb (ii) in s 240(3)(c) will also be satisfied and thus render inapplicable the law of salvage to that historic shipwreck or relic. However, it is conceivable that historic relics protected by the HS Act may not be located on the seabed.⁹⁸ In that circumstance, it would seem that any historic relic that is not located on the seabed would be capable of being subject to salvage operations, on the basis that s 240(3)(c)(ii) is not satisfied. Having said that, any salvor who was looking to salvage an historic relic that is not located on the seabed would need to comply with the provisions of the HS Act to undertake salvage, principally by obtaining a permit under s 15 of the HS Act.

When one refers to s 15 of the HS Act, the interaction between that provision and s 240(3) of the Navigation Act becomes complex. Section 15 of the HS Act provides that:

15 Permits for exploration or recovery of shipwrecks and relics

(1) The Minister may, in his or her discretion, upon application by a person, grant a permit to that person authorizing that person and any other persons named or described in the permit to do an act or thing specified in the permit the doing of which would otherwise be prohibited by section 13 ...

Section 13 of the HS Act prohibits, among other things, conduct by a person that causes interference with, or disposal of, an historic shipwreck or relic. Therefore, it seems that s 15 of the HS Act enables a person to, in effect, engage in salvage activity in respect of historic shipwrecks and relics that are protected by that Act where the person has obtained a permit to engage in that activity. This appears to be so despite the apparent objective of s 240(3)(c) of the Navigation Act to render salvage operations non-applicable to historic shipwrecks or relics that are protected by the HS Act and located on the seabed. It is quite odd that the UCH law (i.e. the HS Act)

⁹⁶ Cf Damien J Cremean, 'Ownership of Unclaimed Wreck' (2018) 92 *Australian Law Journal* 667, 669.

⁹⁷ *Admiralty Act 1988* (Cth) s 4(3). See also White, above n 14, 498.

⁹⁸ It is also possible that an historic shipwreck may not be located on the seabed, although this possibility is very remote.

would appear to have such a result in circumstances where a maritime law – i.e. the Navigation Act – is expressly attempting to prohibit salvage of maritime property that is located on the seabed and has prehistoric, archaeological or historic interest. It also arguably undermines the very objective Australia must have been seeking to achieve by making a reservation under Article 30(1)(d) of the 1989 Salvage Convention. Whilst mindful that rules of statutory interpretation require cautious treatment of headings to sections of an Act when construing the meaning of the section itself,⁹⁹ the heading to s 15 of the HS Act – in making reference to ‘recovery of shipwrecks and relics’ – lends some support to the view that recovery of historic shipwrecks and relics under the HS Act is possible, so long as the Minister grants a permit which, in terms, allows for that to be done. Of course, the Minister would have power to refuse to grant a permit for salvage of historic shipwrecks or relics protected under the HS Act and, one would hope, the Minister would exercise his or her power in a manner that gives effect to the apparent objects of the HS Act to protect historic shipwrecks and relics. In that regard, it could be argued that those objects would be achieved by either refusing the permit or alternatively granting a permit that allows recovery of the shipwreck or relic, subject to the condition that the carrying out of the recovery operation is consistent with the protection of archaeological or historical values and environmental integrity of the particular shipwreck or relic.¹⁰⁰

Thirdly, it is evident that s 240(3)(c) of the Navigation Act intends to prohibit salvage of maritime property that is located on the seabed and has prehistoric, archaeological or historic interest. To that end, it is worth observing that the HS Act does not protect numerous types of UCH that have prehistoric or archaeological interest. As a result, whilst the Navigation Act may afford some protection to UCH that is not otherwise afforded protection by the HS Act, the protection afforded by the Navigation Act to that UCH is limited only to prohibiting the conduct of salvage operations in respect of that UCH. Section 240(3)(c) of the Navigation Act provides no protection to UCH of prehistoric or archaeological interest which is:

1. not protected by the HS Act; and
2. under threat from anthropogenic maritime activities other than salvage operations, such as recreational diving or other maritime activities.

In concluding this review of the Navigation Act provisions, it is apparent that there is at least some potential for inconsistency between s 240(3)(c) of the Navigation Act and s 15 of the HS Act. In section 4 of this article, the issue of whether a similar potential inconsistency exists between the permit provisions of the UCH Act and s 240(3)(c) of the Navigation Act will be considered.

3.1.4 Australian Heritage Council Act

The ACH Act establishes the Australian Heritage Council (**AHC**), which serves as the principal adviser to the Commonwealth Government on matters of heritage.¹⁰¹ The AHC is conferred with numerous functions pursuant to s 5 of the AHC Act, which include advising the Commonwealth Environment Minister on conserving and protecting places included on the National Heritage List or Commonwealth Heritage List,¹⁰² as well as the Commonwealth’s responsibilities for historic shipwrecks.¹⁰³

3.1.5 Aboriginal and Torres Strait Islander Heritage Protection Act

The ATSIHP Act, amongst other things, provides for a process by which areas and objects in Australian waters that are of particular significance to Aboriginal and Torres Strait Islander peoples may be protected by the making of declarations that serve to prohibit any actions by persons that may injure or desecrate the areas or objects that are subject to the declaration.¹⁰⁴

⁹⁹ See, eg, *Tran v Commonwealth* (2010) 187 FCR 54 at [65] per Rares J and [202] per Besanko J.

¹⁰⁰ The permitting of recovery of UCH in this manner has been recognised under the *Abandoned Shipwreck Act of 1987* in the United States: see Varner, above n 27, 283-284.

¹⁰¹ Australian Government (Department of the Environment and Energy), *Australian Heritage Council* <<http://www.environment.gov.au/heritage/organisations/australian-heritage-council>> (accessed 9 December 2018).

¹⁰² *Australian Heritage Council Act 2003* (Cth) s 5(b).

¹⁰³ *Australian Heritage Council Act 2003* (Cth) s 5(d)(v).

¹⁰⁴ *Aboriginal and Torres Strait Islander Heritage Protection Act 1984* (Cth) Pt 2, Divs 1 and 2.

3.1.6 Protection of Moveable Cultural Heritage Act

The PMCH Act, in effect, prohibits the export of protected objects without a permit or certificate authorising the export of the relevant protected object.¹⁰⁵ The following objects are protected as Class B objects under the PMCH Act: 'objects relating to seagoing exploration, transportation, supply and commerce, including ordnance, coins, ship's gear, anchors, cargo and personal items from shipwrecks, sunken ships and landfalls, ships' logbooks and other documentation'.¹⁰⁶

3.2 Why Was Reform of the Historic Shipwrecks Act and the Wider Legal Regime Required?

The enactment of the HS Act by the Australian Parliament was one of the early examples of a domestic law being enacted to address the protection of specific forms of UCH.¹⁰⁷ To be sure, it should be acknowledged that the HS Act, including the management measures and programs implemented under it, has enjoyed a considerable measure of success over the years.¹⁰⁸ However, the need for reform of the HS Act – and the wider legal regime for protection of UCH in Australia at the Commonwealth level – has become apparent.

In 2009, the Minister for the Environment announced that a review of the HS Act would be conducted, with a discussion paper released for public comment.¹⁰⁹ The objective of the review was to determine what reform of the HS Act should occur including, specifically, whether Australia should ratify the UNESCO Convention or meet international best practice in UCH management in a different way.¹¹⁰ As a result of the review of the HS Act, it became evident (or, perhaps more accurately, was confirmed) that the HS Act – as well as the wider legal regime for protection of UCH at the Commonwealth level in Australia – is suffering from at least 10 deficiencies or inadequacies that need to be remedied.

First, in the absence of any other legislation at the Commonwealth level in Australia that has the express and primary purpose of protection of UCH, the scope of the HS Act is too limited. The HS Act only provides a legislative regime for the protection of specific types of UCH: namely, certain historic shipwrecks and relics. It must be acknowledged that the original purpose of the HS Act was primarily to provide for protection of a small number of Dutch East India Company shipwrecks. However, as understandings of UCH have evolved since 1976, the HS Act generally has not been updated to reflect more detailed and sophisticated notions of what constitutes UCH. In particular, the HS Act arguably reflects an antiquated approach to protection of UCH in that it really focuses upon protection of objects and relics in and of themselves. Contemporary understandings of UCH emphasis not only the protection of UCH articles in and of themselves, but also the broader archaeological, historical and cultural contexts.¹¹¹ Numerous submissions received by the Commonwealth Department of the Environment in response to the discussion paper released in 2009 emphasised the need for the scope of the HS Act to be expanded to cover a broader scope of UCH.¹¹² Examples of UCH that are not afforded protection by the HS Act include the wrecks of aircraft and other vehicles.

Secondly, the current legislative framework for protection of UCH in Australia has become highly fragmented. Indeed, there are several pieces of legislation other than the HS Act at the Commonwealth level that could, by inference, be suggested as applying to UCH (as described in section 3.1 above). In particular, several submissions received by the Commonwealth Department of the Environment in response to the 2009 discussion paper raised concerns about how the protection of UCH was not appropriately integrated in the assessment and approval of proposed actions or developments under environmental and planning laws, principally the EPBC

¹⁰⁵ *Protection of Moveable Cultural Heritage Act 1986* (Cth) Pt 2, Div 1.

¹⁰⁶ *Protection of Moveable Cultural Heritage Regulations 1987* (Cth) Sch 1, Pt 2, cl 2.2(a).

¹⁰⁷ Dromgoole, above n 15, 68-69.

¹⁰⁸ See, eg, Andrew Viduka, '1976 and beyond: Managing Australia's underwater cultural heritage' (2012) 36 *Bulletin of the Australasian Institute for Maritime Archaeology* 1, 8; and White, above n 14, 513.

¹⁰⁹ See Australian Government, above n 66. Nearly 40 submissions were received in response to the discussion paper: see Viduka, above n 108, 3.

¹¹⁰ Australian Government, above n 66, 1.

¹¹¹ O'Keefe, above n 11, 300.

¹¹² See, eg, Patrick J O'Keefe and Lyndel V Prott, *Response to the Review of the Historic Shipwrecks Act 1976 and Consideration of the Requirements Arising From the UNESCO 2001 Convention for the Protection of the Underwater Cultural Heritage* (not dated) <<http://155.187.2.69/heritage/shipwrecks/review/pubs/submissions/okeefe-and-prott.pdf>> (accessed 16 December 2018) and Mark Staniforth, *Submission – Review of the Historic Shipwrecks Act 1976* (not dated) <<http://155.187.2.69/heritage/shipwrecks/review/pubs/submissions/associate-professor-mark-staniforth.pdf>> (accessed 16 December 2018).

Act but also State laws addressing planning and development matters.¹¹³ Thus, not only is there a need for greater protection of a wider variety of UCH, there is also a need to ensure that any new legislation addressing UCH is properly integrated into the wider legislative framework governing development or actions that could impact upon UCH that is protected by law.

Thirdly, the HS Act may be criticised for omitting to include features that are associated with best practices for protection of UCH, as generally reflected by the UNESCO Convention, or including such features but doing so in an inadequate way.¹¹⁴ For example, the encouragement or implementation of programs directed at raising public awareness of, and educating or training persons in, UCH is not addressed in the HS Act at all. This may be contrasted with the UNESCO Convention, which expressly recognises the importance of such matters.¹¹⁵ Whilst such criticisms have merit, it should nevertheless be acknowledged that numerous UCH management programs have been implemented in connection with the administration of the HS Act,¹¹⁶ despite the absence of any express provision in the HS Act itself that requires this to be done.

Fourthly, and somewhat related to the third point, numerous commentators have validly raised the importance of ensuring that those persons or government agencies charged with responsibility for implementing any law addressing UCH are equipped with sufficient resources and funding to ensure that the law can be given full effect. This point has generally been made in the context of criticism of the Australian Government for its failure to provide the persons with responsibility for administering the HS Act with sufficient resources and funding to effectively carry out their duties and responsibilities.¹¹⁷ In raising this point, one should acknowledge that this is more of a criticism of the implementation of law rather than the law itself. Having said that, it cannot be denied that the effectiveness of a law will always be influenced by the level of resources available to the persons who have responsibility for implementing it.

Fifthly, for the reasons given in section 3.1.3 above, there is the potential for inconsistency between the operation of s 240(3)(c) of the Navigation Act and the permit regime contained in s 15 of the HS Act in that whilst the former seems to have the intention of prohibiting salvage operations in respect of historic shipwrecks and relics that are protected under the HS Act and located on the seabed, the latter appears to enable the Minister to allow such operations to be undertaken in respect of such historic shipwrecks and relics in accordance with a permit.

Sixthly, the HS Act does not contain statutory criteria to which regard should be had when determining whether or not particular UCH has heritage significance and thus is worthy of protection by way of a Ministerial declaration being made (in the event that the heritage is not otherwise automatically protected). The absence of such criteria can be contrasted with other Commonwealth legislation, such as the EPBC Act and its associated regulations, which utilise criteria for determining whether particular places or articles (and their wider context) should be listed under the Australian Heritage List or Commonwealth Heritage List.¹¹⁸

Seventhly, the HS Act does not contain within it a power to make a temporary, emergency declaration of provisional protection of an historic shipwreck or relic in circumstances where that shipwreck or relic:

1. ought to be, but is not yet, protected under the HS Act; and
2. is, or is likely to be, under imminent or immediate threat and the application of an ordinary decision-making process is clearly inappropriate.¹¹⁹

¹¹³ See, eg, Staniforth, above n 112, 4; O'Keefe and Prott, above n 112, 4-5 and Australasian Institute for Maritime Archaeology, *Submission on the Review of the Historic Shipwrecks Act 1976* (not dated), <<http://155.187.2.69/heritage/shipwrecks/review/pubs/submissions/australasian-institute-for-maritime-archaeology.pdf>> (accessed 16 December 2018).

¹¹⁴ See, eg, O'Keefe and Prott, above n 112, 7-8.

¹¹⁵ *UNESCO Convention*, arts 20 and 21.

¹¹⁶ Jeffrey, above n 56, 123 and 128-129.

¹¹⁷ See, eg, Staniforth, above n 112, 1 and Jeffrey, above n 56, 127 and 133-135.

¹¹⁸ See *Environment Protection and Biodiversity Conservation Act 1999* (Cth) s 324D (for National Heritage criteria) and s 341D (for Commonwealth Heritage Criteria) and *Environment Protection and Biodiversity Conservation Regulations 2000* (Cth) r 10.01A (for National Heritage criteria) and r 10.03A (for Commonwealth Heritage criteria). Having said this, it should be recognised that there are some non-binding guidelines that exist with respect to determining heritage significance of a shipwreck site for the purposes of the *Historic Shipwrecks Act 1976* (Cth): see generally Jeffrey, above n 56, 127.

¹¹⁹ The absence of such an emergency power can be contrasted with other legislation in Australia addressing heritage: see, eg, *Environment Protection and Biodiversity Conservation Act 1999* (Cth) ss 324JL(1) and 341JK(1).

Eighthly, the HS Act does not expressly provide a process by which any person can make an application for the protection of particular historic shipwrecks or relics under the Act. It would be reasonable to expect, in practice, that the Minister (or perhaps, more likely her Department or the Australian Heritage Council) to be approached (formally or informally) by interested stakeholders with proposals for a particular shipwreck or relic to be protected by way of declaration, or for an area to be declared as a protected zone, under the HS Act.¹²⁰ In light of this, the HS Act should make provision for a statutory process for persons to nominate an historic shipwreck or relic for protection under the Act, or apply for protection of such UCH.

Ninthly, the HS Act does not enable persons to bring merits appeals to the Administrative Appeals Tribunal (AAT) in respect of decisions made under that Act by the Minister. In the absence of such merit appeal rights, the HS Act does not take advantage of the numerous potential benefits that are associated with making provision for merits review of decisions made under that Act including, for example, the provision of an independent forum for decision-makers to be held accountable for decisions, promoting transparency in decision-making, and improvements in decision-making.¹²¹

Finally, the HS Act contains within it an out-dated compliance and enforcement regime, which fails to incorporate more modern tools or mechanisms for compliance and enforcement, such as enforceable undertakings or restoration orders.¹²² For example, as O'Keefe and Prott noted in their submission in response to the 2009 discussion paper:

The [HS] Act relies mainly on penalties – both monetary and imprisonment – to encourage compliance. Guidance as to other possibilities could be obtained by examination of foreign legislation – not necessarily restricted to underwater cultural heritage. For example, the Archaeological Resources Protection Act in the United States of America includes civil penalties based in part on the cost of repairing a site that has been unlawfully excavated. A significant jurisprudence has developed for this kind of calculation.¹²³

The absence of a modern compliance and enforcement regime in the HS Act means that the HS Act is unable to enjoy the benefits that may be associated with such modern regimes.¹²⁴ For example, a modern compliance and enforcement regime that is equipped with the full gamut of regulatory tools will be capable of facilitating the more timely, creative and effective redress of harm to UCH that is caused by unlawful conduct. This serves to avoid the sometimes narrow approach of simply imposing penalties – either financial or imprisonment – on a person who has engaged in unlawful conduct without remedying the harm done to UCH or trying to rehabilitate the offender through engagement in restoration or other activities which serve an educative function. In making that observation, it must, of course, be recognised that the Federal Court or Federal Circuit Court (as the main relevant courts) should continue to have a role in dealing with unlawful conduct and offences committed under UCH law. Further, on some occasions, it may well be appropriate for unlawful conduct or offences to be dealt with in the traditional manner of a penalty being imposed by the courts. However, both the administrators with responsibility for ensuring compliance with UCH law and the courts responsible for dealing with unlawful conduct or offences concerning UCH should have, at their disposal, a suite of compliance and enforcement tools when determining the most appropriate enforcement action to take in any given circumstance.¹²⁵ Currently, the HS Act does not provide for such a framework. Further, to the extent that penalties remain an important compliance and enforcement tool, it is apparent that the penalties contained in the HS Act are no longer appropriate and should be increased.¹²⁶

¹²⁰ The listing of items, objects or other articles of heritage at different scales in Australia is often driven by proposals or demands from interested stakeholders or community members for the decision-makers to protect the heritage in question: see, eg, Tristan Orgill, 'Secrets of local heritage places: An assessment of the integrity of the NSW "heritage conservation area" legal regime' (2016) 21 *Local Government Law Journal* 3, 6 (discussing the example of how assessment by local councils of proposals for heritage listings is often 'in response to local demand'). Orgill's observation is generally also true of many proposals for listing of heritage at a State or Federal level in Australia. Indeed, some heritage statutes in Australia recognise this point by making provision for any person to apply for the protection of heritage, including historic shipwrecks: see, eg, *Heritage Act 2017* (Vic) s 27 and *Historic Cultural Heritage Act 1995* (Tas) s 65(1).

