Australian protection of historic shipwrecks

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In 1972 there entered into force between Australia and The Netherlands an Agreement Concerning Old Dutch Shipwrecks. In the field of treaty making the subject matter of this instrument makes it almost unique. Even if we give it a broad classification—protection of cultural property—there are still only a handful of comparable international agreements. Against this background we offer the following examination of the Agreement, the reasons why it was made, and the legislation Australia has for the protection of historic shipwrecks.

Wrecks off Australia

The earliest recorded wreck off Australia is that of *Tryal*, a ship of the English East India Company which sank in 1622 on Trial Rocks near the Monte Bello Islands. The intervening years have seen several thousand more—Dutch East Indiamen off the West Australian coast, English barques on the islands in Bass Strait, Japanese submarines in the northern waters as well as many others round an often treacherous and isolated coastline.

There are no perfectly accurate records of wrecks off Australia. In the days of the East Indiamen wrecks there was of course no European settlement in Australia. Even after such settlements were made many ships disappeared without trace around the coast line. The principal existing sources for the early days of settlement are official documents and Lloyds Shipping Registers. Newspaper reports provide supplementary sources. In many cases the location of a wreck is known only from fragmentary references and maybe local legends. Thus it is that the search for them is often long and difficult and largely a matter of luck.[1]

Cultural Importance

Why search for wrecks? For some, this is a type of sport with the thrill of the chase culminating in the discovery. For others the lure is the hope of material gain—the recovery of bullion, specie, valuable artefacts and metals. However, in recent years another reason has been emerging. The wreck is now seen to be a capsule of the past providing invaluable

1. A record of shipwrecks and strandings in Australian waters is provided in Bateson, C., *Australian Shipwrecks* (1973).

evidence as to the way of life of our ancestors, their social organisation, technical and artistic achievements.

The cargo of a sunken ship provides 'crucial economic, technological or social evidence of the past'.[2] From it archaeologists are able to ascertain the techniques of carriage of goods of a particular time. They can use objects from the cargo to check their conclusions based on similar objects found on land. The economic historian finds the cargo interesting in that it tells him what goods were in transit, what volumes of material were required in a particular settlement. The *Batavia*, wrecked in 1629 on the Houtman Abrolhos Islands, provided a great range of artefacts of 'considerable value to the artefact specialist and historian, wanting to see a range of material in use by the Dutch in the first half of the 17th Century'.[3] Finds of mercury among the cargo of four excavated Dutch East Indiamen has lead to a reassessment of the importance of the trade in this product.[4] The *Elizabeth*, wrecked near Fremantle in 1839, carried a cargo allowing 'the close dating of a comprehensive and typical list of merchandise en route to the colonies'.[5]

The ship itself is an object of cultural importance. The method of construction, the material used, the design, the rigging can all contribute to knowledge of maritime matters in time past. Information on these aspects is scarce as it is only in relatively recent times that detailed records of ship construction have been kept. A report of the *Vergulde Draeck* excavation off Western Australia concludes:

> Little is known of Dutch East Indiamen of the first half of the 17th century, and it is hoped that further work on the material and the archives will help to improve our understanding of this particular period.[6]

Then, there are the personal possessions of the passengers and crew; the furnishings of the ship itself. Once again these items contribute to our knowledge of how our ancestors lived and what they considered important. They tell of the society in which they lived and from which ours has evolved.

Finally, there are wrecks of a particular kind—those known as war graves. These are warships which have been sunk in battle. They are the graves of persons who died fighting for their country and thus of particular emotional significance to the country concerned.

Shipwrecks are thus of cultural importance; but not all equally so. Their significance will depend on their cargo, their construction and type, the circumstances of their sinking. Some are thus of relatively little importance while others can contribute greatly to enriching our cultural

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2. Report of the Committee of Inquiry on Museums and National Collections, *Museums in Australia 1975* (1975) p 89.
3. Book review, (1977)6 Int J of Nautical Archaeology and Underwater Exploration 178.
4. Cowan, R. 'Mercury' (1975) 4 Int J of Nautical Archaeology and Underwater Exploration 297.
5. *Museums in Australia* 1975, p 89.
6. Greene, J. N. 'The Wreck of the Dutch East Indiaman the *Vergulde Draeck*, 1656' (1973)2 Int J of Nautical Archaeology and Underwater Exploration 267 at 288.

life. Some must therefore be protected for scientific, disciplined excavation. Others can be left for salvage, hobby diving, fishing grounds, etc.

Treatment of Wrecks

The aqualung was invented in 1943. Wrecks previously accessible only to the professional diver with sophisticated but limiting equipment could now be reached by anyone with small capital and little training. The hunting of wrecks became quite a widespread pastime. Often the finders of a wreck did not interfere with it or, if they did, this was done in a responsible manner. However, too often there was either wanton damage to a wreck or objects were removed in such a way as to damage the historical record they formed. At times this was due to lack of knowledge, at others the sole desire was for monetary gain. It was said in 1972 that:

> Amateur diving activities are a postwar phenomenon and these activities have now become a danger to objects of cultural and historical value from ships or in harbours.[7]

In Australia the situation came to a head in Western Australia. A number of wrecks of vessels of the Dutch 'Vereenigde Oostindische Compagnie' (VOC i.e., United East Indian Company) were found during the period 1950-1970; *Batavia, Vergulde Draeck, Zuytdorp, Zeewijk.* The *Tryal,* previously referred to, was found in 1969. The second mentioned VOC ship, the *Vergulde Draeck,* was discovered in April, 1963. Six months later there were reports of extensive blasting on the wreck site and removal of large quantities of material. In 1971, a museum expedition to the site of the *Tryal* 'found that the wreck had been recently blown to pieces. Apparently charges had been placed along the hull and in the mouths of the ancient cannons, and the resulting explosion had not only scattered the relics but also brought down a cliff, thus burying many of the remains.'[8] These were the most notable examples of wanton destruction. Further destruction was taking place in that items of no commercial value were damaged or destroyed by divers employing unsystematic excavation techniques. Even where items were recovered intact they were liable to damage unless proper conservation methods were employed; methods requiring considerable training and expertise on the part of those employing them as well as expensive investment in time, plant and equipment. These the amateur diver did not have.

