

Chapter 9

NEW ZEALAND

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1. Introduction

New Zealand has a coastline of 15,000 km, comprising two main islands and numerous smaller islands scattered throughout the southern Pacific Ocean, from the sub-tropical Kermadec Islands to the sub-Antarctic Campbell Island.¹ New Zealand's maritime boundaries are defined by the Territorial Sea, Contiguous Zone and Exclusive Economic Zone Act 1977. The Act asserts New Zealand sovereignty over the territorial sea (12 nm). The Act also establishes a contiguous zone (a further 12 nm beyond the territorial sea), and an exclusive economic zone (EEZ) (200 nm).² The Continental Shelf Act 1964

* We are most grateful to all those who responded to an informal survey on the UNESCO Convention 2001. Unless a department or agency affiliation is noted in the footnotes, the respondents' statements reflect their personal views. Our thanks also to Professor Warren Brookbanks for his advice on characterisation of Historic Places Act offences. The usual disclaimer applies to any remaining errors.

¹ Interpretation Act 1999 s. 29: statutory references to "New Zealand" include "the islands and territories within the Realm of New Zealand; but do not include the self-governing State of the Cook Islands, the self-governing State of Niue, Tokelau, or the Ross Dependency".

² Territorial Sea, Contiguous Zone, and Exclusive Economic Zone Act 1977 ss. 5–6A, 9.

regulates the economic exploitation of New Zealand's continental shelf, which includes the seabed and subsoil up to the EEZ limit, and extends to the outermost edge of the continental margin where this falls beyond EEZ limits.³

Australia has claimed similar entitlements in its domestic legislation.⁴ As a result, the EEZ and continental shelf claims of New Zealand and Australia overlapped in three main areas: between Norfolk Island and Three Kings Island, between Macquarie Island and Campbell and Auckland Islands, and between Lord Howe Island and New Zealand. In 2004 the New Zealand and Australian governments reached an agreement delimiting common maritime boundaries between the two countries in these areas.⁵ This agreement will be given domestic effect in New Zealand by Orders in Council.⁶

New Zealand has concluded a similar treaty with France regarding the maritime boundary between Tokelau and Wallis and Futuna,⁷ and intends to negotiate common maritime boundaries with Fiji and Tonga. New Zealand also claims the Ross Dependency, a territory in Antarctica with adjoining maritime space, but the limits of this are yet to be determined.

New Zealand was settled much later than most other areas in the world, because it is surrounded by sea for thousands of kilometres. Any explorer sailing to New Zealand had to be an extremely skilful navigator and have a well-constructed craft. It is possible that there were Polynesian visitors to New Zealand in the first century A.D., but it is unlikely that there were significant numbers of settlers. By 1000 A.D. there were increasing visits and possibly the beginnings of permanent settlement. The main waves of pioneering settlers arrived around 1200–1300 A.D. and evolved into the Māori tribes who

³ Land Information New Zealand is currently engaged in mapping the outermost extent of the continental shelf so that New Zealand's submission to the Commission on the Limits of the Continental Shelf can be lodged by the end of 2006.

⁴ See the Seas and Submerged Lands Act 1973 (Cth). In December 2004 Australia caused international disquiet by unilaterally declaring a 1,000 nm Australian Maritime Identification Zone (AMIZ) as part of its counter-terrorism initiatives. The AMIZ covers much of New Zealand's EEZ and territorial sea. Australia proposes to monitor all ship movements throughout the AMIZ and to intercept, board, and seize vessels considered a threat to Australian maritime security. After initial protests, the New Zealand government appears to have accepted Australia's assurances that the AMIZ scheme is not an attempt to extend Australia's maritime boundaries or jurisdiction and that it will be implemented in accordance with international law. As a result of this controversy, the AMIZ has been renamed the Australian Maritime Identification System (AMIS).

⁵ Treaty between the Government of Australia and the Government of New Zealand establishing Certain Exclusive Economic Zone and Continental Shelf Boundaries, done in Adelaide on 25 July 2004 (not yet in force) [2004] *Australian Treaty Not Yet in Force* (ATNIF) 1. See <http://www.austlii.edu.au/au/other/dfat/treaties/notinforce/2004/1.html>.

⁶ The Continental Shelf Act has also been amended to make it clearer that the boundaries of the New Zealand continental shelf may be delineated by Order in Council: Continental Shelf Amendment Act 2005 s. 3.