¹²¹ Such benefits have been recognised in similar regulatory contexts, such as environmental law: see, eg, Jason Cabarrús, 'Merits review of Commonwealth environmental decision-making' (2009) 26 *Environmental and Planning Law Journal* 113, 115-116 and Brian J Preston, 'Benefits of Judicial Specialisation in Environmental Law: The Land and Environment Court of New South Wales as a Case Study' (2012) 29 *Pace Environmental Law Review* 396, 404.

¹²² See, eg, Australian National Maritime Museum, *Australia's Maritime Heritage – submission on the Historic Shipwrecks Act 1976* (July 2009) <<http://155.187.2.69/heritage/shipwrecks/review/pubs/submissions/australian-national-maritime-museum.pdf>> (accessed 16 December 2018).

¹²³ O'Keefe and Prott, above n 112, 7.

¹²⁴ See generally Karen Yeung, 'Better regulation, administrative sanctions and constitutional values' (2013) 33 *Legal Studies* 312.

¹²⁵ The implementation of such compliance and enforcement frameworks has occurred in other similar regulatory contexts, such as in environmental and planning law in New South Wales: see generally Brian J Preston, 'Enforcement of environmental and planning laws in New South Wales' (2011) 16 *Local Government Law Journal* 72.

¹²⁶ See, eg, Australasian Institute for Maritime Archaeology, above n 113, 7.

In concluding this section, it is to be recalled that the objective of the review into the HS Act that was announced in 2009 was to determine what reform of the HS Act should occur including, specifically, whether Australia should ratify the UNESCO Convention or meet international best practice in UCH management in a different way.¹²⁷ One could complain about the fact that the enactment of the UCH Act has taken the Australian Parliament nearly a decade to complete after announcing the review of the HS Act in 2009. However, given Australia's complex constitutional structure and, more specifically, the division of legislative power between the Commonwealth and the States¹²⁸ one must appreciate that the process of reform was always going to take some time. Perhaps the more important thing is to ensure that any reforms that are implemented will be capable of achieving the objectives that drove the need for reform in the first place, including by addressing the deficiencies or inadequacies of the existing law that addresses UCH at the Commonwealth level in Australia.

When it came into force in the mid-1970s, the HS Act was 'a pioneering legislative measure to protect historic shipwrecks, and has been an example to many other States in developing their own protective regimes'.¹²⁹ However, the HS Act (and the wider legal framework for regulating UCH at the Commonwealth level in Australia) has become out-dated and in need of reform. This article now turns to conduct a preliminary assessment of the new regime for protection of UCH that the Australian Government has devised.

4 A Preliminary Assessment of the New Legislative Regime to be Provided Under the Underwater Cultural Heritage Act

4.1 Overview of this Section

As noted in the introduction to this article, the preliminary assessment that follows in this section of the article will not proceed on the basis of a section-by-section analysis of the UCH Act or UCH Transitional Act (as the case may be). Rather, the preliminary assessment presented in this section will address, in turn, each of the following five matters and the manner in which each particular matter has been addressed in the UCH Act or the UCH Transitional Act (as the case may be):

1. the definition of UCH;
2. the sovereign immunity of sunken warships and other State-owned vessels;
3. the application of the law of salvage to UCH;
4. the ownership and abandonment of maritime property that constitutes UCH;
5. the regulation of maritime and other related activities that involve the interaction with, or use of, UCH.

Once each of these five particular matters has been addressed, the preliminary assessment will then consider how the UCH Act or the UCH Transitional Act (as the case may be) has addressed the 10 deficiencies or inadequacies of the HS Act, and the wider legal regime for protection of UCH at the Commonwealth level in Australia, that were identified in section 3 of this article.

¹²⁷ Australian Government, above n 66, 1.

¹²⁸ Sarah Dromgoole, 'Editor's Introduction' in Sarah Dromgoole (ed), *The Protection of the Underwater Cultural Heritage: National Perspectives in Light of the UNESCO Convention 2001* (Martinus Nijhoff Publishers, 2nd ed, 2006) I, xxviii.

¹²⁹ Craig Forrest, *Submission on the Review of the Historic Shipwrecks Act 1976 and consideration of the requirements arising from the UNESCO 2001 Convention for the Protection of the Underwater Cultural Heritage* (not dated), <<http://155.187.2.69/heritage/shipwrecks/review/pubs/submissions/dr-craig-forrestpdf.pdf>> (accessed 16 December 2018).

4.2 How has the Underwater Cultural Heritage Act Addressed the Five Key Matters Arising in the Context of Legal Protection of UCH?

4.2.1 Definition of UCH – Understanding the Issue

How Does the UNESCO Convention Define UCH?

It was observed earlier in this article that the task of defining UCH is often a difficult and controversial one.¹³⁰ Certainly, the task of defining UCH was one of the hotly debated topics during the negotiation of the UNESCO Convention. After much debate, the UNESCO Convention ultimately defined UCH as follows:

1. (a) “Underwater cultural heritage” means all traces of human existence having a cultural, historical or archaeological character which have been partially or totally under water, periodically or continuously, for at least 100 years such as:
 - (i) sites, structures, buildings, artefacts and human remains, together with their archaeological and natural context;
 - (ii) objects of prehistoric character.
- (b) Pipelines and cables placed on the seabed shall not be considered as underwater cultural heritage.
- (c) Installations other than pipelines and cables, placed on the seabed and still in use, shall not be considered as underwater cultural heritage.¹³¹

Contrasting views in the literature have been expressed with respect to the appropriateness of this definition.

Competing Views on the Appropriateness of the UNESCO Convention’s Definition of UCH

For example, Bederman, in critiquing an earlier draft of the UNESCO Convention, complained that the definition of UCH in that earlier draft – which, by and large, found its way into the final convention text – was ‘overinclusive, ambiguous, and prone to misinterpretation or confusion’.¹³² Examples of the elements criticised by Bederman included:

1. the potential for items such as ‘pieces of a splintered surfboard’¹³³ or ‘lobster traps’¹³⁴ to be included within the definition of UCH;
2. the absence of any articulation of what is meant by the reference to ‘archaeological and natural context’ in the definition of UCH;¹³⁵
3. the failure to incorporate a ‘significance’ requirement for the purpose of ascertaining what UCH was to be protected under the UNESCO Convention; and
4. the apparent equation of age of the UCH and its significance.¹³⁶

By contrast, others have suggested that the definition of UCH in the UNESCO Convention is appropriately drafted by providing for what is described as a form of ‘blanket protection’ of UCH.¹³⁷ The adoption of an approach of ‘blanket protection’ of UCH can be contrasted with approaches that only utilise significance criteria for determining protection of UCH. The use of significance criteria for determining whether particular UCH ought to be protected is a reactive, rather than proactive, approach to protection.¹³⁸ Such a reactive approach does carry with it some risk that interference with UCH may occur prior to the UCH being protected under law.¹³⁹ This has led Dromgoole to suggest that the ‘blanket protection’ approach is to be preferred on the basis

¹³⁰ Forrest, above n 10, 3.

¹³¹ *UNESCO Convention*, art 1.

¹³² David J Bederman, ‘The UNESCO Draft Convention on Underwater Cultural Heritage: A Critique and Counter-Proposal’ (1990) 30 *Journal of Maritime Law and Commerce* 331, 332-334.

¹³³ *Ibid* 332.

¹³⁴ *Ibid*.

¹³⁵ *Ibid* 333.

¹³⁶ *Ibid*.

¹³⁷ See, eg, Strati, above n 32, 40-42.

¹³⁸ Sarah Dromgoole, ‘Reflections on the position of the major maritime powers with respect to the UNESCO Convention on the Protection of the Underwater Cultural Heritage 2001’ (2013) 38 *Marine Policy* 116, 122.

¹³⁹ *Ibid*.

that 'protection is in place before material is discovered and, therefore, before any deliberate interference can take place'.¹⁴⁰ In any event, Carducci has suggested that the absence of a 'significance' requirement:

... does not necessarily imply what was occasionally stated, i.e., that the definition imposes an extreme obligation to protect any human trace with a presence in water since at least a century ago. Actually, the quality of a cultural, historical, or archaeological "character" does allow for some flexibility of interpretation, which, once kept within the due limits of a bona fide interpretation of the [UNESCO Convention] and the general duty to cooperate for the protection of UCH, should prevent such extreme readings ...¹⁴¹

Further, with respect to the inclusion of a quantitative criterion of 100 years for protection, there are again competing views.

For example, Strati has suggested that the inclusion of this time limit was appropriate for two reasons:

1. it avoids a situation where the owner of an old vessel that has sunk cannot salvage that maritime property without the authorisation of competent authorities; and
2. it is useful for distinguishing the application of salvage law from UCH law in that an essential element of salvage – marine peril – would be lacking in that the vessel would be in equilibrium with its underwater environment.¹⁴²

By contrast, Bederman has contended that the equation of age of UCH with significance is a 'tremendous failing',¹⁴³ arguing that, under the UNESCO Convention, if a cargo ship with simple raw materials sank and was on the seabed, the cargo would constitute UCH.¹⁴⁴ White has made similar observations.¹⁴⁵

Consideration of the Competing Views on the Definition of UCH in the UNESCO Convention

It may be accepted that there is a degree of arbitrariness in utilising a quantitative criterion (e.g. a criterion of 100 years), which may result, as Bederman and White point out, in UCH that meets or exceeds the 100 years criterion being protected despite the UCH possessing no heritage significance. However, it should equally be recognised that there is a risk that UCH that has heritage significance and falls short of the 100 years criterion will not be afforded protection. Arguably, the scenario outlined by Bederman and White is easier to address than the scenario where UCH has heritage significance and falls short of the 100 years criterion required for protection under the UNESCO Convention. As will be explained shortly, the scenario outlined by Bederman and White can be safeguarded against by treating the criteria for protection under the UNESCO Convention as a starting position that is capable of being departed from where a person who looking to salvage or otherwise undertake any invasive activity in respect of the UCH is able to demonstrate that the particular UCH has no heritage significance at all, with the consequence that the particular UCH should be stripped of automatic protection. With respect to the scenario where the UCH has heritage significance and falls short of the 100 years criterion, potential solutions include:

1. keeping the quantitative criterion at 100 years and then providing for a legal mechanism by which particular UCH that fails to meet or exceed that criterion may be protected (e.g. the making of declarations of protection under law on the basis of heritage significance);
2. reducing the period specified in the quantitative criterion (e.g. to 75, 50 or 25 years) and, again, providing for a legal mechanism by which particular UCH can be protected (e.g. the making of declarations of protection under law on the basis of heritage significance); or,
3. eliminating the need to satisfy a quantitative criterion completely.

¹⁴⁰ Ibid.

¹⁴¹ Carducci, above n 52, 423.

¹⁴² Strati, above n 32, 42. Others have argued that there should be a general presumption that UCH is, by its nature, never in marine peril: see, eg. Juvelier, above n 27, 1038-1041.

¹⁴³ Bederman, above n 132, 333.

¹⁴⁴ Ibid.

¹⁴⁵ White, above n 14, 509.

The third solution would ensure protection for all UCH irrespective of age or significance, but would likely be unpalatable to many persons, particularly those who are already critical of the definition of UCH in the UNESCO Convention. The first and second solutions are an improvement on the regime contained in the UNESCO Convention, which currently has no scope to afford protection to UCH that fails to meet the quantitative criterion of 100 years.¹⁴⁶ However, both of the first and second solutions are, admittedly, reactive in nature and thus carry the risk that interference may occur with the particular UCH before legal protection is in place.

Having regard to the arguments summarised above, it is considered that the definition of UCH in the UNESCO Convention is, for the most part, sound and that, to the extent that there are deficiencies in the definition of UCH (e.g. no scope to protect UCH that fails to meet or exceed the 100 years criterion), those deficiencies are capable of being appropriately remedied when States enact domestic legislation to give effect to the overarching objectives promoted by the UNESCO Convention. Reasons for this view now follow.

Given the wide variety of articles and associated contexts that may be regarded as constituting UCH, it is essential for any definition of UCH to be broad in describing the subject matter that is to be captured by the definition. Certainly, it is apparent that the definition of UCH in the UNESCO Convention is broad. However, the definition does have both quantitative and qualitative restrictions. In terms of quantitative restriction, the definition requires the traces of human existence to have been either partially or totally underwater, either periodically or continuously, for a period of at least 100 years. In terms of qualitative restriction, the definition requires the traces of human existence to be underwater and have a cultural, historical or archaeological character.¹⁴⁷

While the need for limitations or criteria in determining whether UCH should be afforded protection is desirable, it is considered that one deficiency of the definition of UCH in the UNESCO Convention is that it tries to do too much work. Not only does the definition serve the purpose of stating the meaning of UCH (i.e. in essence, traces of human existence located underwater), it also tries to establish the criteria of *what* UCH will be protected (i.e. traces of human existence located underwater that have cultural, historical or archaeological character) and *when* that UCH will be protected (i.e. once it has been underwater for a period of at least 100 years). It is considered that the more appropriate approach to have taken in the UNESCO Convention would have been to adopt a broad definition of UCH in Article 1 and then, in a separate article, identify what UCH would be protected by the UNESCO Convention, including any qualitative or quantitative criteria governing the selection of particular UCH for legal protection.

More specifically, it is considered that it would have been appropriate for UCH to have been defined in Article 1 of the UNESCO Convention to mean:

All traces of human existence which are located either partially or totally under water, either periodically or continuously, and including:

- (a) sites, structures, buildings, artefacts and human remains, together with their archaeological and natural context;
- (b) vessels, aircraft, other vehicles or any part thereof, their cargo and other contents, together with their archaeological and natural context; and
- (c) prehistoric objects,

but not including pipelines or cables placed on the seabed, or other installations on the seabed which remain in use by humans.

Then, in a separate article, the UNESCO Convention should have outlined the circumstances in which UCH (as just defined) would attain the status of legally protected UCH. To that end, it is considered that the imposition of a quantitative criterion in that separate article would be desirable and the period of 100 years that is currently reflected in the UNESCO Convention text is a reasonable period to adopt for that purpose, although the point from which the 100 year period is to be calculated could be made clearer (e.g. the period is to be calculated from the date on which the UCH first became partly submerged underwater, acknowledging that there may be factual obstacles to performing this task in any given circumstance).¹⁴⁸ As Forrest suggests, the use of a quantitative criterion, whilst somewhat arbitrary, serves an important purpose of administrative pragmatism and, in any event, it 'can be presumed that objects older than 100 years are likely to be archaeologically or historically

¹⁴⁶ Forrest, above n 10, 10.

¹⁴⁷ See also Carducci, above n 52, 423.

¹⁴⁸ Forrest, above n 10, 10.

significant'.¹⁴⁹ The word 'presumed', as used by Forrest in this passage, should be emphasised here. It would have been desirable for the UNESCO Convention to adopt the starting position or presumption that any UCH (as defined by the author above) will be automatically protected after 100 years and then integrate a 'safety valve' into the text of the convention which enables any UCH that is automatically protected to be stripped of that status (and thus able to be subject to salvage or other invasive activities) where it can be demonstrated that the particular UCH does not have heritage significance.¹⁵⁰ The onus of demonstrating that particular UCH does not have heritage significance should fall upon the person seeking to remove the automatic protection of that UCH and should involve that person engaging an appropriately qualified maritime archaeologist to conduct an assessment of whether the particular UCH satisfies relevant quantitative and qualitative criteria of heritage significance. As explained above, the approach of the UNESCO Convention could have also been improved by providing for a mechanism by which UCH that has heritage significance and fails to meet the quantitative criterion of 100 years could be protected by the UNESCO Convention or alternatively, at the very least, acknowledging the rights of States to adopt such mechanisms in their own domestic laws.

The adoption of an approach along the lines just outlined would, it is submitted, have struck an appropriate balance between protection of UCH that has significance and UCH that does not have significance under the UNESCO Convention. It would have also significantly restricted, if not eliminated, any scope for commentators to reasonably contend that the UNESCO Convention is deficient due to the failure of its drafters to integrate heritage significance criteria into its text, or the failure of its drafters to provide for an appropriate 'safety valve' to remove items like lobster traps or pieces of a splintered surfboard from the UNESCO Convention's protection regime. Having said that, it must be recognised that States that have not ratified the UNESCO Convention, such as Australia, would be able to ensure that their domestic UCH laws avoid reproducing such deficiencies.

Bearing these observations in mind, it is now appropriate to consider how the UCH Act has addressed the potentially problematic task of defining UCH.

4.2.2 Approach of the Underwater Cultural Heritage Act to Defining UCH and Establishing a Protection Regime that Applies the Selected Definition of UCH

Consideration of the Definition Of UCH in the Underwater Cultural Heritage Act

The most useful place to start consideration of this issue is s 15(1) of the UCH Act, which defines UCH as meaning:

- any trace of human existence that:
 - (a) has a cultural, historical or archaeological character; and
 - (b) is located under water.

There are several points that should be made about this definition of UCH.

First, the phrase 'trace of human existence' is given a non-exhaustive definition in s 15(2) of the UCH Act so as to include:

- (a) sites, structures, buildings, artefacts and human and animal remains, together with their archaeological and natural context; and
- (b) vessels, aircraft and other vehicles or any part thereof, together with their archaeological and natural context; and
- (c) articles associated with vessels, aircraft or other vehicles, together with their archaeological and natural context.

Secondly, the phrase 'located under water' as appearing in s 15(1) of the UCH Act is also given an extended meaning, as s 15(3) of the UCH Act states:

- (3) For the purposes of [s 15(1)(b)], a trace of human existence is located under water:
 - (a) whether partially or totally under water; and

¹⁴⁹ Forrest, above n 51, 524.

¹⁵⁰ The development of this approach is informed by, and adapts, an earlier proposal put forward in the literature: see Forrest, above n 10, 9-10.

(b) whether under water periodically or continuously.

Thirdly, s 15(4) of the UCH Act carves out a number of items from the definition of UCH contained in s 15(1), being pipelines and cables on the seabed and other installation that are on the seabed and still in use.