It was against this background of general and specific destruction that the Government of Western Australia looked to legislative action to protect these and other historically important wrecks off its coast.

Existing Legislation in 1964

At the time the *Vergulde Draeck* was damaged there was no legislation specifically to protect wrecks as submarine archaeological sites.

Western Australia claimed that it had title to wrecks lying off its coast under the state *Wreck Act* of 1887. This claim was tenuous and several

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7. Resolution adopted unanimously by the First International Congress of Maritime Museums of the Atlantic Basin, London, United Kingdom, 1 October, 1972.
8. *Museums in Australia 1975,* p 89.

aspects could only have been settled by expensive and protracted litigation. The machinery enabling the state to take possession of wrecks under the Act had been abolished at federation.[9]

Part VII of the *Navigation Act* 1912 (Cth) deals with wrecks and salvage. It is of only limited effectiveness in dealing with archaeological matters, establishing in the main procedures for effective disposition of a wreck based on its economic value. Thus, s 303 empowers the Receiver of Wreck, when he so desires, to take possession of a wreck. This enables the rights of the owner and salvor to be protected and ensures that any unclaimed wreck reverts to the Commonwealth Government. Hence the protection of historic wrecks is only incidental to the Receiver's major functions.

Its most unsatisfactory feature is that the Receiver of Wreck is primarily concerned with locating the legal owner and if he cannot locate the owner within twelve months, he must dispose of the wreck. Obviously, the legal owners of a barque wrecked in 1875 cannot be quickly traced in 1975. The situation might arise in which the Receiver was required by law to sell by auction a most important historic wreck.[10]

A further major defect of this procedure in an archaeological context is that the Receiver is under no obligation to apply emergency conservation methods to the objects he holds. This is particularly important as deterioration often starts as soon as the object or artefact leaves the water.

Thus, existing legislation in 1964 gave virtually no protection to wrecks as objects of archaeological importance. All that one was required to do on finding a wreck was notify the Receiver and deliver to that official any objects raised.

Early Western Australian Legislation

It was in this situation of wreck despoliation and virtual legal vacuum that Western Australia passed the Museum Act Amendment Act 1964. This was repealed by the Museum Act 1969, Part V of which dealt with 'Historic Wrecks'.

Both these Acts had the same approach to the problem. They dealt with 'historic wrecks' which were those specified in a Schedule to the Act or those abandoned, wrecked or stranded in territorial waters before 1900. Any person finding a wreck in the last category was required to give notice of his find. It was an offence to remove, damage or destroy the wreck. Provision was made for paying a reward at the discretion of the authorities. Power was given for vesting of an historic wreck in the Western Australian Museum but no compensation was to be paid. Persons having objects recovered from an historic wreck before 18 December, 1964, were required to report this to the Director of the Museum.

Defects in the Western Australian Scheme

There were two major defects in the legislative scheme described above.

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9. Parl Deb. WA Hansard Vol 168 (1964) 2211.
10. *Museums in Australia 1975*, p 91.

The problem was that neither defect was capable of remedy by the Western Australian Parliament acting alone.

As to the first defect, the Acts were expressed to apply to ships lying below low water mark in the territorial waters of the state. By 1969 a bitter conflict had emerged between the Federal Government and the six state governments of the Commonwealth of Australia as to which had sovereignty in the territorial sea of Australia. The Chief Justice of the High Court expressed his opinion in *Bonser v La Macchia*[11] that the states had never had a territorial sea; that at federation the territorial sea was vested in the Imperial Legislature. On that basis the Commonwealth Parliament had the power to legislate in respect of the territorial sea. This was not to say that the states could not legislate for the same area. There would be two limitations on such legislation. Firstly, it would be invalid if it conflicted with federal legislation on the same subject matter. Secondly, under the state's own constitutional law it would have to be a law for the peace, order and good government of the territory of the state. As will be obvious this whole situation was one about which the State of Western Australia could do nothing. It could pass the legislation and it would then be up to a court to declare its validity if challenged.

The second defect in the Western Australian scheme arose from the power given in the Acts for vesting of historic wrecks in the Western Australian Museum. There could be problems with this at two levels. Firstly, the Government of The Netherlands as successor in title to the VOC maintains that it still has title to wrecked VOC vessels wherever they may lie. In English salvage law, title survives unless the wreck is abandoned—in practical terms this will not be regarded as taking place unless there is virtually an express statement of abandonment. Thus, there was the possibility of the divers and The Netherlands Government coming to some arrangement for division of objects raised. Although a Western Australian court would probably uphold a vesting in the museum there would be no guarantee that courts of other jurisdictions would follow suit. The second problem with the vesting of title arose from the failure to make provision for payment of compensation. Assuming The Netherlands could uphold its claim to title, a vesting of that title in some other body without payment of compensation could engage the international responsibility of Australia. This could be argued on the basis that, as Australia is internationally responsible for the acts of the Western Australian government, the taking of VOC ships by that government amounted to a direct wrongful act by Australia against The Netherlands. Alternatively, as the VOC was a trading corporation it might be said that a taking without compensation amounted to an illegal expropriation under public international law.

Agreement Concerning Old Dutch Shipwrecks

The second defect in the Western Australian legislative scheme was

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11. (1969) 122 CLR 177.

virtually resolved by the Agreement between Australia and The Netherlands Concerning Old Dutch Shipwrecks.[12] In this Agreement The Netherlands transferred 'all its right, title and interest in and to wrecked vessels of the VOC lying on or off the coast of the State of Western Australia and in and to any articles thereof to Australia'. The Agreement does not state that The Netherlands had title to the wrecks and thus does not constitute an acknowledgement of this claim by the Australian Government. Rather, whatever title The Netherlands did in fact have under its own law and/or any other system of law, is transferred to Australia. The Agreement came into force on 6 November, 1972.