⁷ Agreement between the Government of New Zealand and the Government of the French Republic Concerning the Delimitation of Maritime Boundaries between Wallis and Futuna and Tokelau, done in Atafu on 30 June 2003 [2003] *Pacific Islands Treaty Series* (PITS) 5 (see http://www.paclii.org/pits/treaty_database/2003/5.html).

occupied New Zealand when the European explorers arrived. The exact dates of Polynesian exploration and settlement are a matter of considerable debate among archaeologists.⁸ The Polynesian explorers would almost certainly have used the large double-hulled canoes with sails that had been developed for venturing around the Pacific. These are thought to have been up to 24 m long, about the same size as the European ships that started exploring the Pacific from 1520 A.D.

The first known European to sight New Zealand was the Dutch explorer Abel Tasman in 1642, but there was no follow-up until Captain Cook landed in 1769. The earliest underwater artefacts recovered in New Zealand, with an undisputed provenance, are anchors belonging to the French explorer de Surville, which were lost in 1769 and recovered just over 200 years later by the New Zealand diver Kelly Tarlton. Several artefacts may predate these anchors: for example, the 'Spanish' helmet or the 'Tamil' bell, but the provenance of these items is uncertain. The first known European shipwreck, the *Endeavour*, occurred in 1795 in Dusky Sound. Thereafter, there were numerous shipwrecks, particularly of vessels hunting seals and whales at the beginning of the nineteenth century, and during the gold rushes on the West Coast of the South Island in the 1860s and 1870s. Altogether there are in excess of 2,000 reported casualties, but the sites of most of these are not accurately known. In many cases, the strong tides and stormy seas have long destroyed any traces of these vessels.⁹ These casualties include several warships, the best known being HMS *Orpheus* lost on the Manukau Bar in 1863, resulting in the death of 189 people.

None of the great seafaring waka (canoes) used by the Māori has been found, but a number of smaller waka have been discovered. Māori stone fish traps, Māori shell middens and oven sites have been uncovered by the tides on beach and harbour margins. These form an important part of New Zealand's maritime cultural heritage. There is also a submerged pā (fort) site in Lake Okataina near Rotorua with the remains of the palisade.

European settler occupation only became significant from 1840 onwards. New Zealand's underwater cultural heritage (UCH) includes the submerged remains of old jetties, wharves,¹⁰ and other structures, such as the remains of part of the town of Cromwell which was submerged when Lake Dunstan was created for hydro-electricity generation. There are also a small number of significant wrecks of aircraft around the New Zealand coast, including two aircraft of the Royal New Zealand Air Force.

As New Zealand is a long way from those parts of the world where international trade converges, there are not the professional salvage companies that exist in ports like Rotterdam and Singapore. Salvage is done by whichever vessel is in the vicinity. New Zealand port companies have tugs which are often used in salvage operations when larger commercial vessels get into trouble.

⁸ N. Prickett 'First Settlement Date and Early Rats' (2002) 45 *Archaeology in New Zealand* 288.

⁹ Most known New Zealand wreck sites are listed in S. Locker-Lampson and I. Francis *The Wreck Book* (2nd edn., Auckland, 1994) and New Zealand shipwreck casualties in C.W.N. Ingram *New Zealand Shipwrecks* (7th edn., Auckland, 1990).

¹⁰ Some of these remains were subsequently covered by port reclamation. See S. Bickler, B. Baquie and R. Clough 'Excavations at Britomart, Auckland' (2004) 47 *Archaeology in New Zealand* 136.

The explorers and excavators of wrecks tend to be commercial or recreational divers. In the late 1960s and early 1970s, when scuba diving equipment became generally available, there was a 'free-wheeling' approach to excavating wrecks. The main purpose was to recover treasure or metal objects. The use of explosives was not unknown. In most of the wreck excavations, the divers were looking for propellers, portholes, condensers and other metallic objects of value for souvenirs or scrap purposes. At the same time a number of wrecks were searched for treasure. Between 1965 and 1969 a considerable number of silver coins and some gold half sovereigns were recovered from the *Elingamite*, which had sunk in 1902 carrying bullion. The *Niagara*, sunk in June 1940 by an enemy mine, also yielded considerable gold bullion. When the *Tasmania* sank in 1897, there was on board a jeweller – Mr Rothschild – who had a suitcase full of jewellery valued at the time at £3,000. This jewellery was recovered in 1975 and purchased from the Rothschild Estate. It was put on display at the Kelly Tarlton Shipwreck Museum, but most of the items were stolen in 2000 and their whereabouts are currently unknown.