Fourthly, it is instructive to compare the definition of UCH contained in s 15 of the UCH Act with the definition of UCH provided in Article 1 of the UNESCO Convention (which has been set out in section 4.2.1 above). As one can appreciate when comparing the two definitions, there is a great deal of overlap between them. However, the following differences between the two respective definitions are apparent and worth noting:

1. Unlike the UNESCO Convention, the UCH Act definition of UCH does not incorporate a quantitative or temporal element regarding the amount of time UCH is to have been located underwater before it can attain the status of protected UCH (i.e. at least 100 years). Having said that, a quantitative or temporal criterion of 75 years is required to be met in order for specific forms of UCH to be *automatically* protected under the UCH Act, as will be addressed shortly.
2. The non-exhaustive definition of 'trace of human existence' in s 15(2)(a) of the UCH Act expressly refers to 'animal remains', whereas the non-exhaustive list of UCH in Article 1(1)(a)(i) of the UNESCO Convention makes no such reference to animal remains.
3. The non-exhaustive definition of 'trace of human existence' in s 15(2)(b) of the UCH Act makes no express reference to 'cargo or other contents' of a vessel, aircraft or other vehicles as being an example of an object or item that may potentially be UCH, whereas the non-exhaustive list of UCH in Article 1(1)(a)(ii) of the UNESCO Convention does make such express reference.

On its face, this omission from s 15(2)(b) of the UCH Act appears to be somewhat stark, particularly in the context of interactions between salvage and maritime archaeology. However, it is unlikely that anything turns on it. This is because:

- a. s 15(2)(c) of the UCH Act makes reference to '*articles associated with* vessels, aircraft or other vehicles ...' (emphasis added);
 - b. s 10 of the UCH Act relevantly defines the phrase 'associated with' as follows:
 - (1) An article is associated with a vessel, aircraft or other vehicle if the article:
 - ...
 - (b) appears to have been ... carried on the vessel, aircraft or other vehicle
 - ...; [and]
 - c. whilst the word 'article' is not defined in the UCH Act (and, indeed, is foreign to the UNESCO Convention), it is suggested that application of principles of statutory interpretation relating to the use of ordinary meaning of words in dictionaries¹⁵¹ would comfortably enable a valid conclusion to be reached that the 'cargo and other contents' of a vessel, aircraft or other vehicle would constitute 'articles' that, in the words of s 10(1)(b), 'appear to have been ... carried on the vessel, aircraft or other vehicle'.
4. The non-exhaustive list of UCH in the UNESCO Convention expressly embraces 'objects of prehistoric character', whereas the UCH Act does not. Having said that, it is considered that such objects would fall within the definition of UCH as set out in s 15(1) of the UCH Act.

Finally, it is important to recognise that, unlike the definition of UCH in the UNESCO Convention, the definition of UCH in the UCH Act does not operate in a manner that establishes what UCH is protected. In other words, it is not enough for articles to fall within the definition of UCH in s 15 of the UCH Act to be protected under the Act; rather, the application of the protection regime created by Part 2 of the UCH Act is the process by which UCH that satisfies the definition in s 15 is afforded protection by the Act. The protection regime established by Part 2 of the UCH Act is not only inextricably linked with the definition of UCH in the UCH Act, but also addresses important issues that are typically discussed in the context of defining UCH. Such issues include the use of significance criteria in determining which UCH ought to be protected by law, and the

¹⁵¹ See, eg, *2 Elizabeth Bay Road Pty Ltd v The Owners – Strata Plan No 73943* (2014) 88 NSWLR 488, [80]-[85] (Leeming JA).

use of quantitative criteria to determine when UCH is automatically afforded protection under law. As a result, it is useful to address the protection regime in Part 2 of the UCH Act now.

Consideration of the Protection Regime that Applies the Definition of UCH in the Underwater Cultural Heritage Act

The protection regime created by the UCH Act has, subject to the operation of the provisions contained in Part 2 of the UCH Act regarding revocation of a Ministerial declaration as to UCH,¹⁵² both a permanent and provisional aspect to it.

At a general level, the permanent protection aspect of the UCH Act involves UCH being afforded permanent protection under law via two pathways:

1. automatic protection pursuant to s 16(1) of the UCH Act; and
2. protection by way of Ministerial declaration made pursuant to either ss 17 and 18 of the UCH Act, noting that the Minister would need to be satisfied that the particular UCH *is* of heritage significance before making a declaration.¹⁵³

By contrast, the provisional protection aspect of the UCH Act involves UCH being afforded temporary protection under law by way of a provisional declaration of protection being made by the Minister pursuant to s 19 of the UCH Act, noting that the Minister would need to be satisfied that the particular UCH *may be* of heritage significance before making such a provisional declaration. The provisional declaration may remain in force for a period of up to 5 years after it is made.¹⁵⁴

Appendix 1 to this article depicts the mechanics of the process for protecting UCH by way of a flowchart, which may assist readers in understanding the detailed explanation of the protection regime that follows. The permanent protection provisions will be examined first, before turning to the provisional protection provisions.

In relation to the permanent protection aspect of the UCH Act, as noted above, the UCH Act creates two pathways by which UCH may, subject to the operation of Part 2 of the UCH Act, be permanently protected.

The first pathway of permanent protection is one of automatic protection pursuant to s 16(1) of the UCH Act. That provision states:

- (1) The following articles are protected [UCH]:
 - (a) all remains of vessels that have been in Australian waters for at least 75 years;
 - (b) every article that is associated with a vessel, or the remains of a vessel, and that has been in Australian waters for at least 75 years;
 - (c) all remains of aircraft that have been in Commonwealth waters for at least 75 years; and
 - (d) every article that is associated with an aircraft, or the remains of an aircraft, and that has been in Commonwealth waters for at least 75 years.

It is not necessary for the existence or location of an article described in s 16(1) of the UCH Act to be known in order for legal protection to be afforded to those articles under the Act.¹⁵⁵ Further, the legal protection afforded to an article described in s 16(1) of the UCH Act will continue even if the article has been or is removed from Australian or Commonwealth waters.¹⁵⁶

¹⁵² It should be observed here that, unfortunately, the *Underwater Cultural Heritage Act 2018* (Cth) does not define 'Minister' or 'Department', despite the fact that the Act purports to use those terms in a defined manner. In the absence of these two words being defined by the Act, it is noted that the author understands that the Commonwealth Minister for the Environment and the Commonwealth Department of Environment and Energy will have responsibility for administering the *Underwater Cultural Heritage Act 2018* (Cth). This would be consistent with the current Administrative Arrangements Order made in respect of the *Historic Shipwrecks Act 1976* (Cth). Accordingly, wherever the 'Minister' is referred to in the discussion that follows below, that reference should be understood to be a reference to the Commonwealth Environment Minister or a delegate of the Minister as authorised by s 56 of the *Underwater Cultural Heritage Act 2018* (Cth).

¹⁵³ *Underwater Cultural Heritage Act 2018* (Cth) ss 17(1) and 18(1).

¹⁵⁴ *Underwater Cultural Heritage Act 2018* (Cth) s 19(3).

¹⁵⁵ *Underwater Cultural Heritage Act 2018* (Cth) s 16(2).

¹⁵⁶ *Underwater Cultural Heritage Act 2018* (Cth) s 16(3). The expressions 'Australian waters' and 'Commonwealth waters' are defined in ss 11 and 13 respectively of the *Underwater Cultural Heritage Act 2018* (Cth).

When reflecting upon the content in s 16(1) of the UCH Act, it is evident that the UCH Act proceeds on the basis that where the remains or articles specified therein have been in Australian or Commonwealth waters for at least 75 years, those remains or articles are considered, *prima facie*, to be of heritage significance and are afforded automatic protection. A couple of observations may be made in relation to this point.

First, the UCH Act utilises a quantitative criterion of 75 years for automatic protection that, in terms of protection of the specific forms of UCH referred to in s 16(1) of the UCH Act, is more generous than the 100 years criterion contained in the UNESCO Convention.

Secondly, the quantitative criterion of 75 years would appear, *prima facie*, to be consistent with the use of that time period in the context of administering the HS Act. However, that is not quite correct. This is because, in 1993, the Minister with responsibility for administering the HS Act made a declaration of blanket protection of certain UCH (i.e. all shipwrecks that are at least 75 years old and their associated articles, and articles (associated with a ship) that entered Australian or Commonwealth waters at least 75 years ago) to be an historic shipwreck or relic for the purposes of the HS Act.¹⁵⁷ By contrast, the UCH Act utilises the quantitative criterion of 75 years in a manner that acts as an automatic trigger for blanket protection: once the particular UCH listed in s 16(1) of the UCH Act has been underwater for 75 years, it gains automatic protection. There is no need for any declaration (blanket or otherwise) by the Minister in respect of such UCH. Whilst it is acknowledged that the practical effect of both the approach in s 16(1) of the UCH Act and the blanket protection declaration by the Minister in 1993 under the HS Act is essentially the same (i.e. protection of particular UCH), it is important to understand that the process for legal protection is different in the manner just described. Further, s 16(1) of the UCH Act affords automatic protection to a greater variety of UCH than the existing blanket protection declaration under the HS Act, in that, for example, all remains of aircraft and associated articles that have been in Commonwealth waters for at least 75 years are afforded automatic protection under s 16(1)(c) and (d) of the UCH Act, but are not afforded protection under the blanket protection declaration under the HS Act.

Thirdly, whilst advocates for protection of UCH would regard s 16(1) of the UCH Act as being an example of best practice for domestic legislation to give effect to the objectives of the UNESCO Convention, it can be appreciated from the discussion in section 4.2.1 of this article that critics of the definition of UCH in the UNESCO Convention would likely suggest that:

1. the UCH Act has adopted an arbitrary quantitative criterion of 75 years for automatic protection of UCH; and
2. this serves to falsely equate age with heritage significance.

Forrest, in responding to such criticisms of the UNESCO Convention's definition of UCH, acknowledged that the selection of a quantitative criterion will involve some degree of arbitrariness, but that this served an important purpose of administrative pragmatism.¹⁵⁸ He has also noted that it was reasonable to presume that UCH that satisfied the 100 year quantitative criterion in the UNESCO Convention had heritage significance,¹⁵⁹ and that the adoption of such a criterion would probably constitute a more cost-effective regime of protection on the basis that the expense of separately determining the heritage significance of voluminous articles of UCH would be avoided.¹⁶⁰

There is, with respect, much logic and force in Forrest's views in relation to this aspect of the UNESCO Convention and his views are generally apposite in the context of s 16(1) of the UCH Act. The utilisation of a quantitative criterion of 75 years in s 16(1) of the UCH Act is a sensible approach in that s 16(1) of the UCH Act reproduces a time period that stakeholders are already familiar with from the HS Act,¹⁶¹ but strengthens the application of that criterion by utilising it as an automatic trigger in the statute itself, rather than in a blanket protection declaration made under the statute. The cost and administrative benefits of an automatic regime of protection referred to by Forrest in the context of the UNESCO Convention are thus replicated in s 16(1) of the UCH Act.

¹⁵⁷ Australian Government, above n 66, 10.

¹⁵⁸ Forrest, above n 51, 524.

¹⁵⁹ *Ibid.*

¹⁶⁰ Forrest, above n 10, 9.

¹⁶¹ See Australian National Maritime Museum, above n 122, 6. Contra O'Keefe and Prot, above n 112, 1-2.

However, it is important to note that the description of the automatic protection in s 16(1) of the UCH Act as affording *permanent* protection might be somewhat of a misnomer. This is because s 16(4) of the UCH Act states, in effect, that the UCH Rules may remove the status of automatic protection for specified UCH referred to in s 16(1) and (3) of the UCH Act. It is uncertain how this provision will operate in practice, as the UCH Rules have not yet been finalised and no draft of those rules has been publicly released, as far as the author is aware. Potentially, it may be the case that s 16(4) of the UCH Act operates as a 'safety valve' to ensure that any article of UCH that:

1. is automatically protected by s 16(1) of the UCH Act; and
2. cannot be regarded as having heritage significance (e.g. the examples of lobster traps or pieces of a splintered surfboard suggested by Bederman,¹⁶² or a lump of coal from tonnes of coal in a wreck as suggested by White),¹⁶³

may have its status as automatically protected UCH removed, with the consequence that the article may be retrieved and placed back into the stream of maritime commerce.

It is not far-fetched to envisage situations where a particular UCH article that is automatically protected by s 16(1) of the UCH Act has no heritage significance at all, but is simply an old article of maritime property. Arguably, the Australian legislature was aware of the potential for s 16(1) of the UCH Act to operate to protect old articles of maritime property that have no heritage significance, and it was for this reason that s 16(4) was included in the UCH Act. It is hoped that this was the intended effect of s 16(4) of the UCH Act. If it was, it is suggested that the Australian Parliament has insulated itself well from any criticism that s 16(1) of the UCH Act falsely equates age with heritage significance.

The second pathway of permanent protection is one of Ministerial declaration pursuant to either ss 17 or s 18 of the UCH Act. Each of ss 17 and 18 of the UCH Act are addressed in turn.

The articles of UCH that may be subject to a Ministerial declaration under s 17 of the UCH Act are:¹⁶⁴

1. the remains of, or articles associated with the remains of, a vessel if it is in, or has been removed from, Australian waters;
2. the remains of, or articles associated with the remains of, an aircraft, if it is in, or has been removed from, Commonwealth waters; and
3. an article of UCH that is not otherwise covered by any of the above, if it is in Commonwealth waters.

In order for any of these articles of UCH listed above to be subject of a Ministerial declaration under s 17 of the UCH Act, it is necessary for the Minister to be satisfied that the article is of heritage significance.¹⁶⁵ To that end, s 22(1) of the UCH Act provides that the UCH Rules 'may prescribe criteria relating to assessing whether [articles of UCH] are, or may be, of heritage significance'. If there are criteria relating to heritage significance contained in the UCH Rules, those criteria must be considered by the Minister in reaching a decision under s 17(1) of the UCH Act.¹⁶⁶ As noted earlier, the UCH Rules have not been finalised and no draft of the rules has been publicly released, so it is not yet certain if there will be any such criteria or, if there are such criteria, what those criteria will be.

With respect to s 18 of the UCH Act, the Minister is conferred with power to declare an article of UCH to be protected under the UCH Act if the article is outside Australian waters and he or she is satisfied that the article is of heritage significance to Australia.¹⁶⁷ Again, pursuant to s 22(2) of the UCH Act, any criteria relating to

¹⁶² Bederman, above n 132, 332.

¹⁶³ White, above n 14, 509.

¹⁶⁴ *Underwater Cultural Heritage Act 2018* (Cth) s 17(5). An article that is subject to protection under a declaration made pursuant to s 17 continues to be legally protected even if the article is removed from the particular waters after the declaration is made: see *Underwater Cultural Heritage Act 2018* (Cth) s 17(3).

¹⁶⁵ *Underwater Cultural Heritage Act 2018* (Cth) s 17(1).

¹⁶⁶ *Underwater Cultural Heritage Act 2018* (Cth) s 22(2).

¹⁶⁷ *Underwater Cultural Heritage Act 2018* (Cth) s 18(1). An article that is subject to protect under a declaration made pursuant to s 18 continues to be legally protected even if the article is removed from the particular waters after the declaration is made: see *Underwater Cultural Heritage Act 2018* (Cth) s 18(2).

heritage significance contained in the UCH Rules would need to be considered by the Minister in reaching a decision under s 18(1) of the UCH Act.

In relation to provisional protection provisions, s 19 of the UCH Act enables the Minister to make a provisional declaration of protection in respect of the following articles:¹⁶⁸

1. an article that appears to be either the remains of a vessel, or associated with a vessel or its remains, if it is located in, or has been removed from, Australian waters;
2. an article that appears to be either the remains of an aircraft, or associated with an aircraft or its remains, if it is located in, or has been removed from, Commonwealth waters;
3. an article that appears to be UCH and that is not otherwise covered by any of the above, if it is located in Commonwealth waters.

In order for any of the above articles to be subject of a Ministerial declaration under s 19(1) of the UCH Act, it is necessary for the Minister to be satisfied that the article *may* be of heritage significance, which may be contrasted with the declaration powers in ss 17(1) and 18(1) where the Minister *must* be satisfied that the article has heritage significance. For the purpose of making that determination, the Minister must, pursuant to s 22(2) of the UCH Act, have regard to any criteria relating to heritage significance that are contained in the UCH Rules. A declaration made under s 19(1) of the UCH Act continues in force until the earlier of its revocation or the day 5 years after the date the declaration was made.¹⁶⁹

Importantly, it should be recognised that any Ministerial declaration made in respect of UCH under ss 17(1), 18(1) or 19(1) of the UCH Act may be varied or revoked by the Minister.¹⁷⁰

Having now examined each of the Ministerial declaration mechanisms provided for by the UCH Act, it would be useful, at this juncture, to summarise some of the key points that should be made in respect of those mechanisms:

1. The UCH Act, by its definition of UCH and the protection regime created in Part 2 of the UCH Act, provides scope for protection of a greater variety of UCH than the HS Act (e.g. it may provide for protection of UCH in the form of prehistoric or archaeological articles that are not historic shipwrecks). In the process, the UCH Act can, unlike s 240(3)(c) of the Navigation Act, operate to provide for protection of UCH from anthropogenic maritime activities other than salvage. This is unquestionably an improvement on the HS Act.
2. The UCH Act contains three different types of Ministerial declaration power. The first is the Ministerial declaration power under s 17(1) of the UCH Act that may be exercised in respect of UCH that is either located *within* Australia's jurisdiction or has been *removed from* Australia's jurisdiction. The second is the Ministerial declaration power under s 18(1) of the UCH Act that may be exercised in respect of UCH that is located *outside* Australia's jurisdiction. Both the first and second Ministerial declaration powers are of a permanent nature. The third is the *provisional* Ministerial declaration power under s 19(1) of the UCH Act.
3. The reason why the UCH Act employs these three different types of Ministerial declaration power is because each serves a different purpose and addresses different issues. This point can be supported by consideration of the following, non-exhaustive examples listed below:
 - a. Unlike the permanent declaration powers contained in ss 17(1) and 18(1) of the UCH Act, the provisional declaration power contained in s 19(1) of the UCH Act can be exercised by the Minister to provisionally protect UCH even if the Minister is unsure as to whether the article is actually UCH. The rationale for this is that the provisional declaration power affords temporary protection for articles that may be UCH to enable sufficient time to be dedicated to ascertaining the status of the article and, if the article is proven in time to be UCH, then the

¹⁶⁸ *Underwater Cultural Heritage Act 2018* (Cth) s 19(5).

¹⁶⁹ *Underwater Cultural Heritage Act 2018* (Cth) s 19(3).