The 'articles' referred to are defined to include not only parts of the vessels whether detached or not but also 'the fittings, goods and other property, wherever situated, that were installed or carried on those vessels'. The breadth of objects covered is interesting in that in 1972 the Runde find off Norway brought this very much to the attention of the Dutch. The find was that of a VOC vessel—the *Akerendam*—from which a large quantity of gold and silver coins were recovered. The Norwegian Protection of Antiquities Act covered vessels, hulls, and 'objects pertaining thereto' but not cargo. The question of significance was whether the treasure pertained to the hull or constituted cargo.[13]

In the Agreement Australia recognised that The Netherlands 'has a continuing interest, particularly for historical and other cultural purposes, in articles recovered from any of the vessels' that were referred to in the transfer of 'right, title and interest'. While recognising this 'continuing interest'—note, not a 'claim'— Australia agreed that it would not seek reimbursement from The Netherlands of any costs incurred in searching for the vessels or recovering articles from them.

Following on recognition of The Netherlands' 'continuing interest', most of the body of the Agreement is taken up with provisions for the establishment of a Committee 'to determine the disposition and subsequent ownership of the recovered articles between the Netherlands, Australia and the State of Western Australia'. The Committee is formed of two persons nominated by Australia and two by The Netherlands. In the event of disagreement between the members regarding the disposition of articles, there is provision for the appointment of an independent consultant who shall report on the matter. His report is referred to the Committee for reconsideration of the issue. If the Committee still fails to agree then the question becomes one for negotiation between the governments of The Netherlands and Australia. Costs of the Committee are borne one-third by The Netherlands and two-thirds by Australia with such items as travel, communications and transport of the articles being borne by the State concerned.

The members of the committee, who must have 'the scientific and cultural expertise appropriate for the discharge of their functions', are guided in their deliberations by an 'Arrangement' which, signed by

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12. 1972 Aust T S No 18.
13. For a full discussion of the case see Braekhus, S. 'Salvage of Wrecks and Wreckage: Legal Issues Arising from the Runde Find' (1976) 20 Scandinavian Studies in Law 37.

Australia and The Netherlands, is attached to the Agreement. This 'Arrangement' commences with a statement of 'General Principles' setting out the considerations governing the partition of archaeological collections. The emphasis is placed on maintaining the material collected as 'a corporate entity rather than its division into parts'. Thus, from a philosophical viewpoint, even though material from an archaeological site be shared, such sharing 'is best regarded as the accommodation in several localities of a corporate entity . . .' This follows from the viewpoint that 'sites are no longer regarded merely as a source of important individual items, but rather as a body of material whose collective value far outweighs the importance of the individual pieces and in which the relationship of the individual objects within the sample are a major part of its historical value'. Although the bulk of the material excavated was to be held in the Western Australian Museum it was 'most desirable' on 'historic, educational, scientific and international considerations' to make the deposition of representative collections in the museums of The Netherlands and Australia.

Two major principles are stated for apportioning the contents of an archaeological site: one, 'the total assemblage should be capable of reassembly to allow further statistical and scholarly analysis'; and, two, 'where unique or rare objects, themselves, form a meaningful assemblage within the whole, this assemblage should not be split or, if split, perfect replicas be made to complete the assemblage'. The emphasis, then, is on maintaining the material as a unit and the avoidance of further splitting among the bodies concerned. The general aim of the Committee is stated in this way:

> the Committee will have, as its general aim, the purpose of ensuring that representative series of statistical samples and sufficient examples of the rarer objects will be deposited in the museums of the Netherlands and Australia to convey the variety and contents of each wreck to both the public and to scholars while, at the same time, ensuring that major projects of scholarly research will not be impeded by overfragmentation of the collection.

Thus, with statistical samples a representative collection is to be made available to a museum in each country. In the case of coins both governments are to receive 'as complete a series as possible representing the mintings and values contained within each of the wrecks'. Every two or three years a representative sample of the rarer or unique objects is to be assembled thus allowing for the possible excavation of duplicates before the Committee deliberates on the distribution.

The Committee has met annually in Perth since 1973. The two Australian members are G. Bolton, Professor of History, Murdoch University and J. Bach, Professor of History, University of Newcastle. Members representing The Netherlands are Dr G. D. van der Heide of the Zuider Zee Museum and a senior diplomatic agent from The Netherlands Embassy, Canberra. It is said[14] that the Committee has attained a high

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14. Bolton, G. 'The Truth about ANCODS; A Report on the Australian-Netherlands Committee on Old Dutch Shipwrecks' abstract of paper delivered at First Southern Hemisphere Conference on Maritime Archaeology, Perth, 3-8 September, 1977.

level of harmonious working; that no chairman is appointed and decisions are taken on a consensus basis, there never having been a split vote. Most of its decisions so far have concerned the allocation of material from the *Vergulde Draeck* and the *Batavia*. There is a suggestion that the Dutch interpret the Agreement as giving them one-third of the material recovered.[15] There is no basis for this in the Agreement; such an interpretation would be contrary to the 'General Principles' of the Arrangement and what is known of the working of the Committee.

There are some other points of ambiguity. A Dutch commentator has stated that the agreement covers only ships sunk in (West) Australian waters.[16] In fact it refers to ships sunk 'on or off the coast' of Western Australia. This would seem to include ships sunk on the continental shelf to which the Commonwealth Act now extends.

There is the question about the status of the 'Arrangement'. It was signed at the same time and by the same persons as the Agreement. Their signatures were expressed to be on behalf of their States. Obligations are imposed by it on the Committee and thus on each State to instruct its delegates accordingly. It seems difficult in the light of these considerations not to regard it as a full inter-State treaty of the same legal status as the main Agreement on which it depends.