A number of wrecks, two of the most interesting of which are the *Edwin Fox* and the PS *Waimarie*, have been restored by enthusiasts. The *Edwin Fox* was originally a tea clipper, later a troop ship during the Crimean War, a convict ship to Western Australia, and an immigrant ship to New Zealand. She finally ended up as a coal hulk but has been restored at Picton. The PS *Waimarie* was a steam-operated paddle steamer on the Whanganui River for many years until she sank at her berth in 1952. She was raised nearly 50 years later and restored. Her steam engines are the fully restored originals. The PS *Waimarie* now operates tours along the Whanganui River.

The Maritime Archaeological Association of New Zealand (MAANZ) was established in the early 1990s and has been developing methods of preserving artefacts discovered on wrecks. It has now established a conservation laboratory in what was previously a coal store on board the heavy lift crane SS *Hikitia* in Wellington harbour.¹¹

There is an increasing trend for decommissioned naval vessels to be sunk as wrecks to provide artificial reefs for exploration by recreational divers. There is also the case of the *Rainbow Warrior*. This Greenpeace vessel was sunk at its berth in Auckland in 1985, with the loss of one life, by an explosion organised by agents of the French government. The *Rainbow Warrior* was subsequently scuttled at the Cavalli Islands as a memorial.

New Zealand has the ninth longest coastline and the fourth largest EEZ (comprising approximately 1.3 million square nm) in the world. Less than three per cent of this area has been surveyed.¹² Balanced against this, the New Zealand population is only slightly in excess of four million. Inevitably, this means that the New Zealand government is under-resourced to deal with such a substantial area of responsibility. The Ministry of Foreign Affairs and Trade cannot be represented at international meetings about conventions and proposed conventions as often as it would wish. For instance, there was a

¹¹ (2005) 20 MAANZ Newsletter 1 and 3; (2005) 21 MAANZ Newsletter 1 and 3; (2005) 96 New Zealand Heritage 28.

¹² See 'OS 20/20 Strategy' March 2005 *Landscan* 2–3 on a strategy launched in March 2005 to survey all of New Zealand's continental shelf and EEZ by 2020.

New Zealand representative at the plenary session of UNESCO in November 2001 but New Zealand had not been able to send a representative to all the meetings prior to that. The number of government staff available to administer issues relating to UCH is limited. The New Zealand Historic Places Trust (Pouhere Taonga) has a very limited annual expenditure of around NZ\$9.05 million. Its main responsibilities are land-based, with marine archaeology only just starting to be significant.

New Zealand does have a tradition of having skilled and dedicated volunteers working in this area. This is reflected in the manner in which many divers work on excavating wrecks. It is also reflected in the activities of MAANZ and the operation of its conservation laboratory.

2. Existing Legal Framework

Article 1(1)(a) of the UNESCO Convention on the Protection of the Underwater Cultural Heritage 2001 defines UCH relatively broadly as encompassing:

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) vessels, aircraft, other vehicles or any part thereof, their cargo or other contents, together with their archaeological and natural context; and
- (iii) objects of prehistoric character.

Using this broad definition of UCH as a starting point, it is immediately apparent that there is no single New Zealand statute specifically dealing with UCH.¹³ No uniform or general definition of UCH is to be found on the New Zealand statute book. Instead, a number of New Zealand statutes, administered by various government departments or organisations, regulate or affect different aspects of UCH. These statutes fall into three broad categories. First, there are general cultural heritage statutes (such as the Historic Places Act 1993 and the Antiquities Act 1975). The primary focus of these statutes is land-based cultural heritage, but they extend to cover UCH to a lesser or greater degree. Secondly, there are maritime law statutes (such as the Admiralty Act 1973 and the Maritime Transport Act 1994) which tend to focus on commercial and public safety issues involving salvage, ownership, and removal of wrecks, rather than on cultural heritage concerns. Indeed, some of the provisions in these statutes potentially clash with the aim of *in situ* preservation of UCH sites. Thirdly, there is a raft of other statutes which are not expressly drafted in terms of UCH or wrecks, but which have the potential to impact on UCH. The most important of these statutes are the Resource Management Act 1991 and the Marine Reserves Act 1971.

¹³ There is also a dearth of New Zealand legal writing on UCH. J.S. Blackie *The UNESCO Convention on the Protection of Underwater Cultural Heritage – Is the Time Right for New Zealand?* (Unpublished LLM dissertation, University of Auckland, 2004) provides the most comprehensive and current treatment of the subject area.