¹⁷⁰ *Underwater Cultural Heritage Act 2018* (Cth) ss 17(4), 18(3) and 19(4).

natural next step to be taken would be to have the Minister make a declaration of permanent protection under s 17(1) of the UCH Act in respect of it.

- b. There is arguably some degree of overlap between a Ministerial declaration made, on the one hand, under either ss 17(1) or 19(1) of the UCH Act in respect of UCH that has been removed from Australia's jurisdiction and, on the other, a Ministerial declaration made under s 18(1) of the UCH Act in respect of UCH that is located outside Australia's jurisdiction. However, it is apparent that:
- the exercise of the Ministerial declaration power in s 18(1) of the UCH Act *would* always require consideration of issues of international law;
 - the exercise of the Ministerial declaration power in either ss 17(1) or 19(1) of the UCH Act *would not* always require consideration of issues of international law (e.g. where the UCH is located in Australian or Commonwealth waters and is an article that has Australian origins); and
 - whilst the Ministerial declaration power in s 18(1) of the UCH Act could theoretically be exercised in respect of UCH that has heritage significance to Australia in circumstances where the particular UCH has never been in Australia,¹⁷¹ the power in either ss 17(1) or 19(1) of the UCH Act could not be so exercised.

Bearing this in mind, one could question the validity of s 18(1) of the UCH Act in circumstances where a declaration is made pursuant to that provision in respect of UCH that is located, for example, in the territorial sea or contiguous zone of another State. This is so despite the Australian Parliament's clear intent to avoid such questions by virtue of requiring, pursuant to s 18(1)(b) of the UCH Act, the particular article of UCH to have both heritage significance and a nexus to Australia. At the very least, it would likely be the case that the scope and operation of s 18 of the UCH Act would be read down so as to ensure that Australia meets its obligations under international law to not interfere with the sovereignty of other States.¹⁷²

Despite each of the Ministerial declaration powers serving a different purpose and addressing different issues, it will arguably be the case that the use of the Ministerial declaration powers will be sparing. First, in relation to the Ministerial declaration powers in ss 17(1) or 19(1) of the UCH Act, the most likely purpose those powers will serve is to protect particular types of UCH that have (in the case of s 17(1)) or may have (in the case of s 19(1)) heritage significance and have been located in Australian or Commonwealth waters for less than 75 years,¹⁷³ such that the UCH is not subject to automatic protection under s 16(1) of the UCH Act. Secondly, in relation to the Ministerial declaration power in s 18(1) of the UCH Act, it is unlikely that there will be many articles of UCH that will be subject to declarations made under that provision. For example, by way of analogy, the list of overseas places of historic significance to Australia maintained under the EPBC Act has only three places currently listed on it.¹⁷⁴

Before summarising the main findings of how the UCH Act has addressed the issue of defining UCH and utilising that definition in the creation of the protection regime contained in Part 2 of the UCH Act, one further feature of the protection regime contained in Part 2 of the UCH Act should be identified: namely, the notion of 'protected zones'.

Once UCH is protected – either automatically by application of s 16(1) of the UCH Act, or by Ministerial declaration made pursuant to ss 17(1), 18(1) or 19(1) of the UCH Act – the Minister has power to declare the area containing protected UCH to be a 'protected zone'.¹⁷⁵ There are numerous factors to which the Minister must have regard when determining whether to declare an area containing protected UCH as a protected zone. These factors are outlined in s 20(3) of the UCH Act as follows:

¹⁷¹ For example, an UCH equivalent to Anzac Cove in Turkey or the Kokoda Track in Papua New Guinea, both of which are land sites recognised as overseas places of historic significance to Australia pursuant to domestic legislation: see generally *Environment Protection and Biodiversity Conservation Act 1999* (Cth), Chapter 5A, Part 15A.

¹⁷² As per *Underwater Cultural Heritage Act 2018* (Cth) s 7(5)(a).

¹⁷³ Forrest, above n 129, 8. See also O'Keefe and Prot, above n 112, 1-2.

¹⁷⁴ Australian Government, *List of Overseas Places of Historic Significance to Australia*

<<http://www.environment.gov.au/heritage/places/list-overseas-places-historic-significance-australia>> (accessed 23 December 2018).

¹⁷⁵ *Underwater Cultural Heritage Act 2018* (Cth) s 20(1).

- (3) In making a [protected zone declaration], the Minister must have regard to the following matters:
- (a) the need to protect underwater cultural heritage that is of particular national or international significance, is rare or is subject to an international treaty or agreement (however described);
 - (b) the need to limit access to environmentally, socially or archaeologically sensitive underwater cultural heritage;
 - (c) the need to protect underwater cultural heritage that is under threat of interference, damage, destruction or removal;
 - (d) any danger posed to the public by the underwater cultural heritage;
 - (e) the need to improve management of underwater cultural heritage and its surrounding environment which may be subject to impacts from visitation or development activity;
 - (f) the need to ensure effective monitoring of underwater cultural heritage in remote locations;
 - (g) any other matters the Minister considers relevant.

The imposition of a requirement on the Minister to consider particular matters when exercising the power to declare a particular area containing UCH to be a 'protected zone' under s 20(1) of the UCH Act is a sensible one. Provisions like s 20(3) of the UCH Act are common in regulatory statutes involving administrative decision-making.¹⁷⁶ The clear purpose of such provisions is to ensure that the decision-maker takes into account each of the listed factors but, of course, the matter of how much weight is to be attributed to those factors is one for the decision-maker to determine.¹⁷⁷ Consistent with principles of administrative law concerning relevancy grounds of judicial review,¹⁷⁸ the failure of the Minister to have regard to each of the factors listed in s 20(3) of the UCH Act when determining whether to make a 'protected zone' declaration under s 20(1) of the UCH Act would leave the decision vulnerable to successful judicial review challenge in the courts.

When one has regard to the factors outlined in s 20(3) of the UCH Act, it is apparent that each of limbs (a) to (f) of s 20(3) raise matters that one would naturally expect the Minister to have regard to in determining whether or not a 'protected zone' declaration ought to be made. Indeed, all of the factors listed in s 20(3)(a) to (f) of the UCH Act are, by and large, identified in the UNESCO Convention as important matters to address in the implementation of UCH laws. With respect to s 20(3)(g) of the UCH Act, that limb is clearly directed to conferring the Minister with some scope to take into account matters which the Minister considers to be relevant but which are not listed in s 20(3)(a) to (f) of the UCH Act. The inclusion of such a 'catch-all' category of relevant matters is logical, for it is seldom the case that a statute can (or should) exhaustively set out all matters that are to be considered in the exercise of a statutory power. As Bates has observed in a similar decision-making context, '[i]t would be very difficult for a statute to categorically include an exhaustive list of all relevant considerations for every decision that could possibly be made under the legislation'.¹⁷⁹

Section 21(5) of the UCH Act requires particular matters to be specified in the protected zone declaration. One of the matters that must be specified is any conduct that is prohibited (either generally or in specific circumstances) in an area forming the protective zone.¹⁸⁰ Section 21(7) gives a non-exhaustive list of examples of conduct that may be prohibited in an area forming the protective zone, which include: the entry of persons or vessels into the area; the movement of persons or vessels once in the area; and conducting underwater activity in the area covered by the declaration.

Summary of Key Points Made in Respect of the Definition of UCH in the Underwater Cultural Heritage Act and the Application of that Definition in the Protection Regime Established by the Underwater Cultural Heritage Act

In concluding this section of this article, it is appropriate to draw together the key points that have been made in this section. They are:

1. The UCH Act has defined UCH in an appropriate manner that takes advantage of the positive features of the UNESCO Convention's definition of UCH, but avoids the deficient features of that definition. Unlike the definition of UCH in the UNESCO Convention, which attempts to set out not only the meaning of UCH but also the circumstances in which it will qualify for protection under the UNESCO Convention, the UCH Act adopts a less complicated approach of setting out the meaning of UCH only and then separately establishing a protection regime in Part 2 of the UCH Act which sets out the

¹⁷⁶ See also Peter Cane and Leighton McDonald, *Principles of Administrative Law* (Oxford University Press, 2nd ed, 2012) 140.

¹⁷⁷ See *Minister for Aboriginal Affairs v Peko-Wallsend Ltd* (1986) 162 CLR 24, 40-41 (Mason J).

¹⁷⁸ See generally Mark Aronson and Matthew Groves, *Judicial Review of Administrative Action* (Thomson Reuters, 5th ed, 2013) 274-286.

¹⁷⁹ Bates, above n 81, 987.

¹⁸⁰ *Underwater Cultural Heritage Act 2018* (Cth) s 21(5)(d).

quantitative and qualitative criteria that need to be satisfied in order for UCH to obtain the status of protected UCH under the Act.

2. The selection of a quantitative criterion of 75 years for automatic protection of the types of UCH listed in s 16(1) of the UCH Act is a sensible one, in that stakeholders in Australia are already familiar with the use of the 75-year criterion in the context of the HS Act. However, the use of that criterion in the UCH Act can be contrasted with its use in the HS Act, in that the UCH Act uses the criterion as an automatic trigger for protection in the statute itself, rather than in a blanket protection declaration made pursuant to the statute.
3. The UNESCO Convention's definition of UCH has been criticised on the grounds that it falsely equates age with heritage significance and may cover objects such as lobster traps, lumps of coal and so on that have no heritage significance at all. The definition of UCH in the UCH Act appears to be capable of avoiding such criticisms if s 16(4) of the UCH Act operates in a manner whereby the UCH Rules can strip certain UCH of the status of automatic protection in circumstances where the UCH that is automatically protected has no heritage significance.
4. Each of the Ministerial declaration powers in ss 17(1), 18(1) and 19(1) of the UCH Act serves a different purpose and addresses different issues. The use of these powers is likely to be sparing.
5. The UCH Act, by its definition of UCH and the protection regime created in Part 2 of the UCH Act, provides scope for protection of a greater variety of UCH than the HS Act.

4.2.3 Sovereign Immunity of Sunken Warships and Other State-Owned Vessels – Understanding the Issue

Numerous traditional maritime powers, such as the United Kingdom and the United States, have previously expressed concerns that the UNESCO Convention would serve to undermine the sovereign immunity of sunken warships and other State-owned vessels as established under the LOSC.¹⁸¹ In essence, the starting proposition adopted by the traditional maritime powers is that the principle of sovereign immunity continues to apply to State vessels even once sunk, and that title to the sunken State vessel continues to be vested in the flag State of the vessel unless expressly abandoned or otherwise disposed of.¹⁸² It is said that the UNESCO Convention undermines the principle of sovereign immunity by conferring coastal States with the 'exclusive right to regulate and authorize activities directed at [UCH] in their internal waters, archipelagic waters and territorial sea'¹⁸³ without requiring the prior authorisation of the sunken vessel's flag State.¹⁸⁴ The traditional maritime powers have also expressed concern about the provisions found in Article 10 of the UNESCO Convention on the basis that, in certain prescribed circumstances, Article 10 enables the coastal States to take measures in respect of sunken State-owned vessels even in circumstances where the flag State has not given its prior consent.¹⁸⁵

Some commentators have expressed the view that the concerns of the traditional maritime powers in this regard are misguided. In support of that view, such commentators have, persuasively, contended that the UNESCO Convention, through Article 2(8), actually seeks to reinforce the importance of the principle of sovereign immunity by providing that nothing in the UNESCO Convention shall be interpreted as modifying the existing rules of international law and State practice relating to sovereign immunities, as well as State rights with respect to its State vessels and aircraft.¹⁸⁶

¹⁸¹ For a full explanation of this matter, see Dromgoole, above n 138, 119-120. It is noted that '[a] significant number, if not the majority, of archaeologically, historically or culturally important shipwrecks are warships': see Craig Forrest, 'Culturally and Environmentally Sensitive Sunken Warships' (2012) 26 *Australian and New Zealand Maritime Law Journal* 80, 80.

¹⁸² Dromgoole, above n 138, 119. This is generally recognised by Australian law: see *Foreign States Immunities Act 1985* (Cth) ss 3, 9, 10 and 18. See also White, above n 14, 462.

¹⁸³ *UNESCO Convention*, art 7(1).

¹⁸⁴ This is because art 7(3) of the UNESCO Convention states that the coastal State should (but not shall) inform the flag State of the discovery of a sunken warship or State-owned vessel: see also Dromgoole, above n 138, 119-120 and Eden Sarid, 'International Underwater Cultural Heritage Governance: Past Doubts and Current Challenges' (2017) 35 *Berkeley Journal of International Law* 219, 231.

¹⁸⁵ See also Sarid, above n 184, 231.

¹⁸⁶ Strati, above n 32, 47-48; Sarid, above n 184, 232-233.

4.2.4 Approach of the Underwater Cultural Heritage Act to Sovereign Immunity of Sunken Warships and Other State-Owned Vessels

To the extent that claims that the UNESCO Convention undermines the sovereign immunity of sunken warships and other State-owned vessels have merit, it is submitted that no reasonable criticism could be made of the manner in which that issue is addressed in the UCH Act for two key reasons.

First, the UCH Act does not seek to affect, either expressly or impliedly, the existing position under the *Foreign States Immunities Act 1985* (Cth) (**FSI Act**) in relation to the sovereign immunity of sunken warships and other State-owned vessels. Consistent with general principles of international law, the FSI Act provides that a foreign State is granted immunity from the jurisdiction of the courts of Australia.¹⁸⁷ More specifically, as White observes, the FSI Act provides that the Australian courts do not have jurisdiction to hear or determine any action brought *in rem* against a vessel or other maritime property (e.g. a salvage claim) belonging to a foreign State unless the vessel or property was in use in for commercial purposes, or unless the foreign State waives its immunity from suit.¹⁸⁸

Secondly, s 52 of the UCH Act provides, in effect, that ownership of and sovereignty in the remains of any:

1. Australian Government vessel that was used on only government non-commercial service (including articles associated with such a vessel); or
2. vessel or aircraft belonging to or used by the Australian Defence Force (including articles associated with such a vessel or aircraft),

that are located outside the outer limits of Australian waters remain vested in the Commonwealth unless, in the case of the remains of a vessel or aircraft, the vessel or aircraft was surrendered, abandoned or the Commonwealth has expressly relinquished its rights in relation to the remains of the vessel or aircraft under international law. Of course, s 52 of the UCH Act is clearly serving the purpose of protecting Australia's sovereign immunity in respect of particular remains or articles that may constitute UCH. However, it is suggested that, in recognising the principle of sovereign immunity in s 52 of the UCH Act, it should logically follow that the Australian Parliament would readily acknowledge and accept any claim of sovereign immunity raised by another State, in accordance with principles of international law, in respect of any sunken warship or other non-commercial vessel (or aircraft) of that State which is located in Australian or Commonwealth waters, so long as the other State had not abandoned or relinquished its rights in respect of the vessel or aircraft. Indeed, such an outcome would be consistent with s 7(5)(a) of the UCH Act, which provides that the UCH Act has effect subject to 'the obligations of Australia under international law, including obligations under any international agreement binding on Australia', including the LOSC.

4.2.5 The Application of the Law of Salvage to UCH – Understanding the Issue

The issue of the application of the law of salvage to UCH was explored, to some extent, in section 2 of this article concerning the need for legal protection of UCH, and section 3.1.3 of this article concerning the interaction between specific provisions of the HS Act and the Navigation Act. Therefore, it suffices, for present purposes, to give a brief explanation of the application of the law of salvage to UCH.

Salvage involves the provision of prompt, effective and voluntary services to vessels and associated articles (e.g. cargo) in peril at sea.¹⁸⁹ As discussed above, the general maritime law enunciated by courts exercising Admiralty jurisdiction has, from time to time, recognised that salvage services may be provided in respect of sunken or derelict maritime property, including shipwrecks. Courts exercising Admiralty jurisdiction in some States have held that maritime property in the form of UCH cannot be salvaged, whereas courts exercising Admiralty jurisdiction in other States have recognised that maritime property can be salvaged.¹⁹⁰ The general approach of the UNESCO Convention to the application of the law of salvage was encapsulated in:

¹⁸⁷ *Foreign States Immunities Act 1985* (Cth) s 9.

¹⁸⁸ White, above n 14, 462.

¹⁸⁹ Roach, above n 16, 314.

¹⁹⁰ See generally Juvelier, above n 27, 1038-1041.

1. Article 4 of the UNESCO Convention, which states:

Any activity relating to underwater cultural heritage to which this Convention applies shall not be subject to the law of salvage or law of finds, unless it:

 - a) is authorised by competent authorities, and
 - b) is in full conformity with this Convention, and
 - c) ensures that any recovery of the underwater cultural heritage achieves its maximum protection.
2. Rule 2 of the Rules annexed to the UNESCO Convention,¹⁹¹ which states:

The commercial exploitation of [UCH] for trade ... or its irretrievable dispersal is fundamentally incompatible with the protection and proper management of [UCH]. Underwater cultural heritage shall not be traded, sold, bought or bartered as commercial goods.

The interrelationship and meaning of these two ambiguous provisions has been well addressed elsewhere.¹⁹² It suffices here to make a few short observations about them. First, as Forrest points out, it is difficult to envisage any circumstance where the law of salvage could be applied to protected UCH 'in full conformity' with the UNESCO Convention, for Article 2(7) (and, probably, Rule 2) of the UNESCO Convention are directed to preventing the commercial exploitation of UCH and the application of salvage law invariably results in such commercial exploitation.¹⁹³ Secondly, whilst there is potential for some inconsistency to occur in relation to the application of Article 4 of the UNESCO Convention and Article 30(1)(d) of the 1989 Salvage Convention,¹⁹⁴ it is apparent that both Article 4 and Article 30(1)(d) generally intend to give effect to the same objective: i.e. to exclude, or permit the exclusion of, the application of the law of salvage to specific forms of UCH. The rationale for that position is a fairly simple one: salvage activities will often result in the harm, damage or destruction of UCH and, for that reason, it is desirable to prevent such activities being conducted in respect of UCH. However, unlike Article 30(1)(d), the ability of Article 4 to deliver on that intended objective is undermined by the series of unclear exceptions outlined in limbs (a) to (c) of Article 4.¹⁹⁵

In relation to Australia specifically, as stated in section 3.1.3 of this article, it is evident that s 240(3)(c) of the Navigation Act is intended to operate so as to prevent salvage operations from being conducted in respect of the specific forms of UCH referred to therein. However, s 15 of the HS Act, somewhat oddly, appears to enable salvage operations to be conducted in respect of UCH that is referred to in s 240(3)(c) of the Navigation Act and protected by the HS Act in circumstances where a permit has been obtained under the HS Act which, in terms, permits salvage operations to be conducted.