Maritime Archaeology Act 1973

Certain features of the Museum Act 1969 (WA) were inconsistent with the scheme established by the Agreement. For example, the 1969 Act entitled the reporter of a wreck to the metal value of any gold or silver therein. As the Commonwealth now had title it was considered 'inadvisable that the State should purport to entitle some other person to this value'.[17] Operating the legislation had also revealed certain weaknesses, making it difficult to implement effectively. Emphasis had been placed on the law of 'wreck' whereas it was salvage law that was of greatest concern. Certain situations were, moreover, not covered, e.g., materials taken ashore by the survivors of wrecks. To meet these and other problems the Western Australian Parliament passed the Maritime Archaeology Act 1973.

Under this Act 'property in and right to possession of all historic ships and maritime archaeological sites is vested in the museum on behalf of the Crown'. The year 1900 was taken as the determining date for rendering ships 'historic'. Any ship that was 'lost, wrecked or abandoned, or was stranded, on or off the coast of Western Australia' before 1900 was, in the terms of the legislation an 'historic ship'. Property in 'maritime archaeological sites' was also vested in the Museum, i.e., the Western Australian Museum. These sites comprise:

(a) any area in which the remains of a ship, which in the opinion of the Director (i.e., the Director of the Museum) may have been a historic ship, are known to be located;
(b) any area in which any relic is known to be located, or where in the

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15. Altes, A. K. 'Submarine Antiquities: A Legal Labyrinth' (1976)4 Syr JIL&C 77 at 86.
16. Altes, A. K. *Prijs der zee* (1973), p 154.
17. Parl Deb WA Hansard Vol 200 (1973) 3688.

opinion of the Director unrecovered relics associated with a ship which may have been a historic ship are likely to be located; and

(c) any structure, campsite, fortification or other location of historic interest that, in the opinion of the Director, is associated with, and was occupied or used by, persons presumed to have been in a historic ship.

A relic meant 'any thing of historic interest that appears to have formed part of, or to have been carried by or derived from or associated with any historic ship, or to have been constructed or used by any person associated with any such ship . . .'. A 'maritime archaeological site' could be under the sea, on land or part way between.

Compensation was not payable to any person by reason that the property specified under the Act was vested in the Museum.

For the archaeologists a most important part of the 1973 Act was the protection it gave to maritime archaeological sites. Under s 9 the Governor was given power to declare an area as such a site and that 'a specified area surrounding that site is a protected zone'. The boundaries of the site had to be specified if they were below low water mark and those of the protected zone could not extend more than 500 metres from the perimeter of the site. The Governor was further given power to make regulations on matters such as diving or other underwater activity within the protected zone; bringing objects such as explosives, salvage tools within it; mooring vessels. It was an offence to contravene any provision of regulations so made—the penalty being $1000 or imprisonment for six months or both.

The Act provided a typical carrot and stick approach to reporting of historic ship finds. Under s 17 every person who found a ship that was or appeared likely to have been lost before 1900 had to report his find to the Director of the Museum. There was a $500 fine for the offence of failure to do so. On the other hand, the Trustees of the Museum had the power to reward the person who first notified the position of such a ship. If the person was 'aggrieved by the decision' of the Trustees he could make application to a Judge in Chambers 'for an order requiring the Trustees to pay him such amount as is just'. Basically, the maximum award obtainable was $5000. However, this could be increased by order of the Minister or, when the metal value of any relics was considerable, a judge could award up to one half of the market value of that metal content. The Trustees were given certain powers to dispose of relics that had been preserved, examined and recorded.

Robinson v. The Western Australian Museum

The Western Australian legislation of 1973 was a sophisticated attempt to deal with two problems raised by historically important wrecks: their protection and the question of title to relics that may remain. There still remained the question of whether such legislation could be validly enacted by a government of a state of the Commonwealth. This was tested in *Robinson v The Western Australian Museum.*[18]

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18. (1977) 16 ALR 623.

The *Vergulde Draeck* lies on a reef some 2.87 nautical miles west of the coastline of Western Australia. A local diver, Mr E. A. Robinson, alleged that he found the wreck in 1957; subsequently lost it and rediscovered it in 1963. He had notified the Commonwealth Receiver of Wreck and claimed an interest in the wreck as finder. However, in 1964 the *Vergulde Draeck* was listed as an historic wreck under the Museum Act Amendment Act. This classification was continued under the Museum Act 1969 and, in the Maritime Archaeology Act 1973, the *Vergulde Draeck* was scheduled as an historic ship. Robinson claimed that the legislation prevented him from exploring the wreck; from conducting salvage operations with respect to it and from removing objects from it. He sought a declaration from the High Court of Australia that the provisions of the Western Australian legislation to this effect were invalid.

Six members of the High Court gave judgment in the case: Barwick, C. J.; Gibbs, Stephen, Mason, Jacobs, Murphy, JJ.

Three of the judges, including the Chief Justice, found the legislation or its key provision invalid. One other found a subsidiary aspect invalid but the remainder valid. The invalidity of the scheme of legislation was thus brought about by the casting vote of the Chief Justice. This is the only aspect of the case that could be termed a decision; apart from it there is only a collection of opinions on different points. Indeed the point that one judge relies on to reach his conclusion is often expressly rejected by another or completely ignored. Following this case it would be most difficult to advise what aspects of state legislation dealing with historic ships in Australian territorial waters would be invalid and on what grounds.

The Chief Justice found the legislation invalid on the ground that it was not a law 'for the peace, order and good government of the State'[19] and therefore could not operate extraterritorially; the seabed not being included in the territory of the state. He rejected the argument that the historical significance of these wrecks made them really a matter of concern for the 'peace, order and good government' of Western Australia. It is noteworthy that both Gibbs and Mason, JJ., specifically reach the contrary conclusion on this point. In the words of Mason, J.:[20]

> 'Likewise, in my opinion, there is a sufficient connection between legislation regulating the ownership or possession of historic wrecks on or near the coasts of Western Australia and the peace, order and good government of the State.'

Jacobs and Murphy, JJ., also found the legislation invalid. The former relied mainly on the Seas and Submerged Lands Act 1973 (Cth). This, he says, vested sovereignty in respect of the territorial sea in the Commonwealth and carried with it dominion over those things 'in, on or under the sea over which by any law, including the law of the prerogative, the Crown has dominion'.[21] These included derelicts subject to the claim of the true owner. Jacobs, J., thus regarded the vesting of property under s

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19. At 636.
20. At 664.
21. At 672.

6 of the Maritime Archaeology Act 1973 as a vesting of the sovereign right of dominion. The vesting provision being invalid, other sections of the legislation—8 and 9—became inapplicable. The reasoning of this approach appears to be at variance with that of Gibbs, J. He argued from the point of view that, although the Commonwealth in the Seas and Submerged Lands Act declared its sovereignty in the territorial sea, it did not go on to exercise the sovereignty it asserted. Moreover, not having exercised that sovereignty in respect of wrecks, it could not be said that a 'law vesting property in someone on behalf of a State is . . . a law which vests sovereignty in that person or makes it exercisable by him'.[22] However, if we accept the vesting of sovereignty as carrying with it dominion over things covered by the prerogative law, then, following the law of wreck, the argument of Jacobs, J., is the better. Jacobs, J., also found s 6(1) to be inconsistent with the Navigation Act 1912 (Cth).

In a virtually unargued judgment Murphy, J., stated that the vesting provision (i.e., s 6) of the Maritime Archaeology Act 1973 was invalid for inconsistency with the Seas and Submerged Lands Act. Moreover, 'it was not within the legislative competence of the Western Australian parliament to deal with the ownerhip of the "Gilt Dragon" or to control its archaeological site'.[23] It is not clear whether this is also an argument from inconsistency or from the same basis as that of Barwick, C. J. It is important that, similarly to Barwick, C. J., Murphy, J., excluded competence to 'control' an archaeological site and not merely its vesting.

Mason, J., also found problems with the concept of 'maritime archaeological sites'—declaring that s 6 was inoperative in so far as it applied to these. The sites purported to vest areas of the seabed and thus were contrary to the Seas and Submerged Lands Act. No other aspect of the legislation was inconsistent with the Act; it did not confer 'on the Crown in right of the Commonwealth proprietary rights in the sea-bed'. This is a different point to that taken by Jacobs, J., regarding the vesting of sovereignty which carries with it dominion over objects affected by the prerogative law; namely, derelicts. Mason, J., also found the Western Australian legislation to be inconsistent neither with the Navigation Act 1912 (Cwth) nor the Merchant Shipping Act 1894 (Imp). As already stated he considered it to be for the 'peace, order and good government of the State' so that, with the exception of the vesting of maritime archaeological sites, he reached the conclusion that it was valid.

Gibbs, J., arrived at the same conclusion on this last point. He also found that the Western Australian legislation was not inconsistent with the Navigation Act 1912, the Merchant Shipping Act 1894, nor the Seas and Submerged Lands Act 1973. On the status of maritime archaeological sites he could not see that there was any reason to consider appropriation of part of the seabed as inconsistent with the last mentioned Act.

> 'There is in my opinion no reason to distinguish for this purpose between a law which vests real property in an instrumentality of the

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22. At 645.
23. At 675.

> State and one which vests personal property; neither is expressed to vest or make exercisable any sovereignty . . . .'[24]

The final judgment to consider is that of Stephen, J., who, like Gibbs, J., considered the plaintiff failed in his application. However, in Stephen, J.,'s view he failed because he had no standing to bring the action. To a large extent this followed from a finding that the plaintiff could not take possession of the wreck and therefore suffered no particular detriment in being excluded from the site.

Besides the aspects of invalidity of the legislation we have been considering, the case of *Robinson v The Western Australian Museum* contains a number of observations on salvage law that are relevant in archaeological investigations.[25] Of particular interest in our present context are statements supporting the continued existence of title to the *Vergulde Draeck* in the VOC and through that company, the Government of The Netherlands as successors in title. The fullest treatment of this aspect appears in the judgment of Stephen, J.:[26]

> 'Title to "Gilt Dragon" at the time of her discovery by the plaintiff, must, I think, for present purposes be assumed to have remained in her original Dutch owners . . . in these present proceedings the mere passage of so many years should not be treated as involving abandonment of title, even if in other circumstances the mere passing of time without any attempt to assert possession can perhaps be so regarded. . . .'

Jacobs, J., said:[27]

> 'The true owner of this maritime property, the remains of the "Gilt Dragon" and its cargo, is the successor or successors in title of the owners at the time the vessel foundered and sunk, said to be the Dutch East India Company.'

Historic Shipwrecks Act 1976

Judgment in *Robinson v The Western Australian Museum* was given on 31 August 1977. On 3 September the Governor-General of the Commonwealth of Australia issued a proclamation declaring that the Historic Shipwrecks Act 1976 (Cth) applied in relation to waters adjacent to the coast of the State of Western Australia.

This Act had been prepared partly in anticipation of the possibility that the Western Australian legislation might be found invalid. The Commonwealth Parliament had passed the Act in 1976 and it had received the Royal Assent on 15 December of that year; coming into operation that same day. However, it was expressly stated not to apply 'in relation to waters (including waters above the continental shelf) adjacent to the coast of a State until a Proclamation has been made declaring that this Act applies in relation to waters adjacent to the coast of that State' (s 2). The

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24. At 645.
25. O'Keefe, P.J. 'Maritime Archaeology and Salvage Laws: Some Comments Following *Robinson v Western Australian Museum*' (1978) 7 Int J of Nautical Archaeology and Underwater Exploration 3.
26. 16 ALR at 654.
27. At 671.