Much has been written already on the issue of whether or not the law of salvage should apply to UCH.¹⁹⁶ It is not intended to explore that issue in detail here, other than to state that it is considered that the position of those advocating for the exclusion of the application of the law of salvage to UCH protected by law is, for the most part, to be preferred over the position of those arguing against the exclusion of the law of salvage. To that end, it is submitted that the following three principles should govern the interaction between UCH and salvage in any domestic legal regime addressing the protection of UCH:

1. The starting position should always be to presume that the law of salvage does not apply to any UCH that is protected by law due to its *assumed* heritage significance (e.g. by satisfying a particular description and quantitative criterion for automatic protection, as per s 16(1) of the UCH Act) or its *actual* heritage significance (e.g. determined by way of Ministerial declaration, as per s 17(1) of the UCH Act). This would aim to ensure that the protected UCH is not harmed or destroyed by the conduct of salvage operations.
2. The starting position in Principle 1 is a rebuttable presumption. As a consequence:
 - a. if a would-be salvor is able to demonstrate that the protected UCH does not have heritage significance, the UCH may be stripped of its protected status and then subject to salvage operations; or

¹⁹¹ The Rules form part of the Convention itself: see *UNESCO Convention*, art 33.

¹⁹² See, eg, Dromgoole, above n 55, 69-72 and Forrest, above n 27, 340-349.

¹⁹³ Forrest, above n 27, 346.

¹⁹⁴ *Ibid* 347.

¹⁹⁵ *Ibid* 345-346.

¹⁹⁶ See, eg, Varmer, above n 27; Brice, above n 43 and Bederman, above n 43.

- b. if a would-be salvor is able to demonstrate that the salvage operations will be conducted in a manner that is consistent with the protection of the archaeological or historical values and environmental integrity of the UCH, a permit may be granted that authorises the salvage operations to be conducted to that end.
3. For any UCH that is not protected by law in circumstances where:
 - a. the discovery of that UCH has been reported (e.g. pursuant to s 40 of the UCH Act);
 - b. its heritage significance has been assessed in accordance with applicable UCH law; and
 - c. following that assessment, it is determined by the relevant government official or agency that the UCH should not be protected,

then, if that determination remains standing after the exhaustion of any merit appeal or judicial review rights in respect of it, the law of salvage should apply to that UCH until any future point in time when the UCH is afforded legal protection, on the basis of either its assumed heritage significance or actual heritage significance.

Keeping the above firmly in mind, it is now appropriate to turn to consider how the recent UCH law reforms at the Commonwealth level in Australia have addressed this issue.

4.2.6 Approach of the Underwater Cultural Heritage Act and Underwater Cultural Heritage Transitional Act to the Application of the Law of Salvage to UCH

In order to critically examine the approach of the UCH Act, the UCH Transitional Act and associated Commonwealth laws to the application of the law of salvage, it would be useful to consider two different hypothetical examples before making some general observations on the issues arising.

First Hypothetical Example on Application of the Law of Salvage to UCH

For the purposes of the first example, let it be assumed that a salvor wishes to salvage the remains of an Australian vessel that are located on the seabed within Australian waters and automatically protected by s 16(1) of the UCH Act. Could it be done?

Given that the Navigation Act is the relevant maritime law at the Commonwealth level in Australia addressing wrecks and salvage, it makes sense to commence consideration of the question by referring to that Act. As noted earlier in section 3.1.3 of this article, the Navigation Act makes a distinction between a 'wreck' on the one hand, and an 'historic wreck' on the other. As a result of the UCH Transitional Act, the definition of 'historic wreck' in s 14 of the Navigation Act is to be changed so as to mean:

historic wreck means:

- (a) remains or articles covered by paragraph 16(1)(a) or (b) of the *Underwater Cultural Heritage Act 2018*; or
- (b) remains or articles covered by a declaration made in relation to item 1 or 2 of the table in subsection 17(5) of that Act; or
- (c) remains or articles covered by a provisional declaration made in relation to item 1 or 2 in the table in subsection 19(5) of that Act.

The practical effect of this change in definition is that the AMSA continues to have a much more limited scope of powers to deal in 'historic wrecks' specifically,¹⁹⁷ as distinct from 'wrecks' more generally.¹⁹⁸ The main observation to be made in this regard is that the AMSA is prohibited from exercising its powers under s 229 of the Navigation Act in relation to an 'historic wreck' (as well as equivalent wrecks under State or Territory legislation) unless, in the AMSA's opinion, the exercise of those powers is necessary to either save human life, secure the safe navigation of a vessel or to deal with an emergency situation that poses a serious threat to the environment.¹⁹⁹

¹⁹⁷ *Navigation Act 2012* (Cth) ss 238 and 239.

¹⁹⁸ *Navigation Act 2012* (Cth) s 229.

¹⁹⁹ *Navigation Act 2012* (Cth) s 238(2).

There is no question that the vessel the subject of this first hypothetical example – i.e. an Australian vessel that is automatically protected by s 16(1) of the UCH Act – satisfies the amended definition of an ‘historic wreck’ in s 14 of the Navigation Act.

Part 3 of Chapter 7 of the Navigation Act addresses salvage. Section 240(3) of the Navigation Act relevantly provides:

- (3) This Part does not apply to any salvage operation:
- ...
- (c) to the extent that it involves property:
- (i) that is maritime cultural property of prehistoric, archaeological or historic interest; and
 - (ii) that is situated on the seabed.

It is evident that s 240(3) of the Navigation Act has not been amended in any way at all as a result of the recent UCH law reforms at the Commonwealth level in Australia. This means that the analysis of s 240(3) of the Navigation Act contained in section 3.1.3 of this article remains applicable in this context and that it is necessary only to adapt that analysis to address the interaction of s 240(3) of the Navigation Act with the provisions of the UCH Act that replace the HS Act provisions concerning permits.

First, whilst the words used in s 240(3)(c) of the Navigation Act accord with the words used in Article 30(1)(d) of the 1989 Salvage Convention in relation to making a reservation, the interaction between the types of maritime property referred to in s 240(3)(c) on the one hand, and the forms of UCH that are afforded protection by the UCH Act on the other, is as equally uncertain as the interaction between s 240(3)(c) of the Navigation Act and the provisions of the HS Act considered in section 3.1.3 above.

When considering s 240(3)(c) against the protections afforded by the UCH Act to particular forms of UCH, it would be reasonable to adopt the position that any UCH that:

1. is protected under the UCH Act; and
2. satisfies the definition of ‘historic wreck’ in s 14 of the Navigation Act,

will constitute ‘maritime cultural property of ... historic interest’.

The Australian vessel considered in this first hypothetical example is protected under the UCH Act and satisfies the definition of ‘historic wreck’ in s 14 of the Navigation Act, such that it will constitute ‘maritime cultural property of ... historic interest’.

The conjunctive ‘and’ is used between limb (i) and limb (ii) in s 240(3)(c) of the Navigation Act. This means that, in order for salvage operations to be rendered inapplicable to the Australian vessel considered in this example, satisfying limb (i) in s 240(3)(c) is not enough; it is necessary to also satisfy limb (ii). On limb (ii), it is evident that the Australian vessel considered in this example is located on the seabed. Thus, s 240(3)(c) operates to render inapplicable the law of salvage to that vessel.

Section 23 of the UCH Act enables the Minister to grant a permit to a person to engage in specific conduct relating to particular UCH that is protected under the UCH Act. The permit that is granted must specify, amongst other things, the UCH to which the permit applies, the conduct authorised and the conditions, if any, to which the permit is subject.²⁰⁰ Like s 15 of the HS Act, it seems that s 23 enables a person to, in effect, engage in salvage activity in respect of particular UCH that is protected under law where the person has obtained a permit to engage in that activity. This appears to be so despite the apparent objective of s 240(3)(c) of the Navigation Act to render salvage operations non-applicable to certain UCH (such as the Australian vessel considered in this example). Again, it is quite odd that that the UCH law (i.e. the UCH Act) would appear to have such a result in circumstances where a maritime law – i.e. the Navigation Act – is expressly attempting to prohibit salvage of maritime property that is located on the seabed and has prehistoric, archaeological or historic interest.

²⁰⁰ See generally *Underwater Cultural Heritage Act 2018* (Cth) s 23(5).

Nevertheless, the position in respect of the UCH considered in this first hypothetical example appears to be as follows: whilst s 240(3)(c) of the Navigation Act operates to prevent salvage operations being conducted in respect of that UCH, the Minister would have power, under s 23 of the UCH Act, to grant a permit which authorises salvage operations to be conducted in respect of that UCH. Of course, the UCH Rules may, in due course, include provisions that dictate the reaching of a contrary conclusion, but it is unhelpful to speculate further on that point in the absence of any draft of those UCH Rules being available.

Second Hypothetical Example on Application of the Law of Salvage to UCH

For the purposes of the second hypothetical example, let it be assumed that a salvor wishes to salvage the remains of an Australian vessel located on the seabed in Australian waters that are:

1. not automatically protected by s 16(1) of the UCH Act on the basis that the remains have been underwater for less than 75 years (let it be assumed that the remains have been underwater for 50 years); and,
2. not subject to any Ministerial declaration under s 17(1) or 19(1) of the UCH Act at any subsequent time after the discovery of those remains has been reported under s 40 of the UCH Act.

Could it be done?

The better answer to the question is: no.

The remains of the Australian vessel would probably be regarded as UCH as defined in s 15(1) of the UCH Act, on the basis that the remains would constitute a trace of human existence that has cultural or historical character and is located underwater. However, merely falling within the definition of UCH in s 15(1) of the UCH Act is not sufficient to afford the remains of the Australian vessel with protection under that Act and, as framed here, the hypothetical example clearly indicates that the remains of the Australian vessel are not afforded protection under the UCH Act. It would follow, as a corollary, that the permit provision in s 23 of the UCH Act could not be enlivened to permit the salvage of the remains of the Australian vessel; after all, the permit provision in s 23 of the UCH Act applies in respect of UCH that is protected under the UCH Act. As a result, the question of permissibility of salvage operations is to be answered by reference to s 240(3)(c) of the Navigation Act.

The content of s 240(3)(c) of the Navigation Act has already been set out in this section of the article. When regard is had to that provision, the better view on the application of that provision to the second hypothetical example posed here is that salvage operations could not be conducted in respect of the remains of the Australian vessel on the basis that those remains constitute maritime cultural property that is of historic interest and is located on the seabed.

Summary of Key Points Arising from the Two Hypothetical Examples

Reflecting on the two hypothetical examples posed above, it seems quite odd that there could be circumstances where UCH that is protected under the UCH Act could be subject to salvage operations (i.e. by way of the grant of a permit under s 23 of the UCH Act authorising that conduct to be done), and yet UCH that is not protected under the UCH Act could not be subject to salvage operations by virtue of s 240(3)(c) of the Navigation Act. It is submitted that such unusual situations are undesirable, illogical and prone to cause regulatory confusion amongst stakeholders. Such situations could be avoided or remedied in one or more of the following ways:

1. The Minister ensures that, when exercising her power to grant a permit under s 23 of the UCH Act, she does so in a manner that gives effect to the apparent objects of the UCH Act to protect UCH that is regulated by the Act. In that regard, it could be argued that those objects would be achieved by either refusing the permit or alternatively granting a permit that allows the recovery of the UCH, subject to the condition that the recovery of that UCH is consistent with the protection of archaeological or historical values and environmental integrity of the particular UCH.
2. The UCH Act itself could be amended to expressly provide that permits cannot be granted by the Minister for the salvage of UCH protected by the UCH Act, either absolutely or in particular circumstances (e.g. where the conduct of salvage activities would be inconsistent with the protection of archaeological or historical values and environmental integrity of the particular UCH).

3. Section 240(3)(c) of the Navigation Act is amended to permit salvage operations to be conducted in respect of UCH that is not afforded legal protection under the UCH Act.
4. Both the UCH Act and s 240(3)(c) of the Navigation Act are amended to adopt the three principles articulated in section 4.2.5 above for governing the interaction between UCH and salvage. Such amendments would need to ensure that both the UCH Act and the Navigation Act adopt the same position in respect of salvage of UCH, so as to ensure that the potential unusual results referred to in the two hypothetical examples posed above are not realised.

4.2.7 Ownership and Abandonment of Maritime Property that may Constitute UCH – Understanding the Issue

The issue of ownership and abandonment continues to be problematic.²⁰¹ While some attempts were made to grapple with these issues during the negotiations of the UNESCO Convention text, the final text of the UNESCO Convention itself does not address such issues.²⁰² In this regard, Strati has suggested that the reason the UNESCO Convention does not address such issues is due to the fact that the UNESCO Convention is only directed at ‘interference with cultural heritage and the quality of the work done in relation to that heritage’.²⁰³ Irrespective of the merits of this approach having been adopted, it is evident that issues of ownership and abandonment will often have much importance in resolving questions as to application of different maritime laws to UCH.

Under the law of salvage, the carrying out of a salvage operation must be authorised by the owner of the salvable property (or his or her agent).²⁰⁴ As time passes, the ability of a professional salvor to ascertain the identity of the owner of the salvable property (i.e. wreck of a vessel, cargo or other maritime property constituting UCH) will inevitably become harder. Where the maritime property constituting UCH has been abandoned, the domestic laws of the particular State may seek to vest the maritime property in the State itself, thereby excluding the application of the law of finds (or derelict).²⁰⁵ Where the law of finds or derelict does not apply, the ability of a salvor to acquire ownership of the maritime property constituting UCH would depend on a court awarding the salvor ownership in lieu of a salvage award.²⁰⁶

There is much variance between the approaches taken by different States to issues of ownership and abandonment in the context of salvage of UCH,²⁰⁷ with the consequence that such issues must always be considered on a jurisdiction-by-jurisdiction basis.

4.2.8 Approach of the Underwater Cultural Heritage Act to Ownership and Abandonment of Maritime Property that Constitutes UCH

At a general level, it is apparent that the approach taken under Commonwealth law to ownership of maritime property that constitutes UCH depends, in part, on whether or not the UCH in question constitutes an ‘unclaimed wreck’ or another type of UCH.

Approach to Ownership and Abandonment of Maritime Property in the Form of an ‘Unclaimed Wreck’

With respect to UCH which constitutes an ‘unclaimed wreck’, s 228 of the Navigation Act provides that the Commonwealth is entitled to all ‘unclaimed wreck’ found within Australia’s jurisdiction, including in Australian or Commonwealth waters. Section 14 of the Navigation Act defines ‘unclaimed wreck’ to mean:

any wreck in respect of which no claim has been made during the period of a year beginning when AMSA first publishes a notice under section 234 in relation to the wreck.

The word ‘wreck’ is given a non-exhaustive definition in s 14 of the Navigation Act as follows:

²⁰¹ Forrest, above n 51, 524-525.

²⁰² Ibid.

²⁰³ Strati, above n 32, 43.

²⁰⁴ See Davies and Dickey, above n 15, 884 (and the authorities referred to therein).

²⁰⁵ This has occurred in many jurisdictions, including Australia: see generally Forrest, above n 15, 312; Juvelier, above n 27, 1043-1045.

²⁰⁶ Forrest, above n 15, 312.

²⁰⁷ Juvelier, above n 27, 1043-1045.

'wreck' includes:

- (a) a vessel that is wrecked, derelict, stranded, sunk or abandoned or that has foundered; and
- (b) any thing that belonged to or came from a vessel mentioned in paragraph (a); and
- (c) any thing that belonged to or came from a vessel in distress; and
- (d) jetsam, flotsam and lagan.

As noted earlier in this article, a narrower species of 'wreck' is defined in the Navigation Act – i.e. 'historic wreck'. It is unnecessary to set out that definition again. Rather, it suffices to note here that the definition of 'wreck' in s 14 of the Navigation Act could clearly embrace the remains of a vessel or articles associated with that vessel.

Section 234 of the Navigation Act, which is referred to in the definition of 'unclaimed wreck', provides, in effect, that, as soon as reasonably practicable after being given notice by a person in relation to a wreck under s 232 of the Navigation Act or upon otherwise becoming aware of a wreck, the AMSA must publish a notice on its website or in a prescribed nautical publication that sets out the details prescribed by the *Navigation Regulation 2013* (Cth) (**Navigation Regulation**). Unfortunately, when consulting the Navigation Regulation, it is evident that no details are currently prescribed in them for the purpose of inclusion in a notice that is given under s 234 of the Navigation Act.

If no claim has been made in respect of the wreck during the one year notice period, the Commonwealth will become entitled to claim that wreck. The Minister would then have power under s 51 of the UCH Act to declare, by legislative instrument, ownership of that wreck to be vested in the Commonwealth (including government authorities of the Commonwealth), or a State or Territory of Australia (including government authorities in each of those Australian jurisdictions), a foreign State or any other specified persons.²⁰⁸ The power under s 51 of the UCH Act may only be exercised by the Minister if she is satisfied that the declaration of ownership is necessary for the purpose of giving effect to the UCH Act or any relevant agreement under international law.²⁰⁹ There are no criteria that are prescribed for the purpose of the Minister reaching that state of satisfaction, although that is probably understandable given the difficulties that would be encountered in establishing criteria for determining when it would or would not be 'necessary' for a declaration of ownership to be made.

It is considered that the scheme provided for by the Navigation Act and s 51 of the UCH Act for declarations of ownership to be made is, in principle, sound. In particular, the use of a period of one year for owners to claim their wrecks is a reasonable one. However, there is scope for improvement of this aspect of the regime in two respects:

1. The process for notification of 'unclaimed wrecks' pursuant to s 234 of the Navigation Act would be improved if the AMSA was legally obliged, or exercised its discretion, to encourage persons to register their contact details (particularly email addresses) with the AMSA such that, whenever a 'new' unclaimed wreck is notified via AMSA's website, the registered persons automatically receive a standard template email that provides details as to the 'new' unclaimed wreck that has been listed and the process by which a registered person can make a claim in respect of the wreck as well as any criteria that need to be satisfied for making a claim (noting, of course, that the person would need to have some evidence to demonstrate that the person has a valid claim of ownership in respect of the wreck). Indeed, the process by which a person can make a claim in respect of the wreck would ideally be provided for in either the Navigation Act itself or the Navigation Regulation.
2. The Navigation Regulation should prescribe minimum details that should be included in any notice that is given pursuant to s 234 of the Navigation Act. The notice should be drafted in a manner that gives a person a sufficient understanding of the nature of the wreck that is the subject of the notice. In

²⁰⁸ Theoretically, it may also be possible for the Minister to exercise that power in respect of UCH even in circumstances where the Commonwealth has not become entitled to the unclaimed wreck in accordance with s 228 of the *Navigation Act 2012* (Cth). However, it is reasonable to suspect that the Minister would never exercise her power under s 51 of the *Underwater Cultural Heritage Act 2018* (Cth) to declare ownership of the unclaimed wreck to be vested in a particular person until the notification process under s 234 of the *Navigation Act 2012* (Cth) has been followed.

²⁰⁹ It is noted that a similar power is provided for in the Act with respect to Dutch shipwrecks and relics specifically: see *Underwater Cultural Heritage Act 2018* (Cth) s 50. It should also be noted that if a declaration of ownership of UCH results in the acquisition of property from a person within the meaning of s 51(xxxi) of the *Constitution*, the Commonwealth is liable to pay a reasonable amount of compensation to that person: see *Underwater Cultural Heritage Act 2018* (Cth) s 53. For commentary on s 51(xxxi) of the *Constitution* generally, see Williams, Brennan and Lynch, above n 74, 1298-1327.

particular, the non-exhaustive list of relevant details referred to below should be incorporated into any notice:

- a. a description of the wreck, including any marks or other features by which it is distinguished;
- b. the estimated period of time that the wreck has been located underwater; and
- c. the likely purpose or use that was served by the vessel before it was wrecked.

Approach to Ownership and Abandonment of Maritime Property other than an 'Unclaimed Wreck'

Secondly, with respect to any other type of UCH that cannot be regarded as falling within the definition of an 'unclaimed wreck', such as the remains of an aircraft, it is apparent that there is no procedure that is prescribed under either the Navigation Act or the UCH Act by which the Commonwealth may become entitled to ownership of that UCH. This creates a regulatory gap that could be remedied by reproducing the provisions of the Navigation Act addressing unclaimed wreck in the UCH Act and then adapting the provisions so as to address ownership of unclaimed UCH that is not in the nature of a wreck. In any event, the Ministerial powers contained in s 51 of the UCH Act would generally apply to UCH that is not in the nature of a wreck in the manner described immediately above, and the two recommendations made above in relation to how the process for making declarations of ownerships in respect of wrecks constituting UCH would equally apply to the process for making declarations of ownership in respect of UCH other than wrecks.

4.2.9 Regulation of Maritime and Other Activities that Involve Interaction With or Use of UCH – Understanding the Issue

As stated earlier in this article, there are numerous anthropogenic activities besides salvage operations that may involve interaction with, or use of, UCH that is protected under law. Whilst the UNESCO Convention itself does not make any reference to permits, it is widely understood that the use of a permits system is the common approach to regulating the conduct of any maritime or other activities that involve interactions with, or use of, UCH under domestic legislation (e.g. permits to excavate, export or import UCH).²¹⁰ Forrest has suggested that the use of permits may have a number of benefits in a preservation regime.²¹¹ That may be accepted as a general proposition, although he does not appear to articulate what benefits are associated with permits, beyond indicating that the use of permits may serve to ensure that activities directed at UCH are conducted in accordance with the Rules to the UNESCO Convention.²¹² Certainly, the use of permits – as a command-and-control approach to regulation – can have numerous benefits in the context of a regime regulating activities directed at a specific feature of the environment (i.e. UCH).²¹³ On a general level, the main benefits associated with the use of such permits in the context of UCH are:²¹⁴

1. it can provide a high level of visibility for all stakeholders as to how activities are being regulated in a manner to achieve the objectives of the relevant UCH law;
2. by conferring government regulators with the ability to prosecute permit holders for breaches of permit conditions in the courts and setting sufficiently high maximum penalties for such offences, the UCH law can demonstrate to all stakeholders that the legislators are 'serious' about ensuring that the objectives of the relevant UCH law are achieved; and
3. permits can be drafted in a manner that ensures permit holders are required to adopt and implement available measures that are known to be effective in managing anthropogenic interactions with UCH that is protected under law.

²¹⁰ Forrest, above n 51, 546.

²¹¹ Ibid 546-547.

²¹² Ibid 546.

²¹³ See generally Richard B Stewart, 'Regulation, Innovation and Administrative Law: A Conceptual Framework' (1981) 69 *California Law Review* 1256, 1367.

²¹⁴ Adapted from Stewart, above n 213, 1367-1368.

Having said that, it should be acknowledged that, in the context of environmental regulation generally, command-and-control methods (e.g. permit systems) have been described in the literature as having significant limitations.²¹⁵ Such limitations include:²¹⁶

1. high compliance costs and substantial disincentives to market innovation; and
2. delays, uncertainties and costs associated with adversary decisional procedures.

Whilst such limitations may be acutely felt in the context of regulating, for example, non-point source pollution or climate change, it is unlikely that the use of permits in the context of regulating anthropogenic activities directed at UCH will experience such limitations.

First, like any responsible proponent who is looking to carry out activities that involve environmental interactions, any person who is looking to engage in activities directed at UCH should ensure that they undertake a cost-benefit analysis to ensure that, if that person looks to pursue the activity, the costs of complying with any UCH permit granted in respect of the activity are manageable.

Secondly, the incurrance of costs by government in implementing the compliance and enforcement regime established by any heritage protection law is unavoidable. However, when one considers the main objective that is served by the compliance regime (i.e. ensuring the protection of UCH), the incurring of a reasonable level of costs in implementing the compliance regime is worthwhile. Further, it may be possible to offset those costs by way of generating income from appropriately regulated activities directed at UCH (e.g. UCH tourism²¹⁷) and reinvesting the income from such endeavours into the budget used for administering the UCH law. Having said that, one must acknowledge that, where a State is party to the UNESCO Convention, the implementation of such an approach to managing compliance costs may be significantly restricted, if not prohibited, by Article 2(7) of the UNESCO Convention and Rule 2 of the Annex to that convention. It is noted that Australia would not be subject to such restrictions at the present time, as a result of it not being party to the UNESCO Convention.

Thirdly, the scope for market innovation in the context of UCH is limited, unlike in the context of emissions trading schemes, for example. As a result, any UCH law that is based on the command-and-control method of environmental regulation would not serve to provide substantial disincentives to market innovation.

Fourthly, there will always be some delays, uncertainties and costs associated with decisional procedures set out in a regulatory statute. The key for any regulatory statute is to ensure that such undesirable characteristics are appropriately managed or mitigated to the extent that this is possible. For example, in respect of delays, a regulatory statute can manage this issue by imposing time limitations for making decisions and exercising rights of appeal or review to courts in respect of decisions. Making provision for clear and transparent decision-making processes in the regulatory statute can reduce uncertainties (e.g. the obligation to give formal reasons for decision). The issue of costs has already been addressed.

Keeping the above in mind, it is appropriate to now consider the permitting and compliance systems established by the UCH Act for regulating activities directed at UCH.

4.2.10 Approach of the Underwater Cultural Heritage Act to Regulation of Maritime and other Activities that Involve Interaction With or Use of UCH

Generally speaking, once UCH attains the status of being protected under the UCH Act, it is subject to the regulatory provisions contained in Part 3 of the UCH Act.

At a high level, there are two types of provisions contained in Part 3. First, there are provisions that are directed to the establishment of a permits regime whereby a person may be authorised by a permit to undertake particular conduct with respect to protected UCH. Secondly, there are provisions that are directed to creating the compliance and enforcement regime for the UCH Act. Each of these types of provisions is addressed in turn below.

²¹⁵ Ibid.

²¹⁶ Ibid.

²¹⁷ See, eg. Della A Scott-Ireton and Jennifer F McKinnon, 'As the Sand Settles: Education and Archaeological Tourism on Underwater Cultural Heritage' (2015) 14 *Public Archaeology* 157.

Permit Provisions of the Underwater Cultural Heritage Act

In relation to the provisions directed to the establishment of a permits regime, s 23(1) enables a person to apply to the Minister for a permit that authorises:

- ... the person, persons specified in the permit or persons generally to engage in specified conduct²¹⁸ relating to one or more of the following:
- (a) specified protected [UCH];
 - (b) a specified protected zone;
 - (c) specified foreign [UCH].

The Minister has the discretion to determine to either grant or refuse to grant the permit.²¹⁹ In deciding whether or not to grant the permit, the Minister is required to consider any relevant matters specified in the UCH Rules.²²⁰ The permit must specify particular matters,²²¹ including the conduct authorised (in relation to which, the Act does not appear to impose any limitations whatsoever on the type of conduct that may be authorised by way of a permit)²²² and the period for which the permit is in force.²²³ Reasons for decision must be given in the circumstances described in s 23(6) and (7) of the UCH Act. Any permit granted under s 23(3) of the UCH Act may, in accordance with the procedures prescribed by the UCH Act, be varied (either unilaterally by the Minister or by application of the permit holder),²²⁴ suspended or revoked by the Minister,²²⁵ or transferred.²²⁶

The grant of a permit under s 23(3) of the UCH Act is subject to conditions. In this regard, s 24(1) of the UCH Act states:

- (1) A permit granted under section 23 is subject to the following conditions:
- (a) the conditions set out in subsection (2);
 - (b) the conditions (if any) imposed by the Minister for the purposes of this paragraph
 - (c) the conditions (if any) specified in the Underwater Cultural Heritage Rules for the purposes of this paragraph.

The requirement for a permit to be granted subject to conditions is not a surprising one, given that any authorisation, permit or approval granted in the context of environmental or regulatory law will often be subject to conditions. It is not immediately clear what the scope of the Minister's power is to impose conditions for the purposes of s 24(1)(b) of the UCH Act. Presumably, the power in s 24(1)(b) of the UCH Act is a largely freestanding power that enables the Minister to impose whatever conditions he or she determines to be appropriate to give effect to the protection of the given UCH that is subject to the permit.

To avoid the potential for the power contained in s 24(1)(b) of the UCH Act to be exercised in a manner that is arbitrary, capricious or unreasonable, it is submitted that the development of some fundamental limits on the exercise of that power would be useful. In this regard, it is observed that, in the context of planning law, case law has, separately of statute, required that any condition imposed on a planning approval or development consent must meet the criteria for a valid condition of planning approval or development consent.²²⁷ There are three such criteria, which are commonly referred to as the *Newbury* tests after the case in which they were first collated: *Newbury District Council v Secretary of State for the Environment* [1981] AC 578. In that case, the three criteria or tests set out by Lord Fraser (at 607G) were:

1. the condition must be for a planning purpose or, where the condition has multiple purposes, one of these purposes must be a planning purpose;

²¹⁸ The phrase 'engage in conduct' is defined by the Act very broadly to mean either to 'do an act' or 'omit to perform an act': see *Underwater Cultural Heritage Act 2018* (Cth). Therefore, to 'engage to specified conduct' must be taken to mean to do a specific act or omit to perform a specific act that is referred to in the permit that is issued in respect of activity directed at UCH.

²¹⁹ *Underwater Cultural Heritage Act 2018* (Cth) s 23(3).

²²⁰ *Underwater Cultural Heritage Act 2018* (Cth) s 23(4).

²²¹ *Underwater Cultural Heritage Act 2018* (Cth) s 23(5).

²²² *Underwater Cultural Heritage Act 2018* (Cth) s 23(5)(c).

²²³ *Underwater Cultural Heritage Act 2018* (Cth) s 23(5)(d).

²²⁴ *Underwater Cultural Heritage Act 2018* (Cth) s 25.

²²⁵ *Underwater Cultural Heritage Act 2018* (Cth) s 26.

²²⁶ *Underwater Cultural Heritage Act 2018* (Cth) s 27.

²²⁷ See especially *Newbury District Council v Secretary of State for the Environment* [1981] AC 578, 607G and *Dogild Pty Ltd v Warringah Council* (2008) 158 LGERA 429, [37]-[54] (Biscoe J, including all the authorities cited by his Honour).

2. the condition must relate to the permitted development to which it is annexed; and
3. the condition must not be unreasonable in the sense articulated in *Wednesbury's* case.²²⁸

The criteria articulated by Lord Fraser have been adapted so as to be applied in regulatory contexts besides planning law.²²⁹ To that end, one could suggest that the *Newbury* tests for a valid condition of development consent could be adapted so as to apply to the exercise of the apparently broad and general power vested in the Minister pursuant to s 24(1)(b) of the UCH Act to impose conditions on a permit. For example, the adapted *Newbury* tests in this regulatory context could be that, for a condition of a permit imposed under s 24(1)(b) to be valid, it must:

1. be for a purpose that is directed at either protecting UCH or managing the effects of an activity on UCH (or both of these purposes);
2. fairly and reasonably relate to the activity that is authorised or controlled by the permit, or the article/s of UCH or the protected zone that is the subject of the permit; and
3. not be unreasonable in the *Wednesbury* sense.

It is submitted that the development of such criteria is desirable for it can serve to place some fundamental limits on the exercise of the power contained in s 24(1)(b) of the UCH Act which, in turn, ensures that the power is exercised in a manner that is more consistent with the objective of the UCH Act to protect UCH.²³⁰ This point can be illustrated through use of the example of the *SS Yongala*, a luxury passenger steamer that foundered and sank approximately 12 nautical miles from Cape Bowling Green on the Queensland coast as a result of a tropical cyclone in 1911.²³¹ The ship was gazetted as an historic shipwreck under s 5 of the HS Act in 1981, and two years later, also was subject to a protected zone declaration under s 7 of the HS Act.²³² One of the anthropogenic threats posed to the shipwreck site was penetration diving, which can cause damage to the shipwreck that accelerates corrosion.²³³ Despite the fact that the risks posed by (penetration) diving to the archaeological value of shipwreck sites were well understood by the early 1980s,²³⁴ Viduka indicates that it was not until 1994 that penetration diving at the wreck site was made illegal pursuant to s 7 of the HS Act.²³⁵ Having regard to these facts, it may be well argued that permitting divers to undertake penetration diving from the early 1980s until 1994 involved the unreasonable exercise of power and did not serve to protect UCH or appropriately manage the diving activities directed at the shipwreck. Thus, this example would suggest that there is some utility in having these fundamental limits on the exercise of the power contained in s 24(1)(b) of the UCH Act.

Whilst the permit provisions contained in the UCH Act are generally well structured, there is some scope for improvement to ensure that the permits regime is as effective and efficient as it possibly can be. To that end, the permit provisions contained in the UCH Act could be improved in the following respects:

1. The utilisation of an adapted form of the *Newbury* tests articulated in planning case law for a valid condition of development consent in the manner just described.
2. The imposition of a time limit for the Minister to make a decision in respect of any application made for a permit under the UCH Act (e.g. no later than 60 days after receipt of the application, with a power to extend that period by a further nominated period in special circumstances where an extension is warranted, such as where further heritage assessment needs to be conducted in respect of the particular UCH), as well as the adoption of a 'deemed refusal' provision for the purpose of conferring an

²²⁸ *Associated Provincial Picture House Ltd v Wednesbury Corporation* [1948] 1 KB 223, 229.

²²⁹ For example, the issuing of pollution control or environmental protection licences associated with particular activities: see *EPA v Cleary Bros (Bombo) Pty Ltd* (1996) 92 LGERA 101, 110-111 (Bignold J).

²³⁰ *Underwater Cultural Heritage Act 2018* (Cth) s 3(a).

²³¹ See generally Andrew Viduka, 'Managing Threats to Underwater Cultural Heritage Sites: The Yongala as a Case Study' in Robert Grenier, David Nutley and Ian Cochran (eds), *Underwater Cultural Heritage at Risk: Managing Natural and Human Impacts* (ICOMOS, 2006) 61, 61.

²³² *Ibid.* 62.

²³³ *Ibid.*

²³⁴ See generally Kieran Hosty and Iain Stuart, 'Maritime Archaeology Over The Last Twenty Years' (1994) 39 *Australian Archaeology* 9, 10.

²³⁵ Viduka, above n 231, 62.

applicant with the ability to bring merit appeal proceedings in the AAT (e.g. the application is taken to be refused within 90 days).²³⁶

3. The insertion of a provision into the UCH Act that prohibits the Minister from granting a permit for any activity or conduct directed at an article of protected UCH that is located outside a 'protected zone' declared under s 20 of the UCH Act in circumstances where:
 - a. the activity or conduct would destroy or cause significant harm to the article of protected UCH; and
 - b. there are no reasonable or feasible mitigation measures that may be implemented in order to prevent the activity or conduct destroying or causing significant harm to that article.²³⁷

In this regard, the provision could provide a non-exhaustive list of activities or conduct that may be regarded as destroying or significantly harming protected UCH. That list could potentially be modelled on the list contained in s 20(7) of the UCH Act in respect of conduct that may be specified to be 'prohibited conduct' in a 'protected zone'. Such a provision, if submitted, is essential when regard is had to the fact that the UCH Act, on its current terms, does not appear to impose any limitations whatsoever on the type of conduct that may be engaged in pursuant to a permit.

Penalty Provisions of the Underwater Cultural Heritage Act

In relation to the provisions directed at creating the compliance and enforcement regime for the UCH Act, ss 27 to 40 of the UCH Act establish a suite of criminal and civil penalty provisions that have a range of maximum penalties, including monetary penalties and imprisonment. It is not proposed to examine all of these provisions here. Rather, the general structure employed in each of these provisions will be outlined before some comments on particular aspects of the penalty provisions are made.

Each of the penalty provisions in ss 27 to 40 of the UCH Act provide for three different types and levels of punitive action that a person may be liable for where that person has breached any obligation or duty the person has under the UCH Act.

At the lower end of the spectrum, a breach of a provision can be dealt with by way of the person being charged with a *criminal offence of strict liability*. This means that the offence will be established if the prosecution can prove beyond reasonable doubt that the accused person's conduct constituted an *actus reus* (i.e. a wrongful act).²³⁸ There is no need to go further to demonstrate that the accused person either intended, or was aware of, the fact that he or she was engaging in prohibited conduct under law (i.e. the *mens rea*, or guilty mind, element).²³⁹

In the middle part of the spectrum, the breach can be dealt with by way of a *civil penalty*. Whilst acknowledging that distinctions between civil and criminal penalty provisions can often be unclear,²⁴⁰ it appears from the text, context and purpose of each civil penalty provision in the UCH Act that the civil penalty provisions are to be distinguished from the non-strict liability offence provisions (which will be addressed in a moment) on the basis that the standard of proof required under any civil penalty provision would only be on the balance of probabilities, rather than beyond reasonable doubt.²⁴¹

At the higher end of the spectrum, the breach can be dealt with by way of a person being charged with a *criminal offence that is not of strict liability*. Unlike the strict liability offence provision, it would be necessary

²³⁶ The use of 'deemed refusal' provisions is quite common in planning law: see, eg, *Environmental Planning and Assessment Act 1979* (NSW) s 8.11.