Commonwealth Government had given an undertaking that it would not act on the Act until the decision in the *Robinson* case had been handed down. Thus, until the proclamation in respect of Western Australia was made, the Act applied only to waters adjacent to the coasts of the Australian territories. Under s 9 it also applied to Dutch relics, i.e., articles mentioned in Articles 1 and 2 of the Agreement Concerning Old Dutch Shipwrecks. Persons having or gaining possession or control of these relics had to notify the Minister even though the Act was not proclaimed for waters off the state where they were found.

The Historic Shipwrecks Act begins with a Preamble referring specifically to the Agreement Concerning Old Dutch Shipwrecks. It then puts this forward as justification for the legislation:

> 'AND WHEREAS it is desirable that Australia should protect those wrecked vessels and articles, and the remains of, and any articles associated with, other ships of historic significance . . . .'

The Agreement thus provides additional constitutional underpinning of the legislation. The Commonwealth can point not only to its recognised sovereignty in respect of the territorial sea, but also its treaty obligations under the external affairs power.

What objects does the Act apply to? Under s 5 these are stated to be 'the remains of a ship' which are of 'historic significance' in the opinion of the Minister administering the Act (i.e., the Minister for Administrative Services). Also included are 'historic relics'—articles associated with a ship or 'all articles that were associated with a particular ship' being articles of 'historic importance'. The Minister may declare the remains or the articles to be an historic shipwreck or historic relics respectively. He may also make a provisional declaration to the same effect (s 6). This remains in force if not revoked for twelve months and may be renewed. The purpose of the provisional declaration is to enable immediate protection to be given to the remains of a ship or an article where it is necessary to prevent depredation while its historic importance is being assessed. At times it can take a number of years for this to be done.

What criteria will the Minister take into account when assessing the historical significance of a wreck or relic? The following have been suggested as appropriate:

(a) a wreck significant in the discovery, early exploration, settlement or early development of Australia;
(b) relevance of a wreck to the opening up or development of parts of Australia;
(c) relevance of a wreck to a particular person or event of historical importance;
(d) the wreck is a possible source of relics of historical or cultural significance;
(e) the wreck is representative of a particular maritime design or development; and
(f) naval wrecks, other than those deliberately scrapped or sunk and having no particular historical or emotional interest.[28]

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28. Ryan, P. 'Legislation on Historic Wreck' paper delivered at First Southern Hemisphere Conference on Maritime Archaeology, Perth, 3-8 September, 1977.

The definition section of the Act (s 3(1)) includes within that of 'historic shipwreck' and 'historic relic' Dutch shipwrecks and relics respectively. The meaning of 'Dutch relic' has already been given. A 'Dutch shipwreck' means a wrecked vessel specified in the Second Schedule (i.e., *Batavia*, *Vergulde Draeck*, *Zuytdorp*, *Zeewyk*) or any other wrecked vessel mentioned in Article 1 of the Agreement. This indicates that Australia sees that Article as including not only VOC vessels discovered prior to 1972 but also those that might be found in the future.[29]

The remains of a ship or the articles associated with a ship must be 'situated in Australian waters or in waters above the continental shelf of Australia'. Australian waters are defined as: 'the territorial sea of Australia and waters of the sea (not being waters within the limits of a State) on the landward side of the territorial sea of Australia'. Waters to the outer limit of the territorial sea are thus covered other than waters within the limits of a State. These last may generally be taken to be those referred to as internal waters. However, the Act also deals with objects in waters beyond the territorial sea when it refers to 'waters above the continental shelf of Australia'. The continental shelf is defined by reference to its meaning in the *Seas and Submerged Lands Act 1973*, which in turn refers to the Geneva Convention on the Continental Shelf. That Convention uses a definition of the continental shelf which allows expansion of the shelf depending on technological advances in exploitation techniques. Would this include techniques for recovery of shipwrecks? Furthermore, the Act involves the exercise of extraterritorial jurisdiction.

Barwick, C. J., in *Robinson v The Western Australia Museum*, found no problem with this from the point of view of national law:[30]

> 'There can be no doubt, in my opinion, of the legislative power of the Australian Parliament to pass laws for the possession and control of ancient wrecks around the Australian coast without any specific limitation as to distance therefrom.'

On the other hand, under international law Australia, in respect of the continental shelf, has sovereign rights only 'for the purpose of exploring it and exploiting its natural resources'. There is no right given to treat historic shipwrecks or to prevent others from doing so. Moreover, in its explanatory comments on the draft article in the Geneva Convention the International Law Commission stated:[31]

> 'it is clearly understood that the rights in question do not cover objects such as wrecked ships and their cargoes (including bullion) lying on the seabed or covered by sand of the subsoil.'

In *Treasure Salvors v Abandoned Sailing Vessel*[32] the United States Government argued that an Act, declaring the policy of the United States to be that the subsoil and seabed of the outer continental shelf are subject

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29. Cf Altes, A. K. *Prijs der zee* (1973) p 154.
30. 16 ALR at 637.
31. Report of the International Law Commission to the General Assembly, (1956) Yb ILC Vol 2 p 298.
32. 408 F Supp 907(1976).

to the jurisdiction and control of the United States, brought a Spanish treasure ship within the jurisdiction of the United States and thus within the purview of the antiquities legislation. The District Court, citing the above comment of the International Law Commission, rejected this argument with the observation that:[33]

> '. . . the United States has no basis for asserting its sovereign rights in sunken treasure (which, of course, is not a natural resource) found on the outer continental shelf.'

Australia is one of the first, if not the first, State to assert jurisdiction over historic shipwrecks on the continental shelf. The validity of this in international law is doubtful at this stage. A few isolated and unrelated acts by States to extend their national jurisdiction to take such rights will not be sufficient to create new rules of international law, though their occurrence, if there is no protest, may indicate an emerging custom. To date there has been no protest at the Australian extension of jurisdiction. However, this does raise the question of the extent to which the courts of other States would give effect to the Australian law if a case were ever to come before them.