²³⁷ In relation to UCH located within a 'protection zone', the Act already provides sufficient scope for the Minister to give effect to the adoption of an approach of this nature: see especially *Underwater Cultural Heritage Act 2018* (Cth) s 20(5)(d), (6) and (7).

²³⁸ See generally Michael Eburn, Roderick Howie and Paul Sattler, *Hayes and Eburn Criminal Law and Procedure in New South Wales* (LexisNexis Butterworths, 4th ed, 2014) 56.

²³⁹ *Ibid.*

²⁴⁰ *Ibid* 6-9.

²⁴¹ See also *Regulatory Powers (Standard Provisions) Act 2014* (Cth) s 87 (which notes that the court hearing the prosecution proceedings 'must apply the rules of evidence and procedure for civil matters when hearing proceedings for a civil penalty order').

for the prosecutor to prove both the *actus reus* and *mens rea* elements of the offence beyond reasonable doubt.²⁴² Unlike the civil penalty provision, the balance of probabilities standard of proof would not apply.

Appendix 2 to this article presents, in a summary table, the various penalty provisions established by the UCH Act and lists the different maximum penalties for which a person may be liable if any one of the three types of punitive action is taken in response to a breach of a provision of the UCH Act.

Having regard to the penalties listed in Appendix 2 to this article, it is evident that, for the most part, all penalty provisions contained in the UCH Act prescribe the same maximum penalty, which, in turn, suggests that the Australian Parliament considers most breaches of the UCH Act to be of the same degree of seriousness.²⁴³ There are some exceptions in this regard. For example, it appears that the Australian Parliament regards breach of the following four provisions of the UCH Act to be more serious than breaches of the other provisions contained in the Act:

1. s 29 concerning the carrying out of prohibited conduct within a protected zone without a permit;
2. s 30 concerning conduct that has an 'adverse impact'²⁴⁴ on protected UCH without authority of a permit;
3. s 31 concerning possession of protected UCH without a permit; and
4. s 35 concerning export of UCH without a permit.

It may be accepted that each of these particular breaches is serious in nature. The prescribed maximum penalties in terms of imprisonment for breaches of each of these four provisions are appropriate, however, the maximum financial penalties prescribed for each of these four provisions are much too low and serve to undermine achievement of the objective of the UCH Act to protect UCH, particularly when one has regard to the fact that, in criminal sentencing, fines that are imposed for offences rarely approach the maximum penalty prescribed in the statute.²⁴⁵ Whilst determination of the quantum of a maximum penalty will often involve a degree of arbitrariness, it is considered that the financial penalties specified in each of these four provisions should be increased at least tenfold. The same increase should occur with respect to all of the financial penalties specified in the other provisions contained in ss 27 to 40 of the UCH Act as well. Increasing the financial penalties specified in ss 27 to 40 of the UCH Act tenfold would provide for a much more appropriate level of liability for offences committed under the UCH Act.

Beyond the penalty provisions in ss 27 to 40 of the UCH Act that have just been considered, Part 4 of the UCH Act outlines a variety of additional compliance and enforcement mechanisms. That part of the UCH Act includes the full gamut of regulatory powers that one would expect to find in a modern regulatory statute, including powers directed at monitoring,²⁴⁶ investigation,²⁴⁷ enforceable undertakings²⁴⁸ and injunctions.²⁴⁹ All of these powers are generally made referable to the generic framework for compliance and enforcement that is established by the *Regulatory Powers (Standard Provisions) Act 2014* (Cth). Without doubt, the mechanisms provided for in Part 4 of the UCH Act represent a significant improvement on the compliance and enforcement regime contained in the HS Act, in that Part 4 of the UCH Act provides for a greater variety of powers to facilitate compliance than the HS Act. The provision of such a greater variety of powers will enable those persons with responsibility for administering the UCH Act to better facilitate the more timely, creative and effective redress of harm to UCH that is caused by unlawful conduct.

²⁴² Eburn, Howie and Sattler, above n 238, 56.

²⁴³ Noting that the maximum penalty prescribed under a statute may be regarded as reflecting the 'public expression of Parliament of the seriousness' of the breach: see *Camilleri's Stock Feeds Pty Limited v Environment Protection Authority* (1993) 32 NSWLR 683, 698.

²⁴⁴ Defined in s 30(2) of the *Underwater Cultural Heritage Act 2018* (Cth) to mean conduct which: '(a) directly or indirectly physically disturbs or otherwise damages the protected underwater cultural heritage; or (b) causes the removal of the protected underwater cultural heritage from waters or from its archaeological context'.

²⁴⁵ This is because the imposition of a penalty which is the maximum penalty, or close to the maximum penalty (say, 80% plus of the maximum penalty) is reserved for the worst category of cases for which the penalty is prescribed: *Ibbs v R* (1987) 163 CLR 447, 451-452.

²⁴⁶ *Underwater Cultural Heritage Act 2018* (Cth) s 41.

²⁴⁷ *Underwater Cultural Heritage Act 2018* (Cth) s 42.

²⁴⁸ *Underwater Cultural Heritage Act 2018* (Cth) s 45. The terms of the enforceable undertaking can be quite flexible. It is likely that the terms of an enforceable undertaking could be drafted, for example, to require restoration activities to be conducted in respect of UCH that has been harmed by unlawful conduct.

²⁴⁹ *Underwater Cultural Heritage Act 2018* (Cth) s 46.

4.2.11 How has the Underwater Cultural Heritage Act Addressed the 10 Deficiencies or Inadequacies of the Historic Shipwrecks Act and Wider Regime for Protection of UCH at the Commonwealth Level in Australia?

In section 3 of this article, 10 deficiencies or inadequacies of the HS Act and the wider regime for protection of UCH at the Commonwealth level in Australia were identified. In this part of the article, the manner in which the UCH Act has addressed each of these 10 deficiencies or inadequacies will be considered. Some of the 10 deficiencies or inadequacies have already been addressed, to varying extents, in analysing the five particular matters that are identified in section 4.1 above. As a result, some of the 10 deficiencies or inadequacies will be subject to less consideration than others in the analysis that follows.

The *first* deficiency or inadequacy was that the HS Act's scope is too limited because it provides for protection of only a small portion of Australia's UCH: namely, certain historic shipwrecks and relics. Without question, the UCH Act has remedied this deficiency or inadequacy of the HS Act. First, s 15 of the UCH Act defines UCH to embrace not only a wider variety of articles constituting UCH, but also the archaeological, environmental, historic and cultural contexts of those articles of UCH. Secondly, the use of a quantitative criterion of 75 years for automatic protection of particular UCH in s 16(1) of the UCH Act is considered to be appropriate and will result in the automatic protection of a wider variety of UCH than the HS Act. Thirdly, the conferral of power upon the Minister to declare UCH that fails to meet or exceed the quantitative criterion of 75 years in s 16(1) of the UCH Act to be protected under ss 17(1), 18(1) or 19(1) of the UCH Act is also considered to be appropriate, and will enable the Minister to provide protection to UCH of heritage significance that does not meet the 75 years criterion. Finally, any criticism of age being equated with heritage significance under the UCH Act may be avoided if the power in s 16(4) of the UCH Act operates as a 'safety valve' to ensure that any UCH that is:

1. automatically protected by s 16(1) of the UCH Act; and
2. cannot be regarded as having heritage significance,

may have its status as automatically protected UCH removed, with the consequence that the UCH may be retrieved and placed back into the stream of maritime commerce.

The *second* deficiency or inadequacy identified was that the HS Act and the wider legal regime for regulating protection of UCH has become highly fragmented. In particular, it was suggested that there is a need for the protection of UCH to be appropriately integrated into the assessment and approval of proposed actions or developments under environmental and planning laws, particularly the EPBC Act but also State laws addressing planning matters. This deficiency or inadequacy remains despite the UCH law reforms.

For example, consider the content of the UCH Transitional Act. The purpose of that Act was to deal with consequential and transitional matters arising from the enactment of the UCH Act and for related purposes. Other than addressing uncontroversial transitional arrangements associated with the repeal of the HS Act,²⁵⁰ the UCH Transitional Act addresses consequential amendments to four statutes. For present purposes, only two of the statutes have particular relevance: the AHC Act and the Navigation Act.²⁵¹

In relation to the AHC Act, the only consequential amendment made by the UCH Transitional Act to the AHC Act is to vary s 5(d)(v) of the AHC Act so as to provide that one of the functions of the Australian Heritage Council is to advise the Minister on the Commonwealth's responsibilities for UCH. It is apparent that, once this amendment to the AHC Act is made, the phrase UCH will not be defined in the AHC Act. This is unlikely to be problematic, for the word 'heritage' is also not defined in the AHC Act and, since that Act came into force, it appears that no controversy or confusion has stemmed from the omission of such a definition. The Australian Heritage Council also has the function of advising the Minister on 'other matters relating to heritage'.²⁵² This

²⁵⁰ As to which, see *Underwater Cultural Heritage (Consequential and Transitional Provisions) Act 2018* (Cth) sch 2. Such transitional provisions include ensuring that existing declarations of protection under the *Historic Shipwrecks Act 1976* (Cth) continue in force on the basis that they are re-categorised as declarations covered by particular provisions in the *Underwater Cultural Heritage Act 2018* (Cth), maintaining and continuing the existence of the Register of Historic Shipwrecks, treating existing permits under the *Historic Shipwrecks Act 1976* (Cth) as being permits under the *Underwater Cultural Heritage Act 2018* (Cth) and so on.

²⁵¹ The other two Acts were the *Protection of the Sea (Powers of Intervention) Act 1981* (Cth) and the *Sea Installations Act 1987* (Cth). The consequential amendments to those Acts are uncontroversial and unnecessary to consider for the purposes of this article.

²⁵² *Australian Heritage Council Act 2003* (Cth) s 5(d)(vi).

broad function may arguably be regarded as including the provision of assistance to the Minister in the form of identification, assessment, protection and monitoring of UCH. To that end, the Australian Heritage Council may, in turn, be assisted in discharging its functions by interested stakeholders and community members approaching it to put forward proposals for protection of UCH.

Notwithstanding the above, it is evident that, unlike the express function conferred on the Australian Heritage Council to nominate and advise on places being considered for inclusion in the National and Commonwealth Heritage lists that are respectively provided for by ss 324C and 341C of the EPBC Act,²⁵³ s 5 of the AHC Act does not also provide an equivalent express function in respect of UCH. It is suggested that it was an omission of the UCH Transitional Act to not provide for the amendment of s 5 of the AHC Act to confer such an express function in respect of UCH on the Australian Heritage Council. This is something that could be easily remedied.

In relation to the Navigation Act, the only consequential amendment made by the UCH Transitional Act to the Navigation Act was to replace the definition of 'historic wreck' in s 14 of the Navigation Act so as to refer to wrecks as protected by the UCH Act rather than the HS Act. Whilst such an amendment of the definition of 'historic wreck' was needed, it is submitted that the UCH Transitional Act should also have resulted in reform of Chapter 7 of the Navigation Act addressing wrecks and salvage. More specifically, for the reasons given in section 4.2.6 of this article, it is submitted that there is the potential for undesirable and illogical practical consequences to flow from the interaction between s 23 of the UCH Act addressing permits and s 240(3)(c) of the Navigation Act addressing the prohibition on conducting salvage operations in respect of maritime property of prehistoric, archaeological or historic interest. Recommendations for how such consequences could be avoided or remedied were outlined in section 4.2.6 and are not repeated here.

There were three other statutes that have relevance in the context of legal protection of UCH at the Commonwealth level in Australia but were not subject to amendment by the UCH Transitional Act: namely, the EPBC Act, the ATSIHP Act and the PMCH Act.

Without doubt, the failure of the UCH Transitional Act to address the interaction between the UCH Act and the EPBC Act is the most glaring omission. The UCH Transitional Act has not sought to address how the regime for protection of UCH under the UCH Act is to be integrated with the assessment and approval of actions under the EPBC Act. Indeed, it remains the case that the EPBC Act makes no express reference to matters of UCH at all. It is submitted that the most appropriate manner in which this unsatisfactory situation can be addressed is for Part 3 of Chapter 2 of the EPBC Act to be amended so as to establish, as a new matter of NES, the protection of UCH. By establishing the protection of UCH as a matter of NES, the Australian Parliament would, in addition to the UCH Act, provide for further protection of UCH by prohibiting persons from taking any action that has, will have or is likely to have a significant impact on protected UCH. Like other matters of NES listed under the EPBC Act, the prohibition could be lifted in circumstances where a person has applied for, and obtained, authorisation under the EPBC Act to carry out an action that has such an impact. Potentially, the authorisation under the EPBC Act to impact UCH could simply be in the form of a condition that the proponent of the development or activity will undertake the activity in accordance with a permit granted under s 23 of the UCH Act. If such an approach was adopted, it would make sense for the EPBC Act approval process to run in parallel with the decision-making process followed for the grant of permits under the UCH Act, such that the grant of an EPBC Act approval would occur at the same time as the grant of a permit under the UCH Act. Given that the same government department will administer both the UCH Act and the EPBC Act, the ability for a streamlined assessment and approval process to be implemented for activities requiring consideration under both the UCH Act and the EPBC Act should be capable of being achieved.

The recommendations just made in respect of the EPBC Act would, it is considered, appropriately address the need for integration of matters of UCH protection with decision-making about development or activities under the EPBC Act. However, it would not address the need to integrate consideration of UCH protected under the UCH Act into decision-making processes followed under planning laws in the States and Territories of Australia. Whilst it is beyond the scope of this article to give close consideration to reforms of planning statutes at the State or Territory level in Australia, it is noted that there is potentially one simple but effective approach to addressing this issue: i.e. the relevant planning statutes in these Australian jurisdictions could be amended by inserting a provision into those statutes which says, in effect, that no planning approval or permit granted under

²⁵³ *Australian Heritage Council Act 2003* (Cth) s 5(b) and (c).

the planning statute relieves the proponent of an activity or development from obtaining any permit required under the UCH Act to undertake the activity or development that is authorised under that planning statute.

In relation to both the ATSIHP Act and the PMCH Act, it would arguably make more sense for the provisions in each of those laws addressing UCH to be excised from each of those statutes and inserted into the UCH Act. Alternatively, the potential for fragmentation in relation to the interaction between the ATSIHP Act or the PMCH Act with the UCH Act could be minimised by integrating cross-references to each of the ATSIHP Act and the PMCH Act into the UCH Act and outlining which of the laws is to prevail to the extent of any inconsistency between them.

The *third* deficiency or inadequacy was that the HS Act omits to include features that are associated with best practices for protection of UCH, as generally reflected in the UNESCO Convention, or including such features but doing so in an inadequate way. Again, there is no question that the UCH Act represents a significant improvement on the HS Act in terms of integrating features that are associated with best practices for protection of UCH. This can be illustrated by the following, non-exhaustive examples:

1. The UCH Act's use of a quantitative criterion of 75 years for automatic protection of the particular types of UCH referred to in s 16(1) of the UCH Act is more generous than the 100 years criterion utilised by the UNESCO Convention.
2. Unlike the HS Act, the UCH Act expressly adopts, as one of its three objects, the following: 'to promote public awareness, understanding, appreciation and appropriate use of Australia's [UCH]'.²⁵⁴ There are also substantive provisions in the UCH Act that serve to give effect to this object, such as the maintenance of a Register of UCH pursuant to s 48 of the UCH Act.
3. Unlike the HS Act, which provides for monetary rewards for persons who first provided the Minister with information in connection with shipwrecks or relics,²⁵⁵ the UCH Act has abolished the power of the Minister to give monetary rewards in connection with the discovery of UCH. Instead, s 40 of the UCH Act makes it an offence for a person to not notify of the discovery of an article of UCH that is in Australian waters and appears to be of an archaeological character.²⁵⁶

Having said this, it is apparent that there are aspects of best practice contained in the UNESCO Convention that are not integrated into the UCH Act at all or, arguably, are integrated in an inadequate manner. For example, given the broad scope of the power in s 23 of the UCH Act to grant permits authorising conduct directed at UCH protected under the Act, there is at least scope for debate that this aspect of the UCH Act is inconsistent with Articles 2(7), 4 and Rule 2 of the Annex to the UNESCO Convention. This is not necessarily problematic, if one accepts (as the author does) that these specific provisions of the UNESCO Convention's text are unclear and should be departed from to:

1. better address the application of the law of salvage to UCH protected under the UCH Act; and
2. permit some forms of commercial use of UCH (e.g. UCH tourism) that can, if appropriately managed, facilitate the objective of promoting public knowledge and awareness of UCH and raise funds that can be reinvested in the day-to-day administration of the UCH Act, including implementation of management measures for protection of UCH.

The *fourth* deficiency or inadequacy related to criticisms that the persons with responsibility for administering the HS Act have not been provided with sufficient resources and funding to effectively carry out their duties and responsibilities. As was noted in section 3 of this article, such a criticism is concerned more with the implementation of the law, rather than the law itself. Given this, the only point that can be made here is that it will be essential for the Australian Government to ensure that those persons with responsibility for administering the UCH Act are equipped with the resources and funding that is necessary for them to efficiently discharge their duties and responsibilities under the Act.

²⁵⁴ *Underwater Cultural Heritage Act 2018* (Cth) s 3(c).

²⁵⁵ *Historic Shipwrecks Act 1976* (Cth) s 18(1) and (2)(a).

²⁵⁶ As an aside, it is interesting to note that s 40 of the *Underwater Cultural Heritage Act 2018* (Cth) refers to an article of UCH which has an 'archaeological character' only. This does not sit comfortably with the definition of UCH in s 15 of the Act, which refers to 'cultural, historical or archaeological character' (emphasis added). This issue could be easily remedied by amending s 40(1)(a) of the Act so that it reads 'the article appears to be of a cultural, historical or archaeological character'.