The effectiveness of the extension of jurisdiction to the continental shelf will depend on the presence of any offender within the jurisdiction so that action may be taken against him to enforce the appropriate penalty. Under public international law it is forbidden for the authorities of any State to interfere with the ships of other States on the high seas. As the object itself is outside the territory of the State a strong argument could be put that any interference with a ship working on the site would be unlawful and may lead to international protest.

The Act makes provision for the declaration of protected zones (s 7). This enables an entire area over which the remains of a ship or relics may be scattered to be protected. The area of a protected zone cannot exceed 100 hectares although it may be comprised partly of sea and partly of land. The Act also allows extension of the zone within the limits of a State if this is necessary for protection of the remains or relic. The zone has a vertical dimension in that it includes the airspace above; the waters, subsoil and seabed beneath.

Under the Act a person who finds the remains of a ship or an article associated with a ship must notify the Minister (s 17). He must describe the remains or the article and the place where these are situated in such a way as to allow them to be located. This procedure is to enable the Minister to consider, in his discretion, whether the remains or article should be declared an historic shipwreck or relic. The Act makes provision for the establishment of a public Register of Historic Shipwrecks (s 12). All particulars of historic shipwrecks, relics, provisional declaration of same and protected zones are to be entered in it. The Register is open for public inspection on payment of a fee.

The Minister may grant a permit for the exploration or recovery of historic shipwrecks or relics (s 15). The scheme of the Act is first of all to prohibit certain acts in relation to these objects and certain activities in a

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33. At 910.

protected zone. Thus, except in accordance with a permit, a person shall not damage or destroy, interfere with, dispose of, or remove a historic shipwreck or historic relics from Australia, Australian waters or from waters above the continental shelf of Australia (s 13). This includes removal from the seabed; from the subsoil of the seabed beneath the waters mentioned or from a reef in such waters. The contravention of any of these provisions is an offence punishable, on conviction, by a fine of up to $5000, imprisonment for up to five years, or both. Having prohibited acts in relation to the wreck or relic, the Act then makes provision for the passing of regulations to prohibit certain activities in the protected zone around the wreck or relic (s 14). Such activities include:

(i) the bringing into a protected zone of equipment constructed or adapted for the purpose of diving, salvage or recovery operations, or of any explosives, instruments or tools the use of which would be likely to damage or interfere with a historic shipwreck or a historic relic situated within that protected zone;
(ii) the use within a protected zone of any such equipment, explosives, instruments or tools;
(iii) causing a ship carrying any such equipment, explosives, instruments or tools to enter, or remain within, a protected zone;
(iv) trawling, or diving or other underwater activity within a protected zone; or
(v) the mooring or use of ships within a protected zone.

Such activities are those thought to cause the greatest damage to wrecks or relics and the greatest inconvenience to those legitimately working in the area. Maximum penalties for offences against the Regulations are a $1000 fine, imprisonment for one year or both. The Regulations, when made, may be of general application to all protected zones in existence or they may relate to a particular protected zone. This is to enable flexibility in establishing the protection necessary for a particular zone consonant with normal use of the sea particularly in relation to the international law concepts of freedom of the high seas and innocent passage through the territorial sea. Finally, having made provision for protecting the wreck or relics and prohibiting these activities in the protected zone the Act provides for the issue of permits 'to do an act or thing specified in the permit the doing of which would otherwise be prohibited'.

The permit is not intended to allow an 'open go' at the wreck or relics. Conditions may, and probably will be, imposed on the way the exploration or recovery is carried out. It may have to be done in a specified manner or in accordance with the directions of a person named in the permit. The conditions may require that articles recovered be held in specified custody or dealt with in a manner set out in the permit or otherwise. The following have been suggested as possible considerations bearing on the conditions that might be imposed:[34]

> 'We would need to look at the qualifications and intentions of the person or organisation. Is it the intention of the applicant to carry out an archaeological exploration? If so is he qualified to do so? Does he

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34. Ryan, op cit.

have the expertise and resources to carry out the necessary conservation procedures on any material recovered from the wreck? Should a full excavation of the wrecksite be carried out now or would it be more appropriate for the work to be left for marine archaeologists of the future so that they may have the benefit of researching what are in effect time capsules?'

The Minister has power to revoke, suspend or vary the conditions in a permit at any time. The maximum penalty for contravening a condition is $2000; imprisonment for two years, or both.

The Act also requires persons who have historic relics in their possession to give notice describing the article and its situation to the Minister (s 9). This must be done within thirty days of publication of the notice declaring the article to be an historic relic. Similarly, where such a relic comes into the 'possession, custody or control of a person', that person must give notice of this fact to the Minister within thirty days. The Minister may require persons to give information regarding parts of an historic shipwreck or relic if it appears that the person 'may have, or may have had, possession, custody or control of an article' in question (s 10). It is an offence to fail to give such information. The Minister is also given power to require a person having such article to deal with it in a certain way for the purpose of preservation or exhibition or the provision of access to it (s 11).

Those who notify the Minister of the location of any remains of a ship or article associated with a ship under s 17(1) may receive a reward (s 18). The remains or article must first be declared an historic shipwreck or relic or be a Dutch shipwreck or Dutch relic and the notice must be the first to lead to the wreck or relic. The matter is then at the discretion of the Minister. The amount of any reward so payable is to be laid down in regulations.

Under the Act the Commonwealth does not directly claim title to or property in any historic shipwreck. However, there is residual power in s 20 enabling the Minister to make vesting orders under certain conditions. The vesting must be necessary, in the Minister's opinion, for giving effect to the Agreement Concerning Old Dutch Shipwrecks, any like Agreement or the Act itself. In the last two cases ownership may be vested in the Commonwealth, a state of the Commonwealth, the Government of a country other than Australia or in any other specified person.