The *fifth* deficiency or inadequacy was concerned with the potential for inconsistency to arise between the operation of s 240(3)(c) of the UCH Act and s 15 of the HS Act in that whilst the former seems to have the intention of prohibiting salvage operations in respect of historic shipwrecks and relics that are protected under the HS Act and located on the seabed, the latter appears to enable the Minister to allow such operations to be undertaken in respect of such historic shipwrecks and relics in accordance with a permit. This deficiency or inadequacy was discussed at length in section 4.2.6 of this article. As discussed there, this inconsistency also arises in the context of the UCH Act and can be avoided or remedied in one or more of the following ways:

1. The Minister ensures that, when exercising her power to grant a permit under s 23 of the UCH Act, she does so in a manner that gives effect to the apparent objects of the UCH Act to protect UCH that is regulated by the Act. In that regard, it could be argued that those objects would be achieved by either refusing the permit or alternatively granting a permit that allows the recovery of the UCH, subject to the condition that the recovery of that UCH is consistent with the protection of archaeological or historical values and environmental integrity of the particular UCH.
2. The UCH Act itself could be amended to expressly provide that permits cannot be granted by the Minister for the salvage of UCH protected by the UCH Act, either absolutely or in particular circumstances (e.g. where the conduct of salvage activities would be inconsistent with the protection of archaeological or historical values and environmental integrity of the particular UCH).
3. Section 240(3)(c) of the Navigation Act is amended to permit salvage operations to be conducted in respect of UCH that is not afforded legal protection under the UCH Act.
4. Both the UCH Act and s 240(3)(c) of the Navigation Act are amended to adopt the three principles articulated in section 4.2.5 of this article for governing the interaction between UCH and salvage. Such amendments would need to ensure that both the UCH Act and the Navigation Act adopt the same position in respect of salvage of UCH, so as to ensure that inconsistencies between the two Acts do not occur.

The *sixth* deficiency or inadequacy was that the HS Act does not contain statutory criteria to which regard should be had when determining whether or not particular UCH has heritage significance and thus is worthy of protection by way of a Ministerial declaration being made (in the event that the heritage is not otherwise automatically protected). In principle, the UCH Act has addressed this deficiency of the HS Act by requiring the Minister to consider, pursuant to s 22 of the UCH Act, heritage significance criteria before making a Ministerial declaration for protection under ss 17(1), 18(1) or 19(1) of the UCH Act. However, it is too early to assess whether s 22 of the UCH Act is effective. That section is to be underpinned by the UCH Rules made under the UCH Act, and it will be the UCH Rules that set out the actual heritage significance criteria. However, the UCH Act's reference in s 22 to heritage significance criteria is, in and of itself, a promising start.

The *seventh* deficiency or inadequacy was that the HS Act does not contain within it a power to make a temporary, emergency declaration of provisional protection of UCH. This deficiency is arguably perpetuated in the UCH Act. Whilst s 19 of the UCH Act enables provisional declarations of protection to be made in respect of UCH, it is not, in terms, concerned with emergency situations. Further, as s 19 itself:

1. does not set a short time frame for making decisions in respect of provisional protection (indeed, it prescribes no time frame for making decisions at all); and
2. requires the Minister to make her decision by having regard to heritage significance criteria that would, in all likelihood, require a heritage assessment to be conducted by the Department of the Environment and Energy and then put before the Minister prior making a decision,

it is submitted that s 19 of the UCH Act does not provide an adequate statutory anchor for making emergency declarations of protection for UCH. The UCH Act could easily be amended to replicate, in substance, the emergency protection provisions of the EPBC Act. At a minimum, it is considered that the emergency declaration power would provide for provisional protection of no longer than 6 months' duration, and would not require the Minister to be satisfied of heritage significance criteria prior to being exercised.

The *eighth* deficiency or inadequacy was that the HS Act does not expressly provide for a process by which any person can make an application for the protection of UCH under that Act. Unfortunately, the UCH Act has also perpetuated that deficiency. Given that:

1. it would be reasonable to expect that the Minister (or, perhaps, more likely, her Department or the Australian Heritage Council) to be approached (formally or informally) by interested stakeholders with proposals for particular UCH to be subject to protection under the UCH Act; and
2. it is common for heritage statutes to make provision for such interested stakeholders to nominate or make applications for particular UCH articles to be subject to legal protection,²⁵⁷

there is no logical reason why the UCH Act should not also make provision for such a process.

The *ninth* deficiency or inadequacy was that the HS Act does not enable persons to bring merit appeals to the AAT in respect of decisions made under that Act by the Minister. This deficiency has, to a large degree, been addressed by s 49 of the UCH Act, which enables merit appeals to be brought to the AAT in relation to decisions of the Minister to:

1. declare an article to be UCH;
2. declare an area to be a protected zone;
3. vary or revoke a declaration under s 21(1) of the UCH Act;
4. grant or refuse to grant a permit;
5. grant a permit in terms different to those applied for;
6. vary or refuse to vary a permit; and
7. suspend or revoke a permit.

It is interesting to observe that the legislative drafter appears to have made a deliberate decision to *not* confer a right of merit appeal in relation to either a decision of the Minister to not declare an article to be protected UCH or a decision of the Minister to not declare an area to be a protected zone. Having regard to the potential benefits associated with merits review of decisions, such as the provision of an independent forum for decision-makers to be held accountable for decisions, promoting transparency in decision-making, and improvements in decision-making, it is submitted that there is no rational or logical reason for not also conferring the AAT with the power to review decisions where the Minister has declined to either make a declaration to protect an article of UCH or to declare a protected zone. This would serve to facilitate the promotion of public awareness, understanding, appreciation and appropriate use of UCH, which, of course, is an object of the UCH Act.²⁵⁸ It would also better serve the object of the UCH Act to protect UCH.²⁵⁹

The *tenth and final* deficiency or inadequacy identified was that the HS Act contains within it an out-dated compliance and enforcement regime, which fails to incorporate more modern tools or mechanisms for compliance and enforcement. Without question, as discussed in section 4.2.10, the UCH Act has addressed this deficiency well by providing for a modern compliance and enforcement regime that has the full gamut of regulatory tools. Subject to the provision of sufficient resources and funding to implement this compliance and enforcement regime, and at least a tenfold increase in the maximum penalties set out in ss 27 to 40 of the UCH Act, the persons with responsibility for administering the UCH Act will be capable of facilitating the more timely, creative and effective redress of harm to UCH that is caused by unlawful conduct.

²⁵⁷ See, eg, *Heritage Act 2017* (Vic) s 27 and *Historic Cultural Heritage Act 1995* (Tas) s 65(1).

²⁵⁸ *Underwater Cultural Heritage Act 2018* (Cth) s 3(c). Indeed, given the rather subjective and contested nature of heritage, it has been recognised that appropriate levels of community participation are important in decision-making about heritage: see, eg, Judith Preston and Jeff Smith, 'Heritage Conservation' in Peter Williams (ed), *The Environmental Law Handbook* (Thomson Reuters, 6th ed, 2016) 787, 788.

²⁵⁹ *Underwater Cultural Heritage Act 2018* (Cth) s 3(a).

4.2.12 Summary of this Preliminary Assessment

In summarising the preliminary assessment conducted in section 4 of this article, it is clearly evident that the UCH Act has done much to address the 10 deficiencies or inadequacies of the HS Act and the wider legal regime for protection of UCH at the Commonwealth level in Australia. So long as sufficient resources and funding are provided to those with responsibility for implementing and administering the UCH Act, it is generally considered that the UCH Act has good prospects of succeeding in practice. In particular, the protection, compliance and enforcement provisions contained in the UCH Act are, for the most part, sound and provide stakeholders with an appropriate regime for the protection of UCH and regulation of activities directed at UCH.

However, it is also evident that numerous deficiencies of the HS Act have been perpetuated in the UCH Act, including far too low maximum penalties for breaches of the UCH Act, the absence of emergency declaration powers, the absence of a statutory process for applying for protection of UCH, and the potentially illogical interaction between s 240(3)(c) of the Navigation Act and s 23 of the UCH Act in relation to the conduct of salvage operations directed at protected UCH.

5 Conclusion

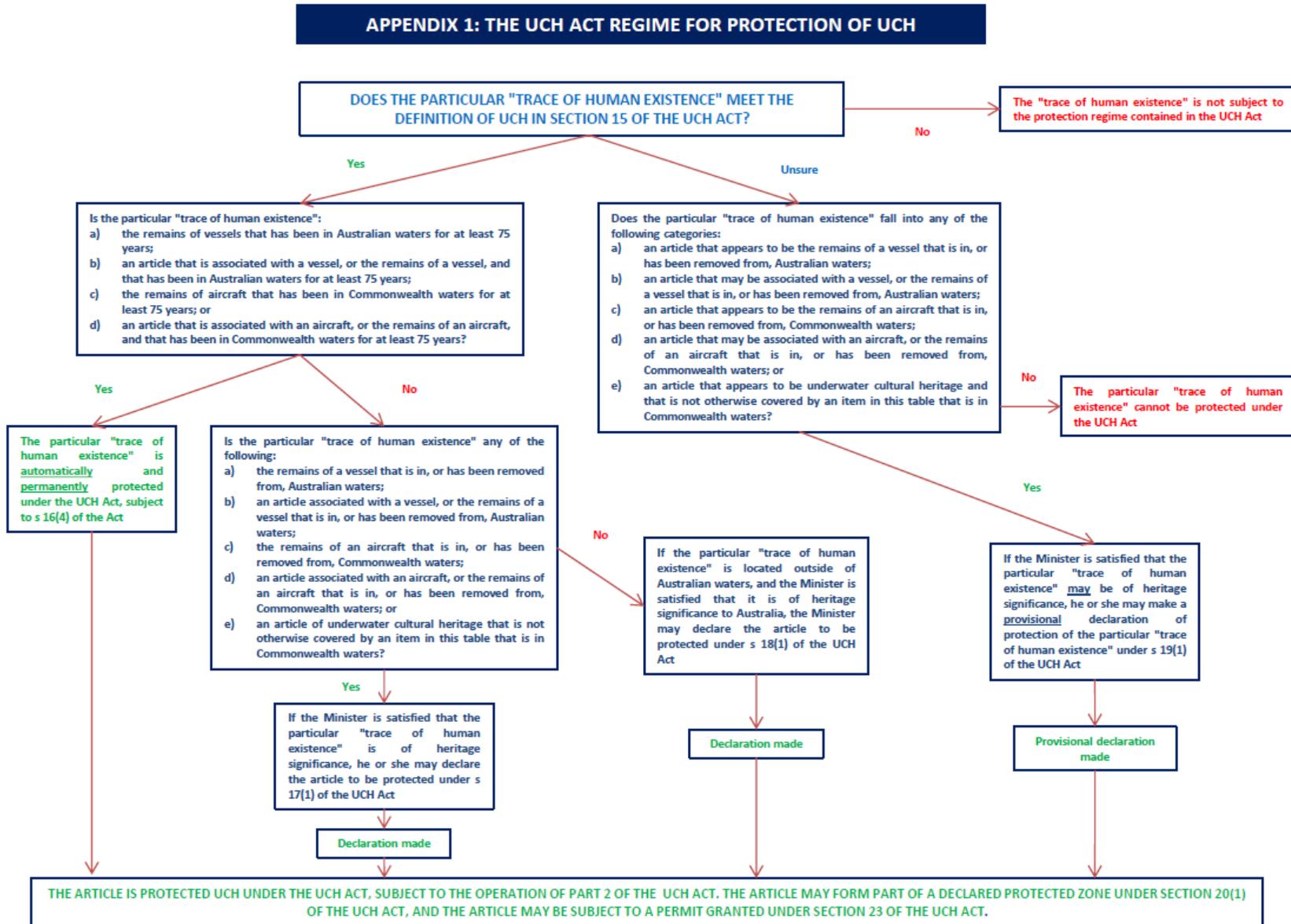
For the most part, the Australian Parliament is to be congratulated on devising a new Act for the protection of UCH that addresses the key issues that arise in the context of drafting domestic legislation for protection of UCH. Certainly, the UCH Act constitutes a significant improvement on the HS Act. In particular, strengths of the UCH Act include its definition of UCH, the automatic protection regime provided in s 16 of the UCH Act, and its modern compliance and enforcement regime. The UCH Act is, for the most part, well drafted, clearly structured and easy to understand. Those practitioners and stakeholders that will engage with the Act on a day-to-day basis will find it quite friendly to work with.

However, there are a number of deficiencies or inadequacies that exist with respect to the UCH Act and the wider legal regime for protection of UCH at the Commonwealth level in Australia. In summary, these deficiencies or inadequacies are:

1. The potential for illogical interaction between s 240(3)(c) of the Navigation Act and s 23 of the UCH Act in relation to the conduct of salvage operations directed at protected UCH.
2. In the context of the issue of ownership and abandonment of UCH, the scope and content of the statutory processes for notification of unclaimed UCH under the Navigation Act and UCH Act are deficient. In particular, the Navigation Act and the UCH Act need to be reformed by providing for more proactive and prescriptive notification obligations, as well as providing for a notification procedure for UCH that does not meet the definition of 'unclaimed wreck' under s 14 of the Navigation Act.
3. The UCH Act does not appear to impose any limitations whatsoever on the type of conduct that may be authorised by a permit in respect of an article of UCH. The UCH Act should be amended to prohibit the Minister from granting a permit where the activity or conduct would destroy or cause significant harm to the protected UCH, and there are no reasonable or feasible mitigation measures that may be implemented in order to prevent that from occurring.
4. The scope of the power to impose conditions on a permit under s 24(1)(b) of the UCH Act is uncertain and would benefit from the application of an adapted version of the three *Newbury* tests for a valid condition of a planning approval.
5. The maximum penalties set out in ss 27 to 40 of the UCH Act are far too low, and should be increased at least tenfold. This would improve the prospects of achieving the objective of the UCH Act to protect UCH and demonstrate to the wider community that the Australian Parliament takes the protection of UCH very seriously.
6. Section 5 of the AHC Act should be amended so as to provide the Australian Heritage Council with an express function to nominate and advise on places being considered for protection under the UCH Act.

7. The EPBC Act should be amended to provide for UCH as a matter of NES. This, in turn, would ensure that the matter of protection of UCH is better integrated in decisions made under that statute in respect of actions or development that may impact on UCH. Planning statutes at the State or Territory level in Australia could be simply amended to provide that the grant of a planning approval or permit under the relevant statutes does not relieve the proponent from obtaining any permit required under the UCH Act for the purpose of carrying out the activity or development in question.
8. The ATSIHP Act and PMCH Act could both be amended so as to excise provisions from those Acts which address UCH and relocate those provisions in the UCH Act or, alternatively, the UCH Act could be amended to utilise cross-referencing to the provisions of the ATSIHP Act and the PMCH Act that address UCH, so as to ensure no inconsistencies between the respective statutes arise.
9. Emergency declaration powers should be provided for in the UCH Act.
10. The extent of merit appeal rights to the AAT under the UCH Act is generally sound, but the scope should be extended to also confer merit appeal rights in respect of both a decision of the Minister to not declare an article to be protected UCH and a decision to not declare an area to be a protected zone.

Many of the deficiencies identified above can be fairly easily remedied in the manner that has been proposed in this article. In raising these deficiencies, the author does not mean to be too critical of the legislative drafters, who have prepared a very good piece of legislation. It is considered that the introduction of the UCH Act has gone a long way to addressing the problems that have plagued the operation of the HS Act for many years and has, once more, placed Australia at the very forefront of domestic responses to global calls for legal protection of UCH. Indeed, the prospects of the UCH Act operating successfully in practice are high. It is hoped that the Australian Parliament equips those persons with responsibility for implementing the UCH Act with the resources and funding that are necessary to ensure that the UCH Act realises its considerable potential.



Appendix 2: Penalty Provisions Under the UCH Act

UCH Act provision	Maximum penalty for criminal offence that is not in the nature of strict liability*	Maximum penalty for criminal offence that is in the nature of strict liability*	Maximum civil penalty*
Section 27 – Failure to notify Minister of transfer of permit	Imprisonment for 2 years or 120 penalty units (i.e. \$25,200), or both	60 penalty units (\$12,600)	120 penalty units (\$25,200)
Section 28 – Breach of permit conditions	Imprisonment for 2 years or 120 penalty units (i.e. \$25,200), or both	60 penalty units (\$12,600)	120 penalty units (\$25,200)
Section 29 – Prohibited conduct within protected zone without a permit	Imprisonment for 5 years or 300 penalty units (i.e. \$63,000), or both	60 penalty units (\$12,600)	300 penalty units (\$63,000)
Section 30 – Conduct with an adverse impact on protected UCH without a permit	Imprisonment for 5 years or 300 penalty units (i.e. \$63,000), or both	60 penalty units (\$12,600)	800 penalty units (\$168,000)
Section 31 – Possession of protected UCH without a permit	Imprisonment for 5 years or 300 penalty units (i.e. \$63,000), or both	60 penalty units (\$12,600)	300 penalty units (\$63,000)
Section 32 – Supply and offers to supply protected UCH without a permit	Imprisonment for 2 years or 120 penalty units (i.e. \$25,200), or both	60 penalty units (\$12,600)	120 penalty units (\$25,200)
Section 33 – Advertising to sell UCH without including permit number	Imprisonment for 2 years or 120 penalty units (i.e. \$25,200), or both	60 penalty units (\$12,600)	120 penalty units (\$25,200)
Section 34 – Importing protected UCH without a permit	Imprisonment for 2 years or 120 penalty units (i.e. \$25,200), or both	60 penalty units (\$12,600)	120 penalty units (\$25,200)
Section 35 – Exporting UCH without a permit	Imprisonment for 5 years or 300 penalty units (i.e. \$63,000), or both	60 penalty units (\$12,600)	300 penalty units (\$63,000)
Section 36 – Importing UCH of a foreign country without a permit	Imprisonment for 2 years or 120 penalty units (i.e. \$25,200), or both	60 penalty units (\$12,600)	120 penalty units (\$25,200)
Section 37 – Failing to produce a permit	120 penalty units (i.e. \$25,200)	60 penalty units (\$12,600)	120 penalty units (\$25,200)
Section 38 – Failure to respond to notice from Minister	120 penalty units (i.e. \$25,200)	60 penalty units (\$12,600)	120 penalty units (\$25,200)
Section 39 – Failure to comply with Ministerial direction	120 penalty units (i.e. \$25,200)	60 penalty units (\$12,600)	120 penalty units (\$25,200)
Section 40 – Failure to advise Minister of discovery of UCH	120 penalty units (i.e. \$25,200)	60 penalty units (\$12,600)	120 penalty units (\$25,200)

Notes

*: Pursuant to s 4AA of the *Crimes Act 1914* (Cth), a penalty unit is currently \$210. All dollar amounts referred to in the table are in Australian Dollars.