The Commonwealth is required to pay compensation where the action of the Minister results in an acquisition of property within the meaning of paragraph 51 (xxxi) of the Commonwealth Constitution (s 21). There are a number of actions which the Minister could take under the Act which would have this effect. One is the making of a vesting order under s 20; another is the giving of a direction under s 11 requiring an article to be delivered over. In the first place, the amount of compensation is to be determined by agreement between the Commonwealth and the person from whom the property is acquired. If no agreement can be reached that person must take action against the Commonwealth in the High Court or the Supreme Court of the State or Territory concerned.

The Act makes provision for the appointment of inspectors to ensure

observance of the provisions of the Act (s 22). Inspectors are given specified powers of entry on board ship, search and questioning. In certain circumstances the inspector will have the right of arrest of the person and seizure of a ship, equipment or articles believed to be used in contravention of the Act.

The expressed intention of the Commonwealth Government is that the administration of the Act would be a cooperative effort between State and Federal authorities.[35] The Act provides that the Governor-General

> 'may make arrangements with the Governor of a State for the performance of functions by a competent authority of the State in relation to the protection, recovery, preservation and exhibition of historic shipwrecks and historic relics.'

Recognising the responsibility of the Western Australian Museum for Dutch shipwrecks and relics, the Act further provides for

> 'arrangements with the Governor of Western Australia for the performance by The Western Australian Museum of functions in relation to the protection, recovery, preservation and exhibition of Dutch shipwrecks and Dutch relics.'

It will be obvious that at a number of points there may be conflict between the provisions of the Historic Shipwrecks Act 1976 and the prohibitions of international law. We have mentioned these at various places in the text e.g., the possible conflict between the principle of freedom of the high seas and the declaration of protected zones. The Act makes provision for resolving this potential source of trouble in these terms:

> '28. Subject to the obligations of Australia under international law, including obligations under any agreement between Australia and another country or countries, this Act extends, according to its tenor, to foreigners and to foreign ships (including foreign hovercraft and any similar foreign craft).'

This section is designed to give the Act the greatest possible scope of operation that it can have consistently with international law. At the same time it seeks to ensure that the rights recognized by international law are not interfered with by the Act. This is a very interesting provision and one that may provide some nice problems of evidence if it should be called into use in a legal action.

What action has so far been taken under the Act? On 12 July the wreck of the Japanese submarine I-124, located off Darwin, was declared an historic shipwreck. Both the Japanese and Australian Governments viewed this as a war grave. It was said to be important historically as the first naval craft sunk by the Royal Australian Navy during World War II. As previously stated the Act was proclaimed for waters adjacent to Western Australia on 3 September 1977. On 8 September, the remains of 38 ships off Western Australia were declared to be historic shipwrecks. The Act was declared to apply to waters adjacent to the coast of Queensland on 18 November, 1977. This was done to enable the *Pandora* to be declared an historic shipwreck on the same day. The *Pandora* sank

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35. For example, Second Reading Speech, S Deb, 20 Oct, 1976 Vol 69, 1334.

in 1791 and is the oldest known wreck on the eastern coast of Australia. The location of the wreck had just been discovered.

Law Applicable Within State Territory

The Historic Shipwrecks Act 1976 and *Robinson v The Western Australian Museum* have effectively precluded virtually any State legislative activity regarding historic ships in the territorial sea of Australia. There is still considerable scope for State initiative in respect of wrecks in internal waters and associated land sites. Wrecks of the required classification within this area are, of course, not as prevalent as in the territorial sea and continental shelf.

We do not intend to make a detailed examination of the relationship between State legislation and that of the Commonwealth in internal waters and associated land sites. On the Commonwealth side both the Historic Shipwrecks Act 1976 and the Navigation Act 1912 have to be taken into account.

In Western Australia the Maritime Archaeology Act 1973 applied to ships 'on or off the coast of Western Australia'. This would appear to retain some scope for that legislation as also under its definition of 'maritime archaeological site'.

The internal waters of South Australia are extensive. In the past the Aboriginal and Historic Relics Preservation Act 1965 was used to protect historic shipwrecks and maritime archaeological sites. The legislation provides for the protection of relics, i.e., 'any trace or remains of the exploration or early settlement' and 'any trace, remains or handiwork of an Aboriginal'. It allows the declaration of areas of historical or scientific significance as either prohibited areas or historic reserves. The latter has been used twice to cover areas of the seabed of historic significance. The Act is aligned towards providing protection and does not deal adequately with excavation and conservation of historic shipwrecks. New legislation is in preparation in South Australia.

The National Parks and Wildlife Act 1970 was used by the Tasmanian Government to protect the wreck of the *Sydney Cove*. This was done on 29 March, 1977, by declaring a State reserve over an area between Rum and Preservation Islands in Bass Strait where the wreck lies.

There have been no examples of similar action in other States.

Conclusion

The Australian protection of historic shipwrecks has had a relatively short but tortuous history. It has involved the application and interaction of both international and municipal law. We now seem to have reached a position where satisfactory protection can be given these objects essential to our cultural life.

The Australian moves to protect maritime archaeological sites reflect an international concern in this matter and antedate to some extent legislative attempts in other jurisdictions to regulate underwater activities relating to the cultural heritage. France amended its salvage laws in 1969, Britain passed the Protection of Wrecks Act in 1973 and some other European countries are applying general antiquities legislation to underwater finds (Turkey's legislation to this effect is the most recent and

extensive). All of these are to some extent stop-gap measures: the subject is clearly one which needs special legislation of its own. Nor can national legislation, however good, effectively cover finds on the continental shelf and deep sea bed unless special action is taken. Concern in Europe about the kind of problems which moved Western Australia to be first in the field has now inspired the Education and Culture Committee of the Council of Europe to undertake a special study on the protection of the underwater cultural heritage. It is also possible that UNESCO, which in 1972 published a special volume on underwater archaeology,[36] may become interested in drawing up an international instrument on the topic. There is small doubt that their studies would be advantaged by a look at the Australian legislation which we have described above.

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36. *Underwater Archaeology: A Nascent Discipline* (UNESCO, Paris) 1972.