2.1 Cultural heritage statutes

2.1.1 *Historic Places Act 1993*

The passing of the Historic Places Act 1980 marked the beginning of a regime which put more emphasis on preservation of a wreck site for its archaeological value. The 1980 Act was subsequently replaced by the Historic Places Act 1993. The purpose of the Historic Places Act 1993 is to “promote the identification, protection, preservation, and conservation of the historical and cultural heritage of New Zealand”. The New Zealand Historic Places Trust, a Crown entity, administers and enforces the provisions of the Act.¹⁴ The Act provides that it is unlawful to destroy, damage or modify any archaeological site “knowing or having reasonable cause to suspect that it is an archaeological site”, or to carry out any archaeological investigation that may destroy, damage or modify any archaeological site, without prior authorisation from the Trust.¹⁵ The Trust may impose heritage orders and heritage covenants in respect of historic sites, and is charged with establishing a register of historic sites.¹⁶

In terms of the Act, an “archaeological site” is:

any place in New Zealand that –

- (a) Either –
 - (i) Was associated with human activity that occurred before 1900; or
 - (ii) Is the site of the wreck of any vessel where that wreck occurred before 1900; and
- (b) Is or may be able through investigation by archaeological methods to provide evidence relating to the history of New Zealand.¹⁷

There are some obvious difficulties with this definition, which is both wide-ranging and vague. First, the express limitation of archaeological sites to places “in New Zealand” indicates that the Act applies only to UCH sites in inland waters and the territorial sea. UCH sites in the New Zealand contiguous zone, EEZ or continental shelf cannot be said to be “in New Zealand”, however historically significant they may be.¹⁸ Although most known New Zealand historic shipwrecks occurred relatively close to the coastline, there are some notable shipwrecks further out to sea, including those of the *Turakina* and the

¹⁴ For more information on the Trust and its activities, see <http://www.historic.org.nz/>. The Historic Places Amendment Bill 2005 will reduce the size of the Trust Board and increase the number of Crown appointments “to strengthen the Trust’s governance arrangements”. The Bill has been criticised as undermining the Trust’s independence.

¹⁵ Historic Places Act 1993 s. 10. Sections 11–20 set out the procedures for applying for an authority to destroy, damage, or modify an archaeological site and the Trust’s powers and duties in respect of granting, denying, or imposing conditions on authorities.

¹⁶ *Ibid.* ss. 5–8, 22–37.

¹⁷ *Ibid.* s. 2.

¹⁸ See too the definitions of “historic place” and “historical area” in s. 2, which are expressly limited to places and areas lying “within the territorial limits of New Zealand”. The Interpretation Act 1999 s. 29 provides that “territorial limits of New Zealand”, “limits of New Zealand”, and similar statutory expressions mean “the outer limits of the territorial sea of New Zealand”. It therefore seems clear that Parliament did not intend the Historic Places Act to have extra-territorial application.

Rangitane. The possibility of discovering further significant UCH sites beyond the territorial sea cannot be discounted.

Secondly, the use of a fixed cut-off date of 1900 for protected archaeological sites is highly unfortunate and gives rise to anomalies:

There is no real justification for the 1900 cut off point as this is an arbitrary date which does not coincide with any significant advance in technological or social change, especially given that it is the depositional date rather than the time of construction which defines whether a wreck is to be protected or not. This fosters a situation where an arguably nationally significant vessel such as the *Elingamite* – built in 1887 and said to be ‘a first rate ship of her class’, carrying gold bullion of 17,320 pounds at the time it sank in 1902, and in which 17 people drowned and 28 died of exposure . . . – is not protected, while a far less significant ketch such as the *Liberty* – built in 1896 and sank at its moorings in the Firth of Thames in [the] same year – would be protected.¹⁹

The definition of archaeological sites and the cut-off date was unfortunately not included in the current review of the Act, apparently because it was regarded as a “contentious” issue.²⁰

Thirdly, unless aircraft can be said to come within the term “vessel”, the Historic Places Act definition of archaeological sites excludes wrecks of aircraft. This is unfortunate, as there are a number of historically significant aircraft wrecks around the New Zealand coast.²¹ Given the cut-off date of 1900, the Act does not protect these aircraft wreck sites in any event.

Fourthly, the definition of archaeological site focuses on the *site* of the wreck of the vessel, rather than on the physical wreck itself, wreck material, or artefacts recovered from the wreck. Although this legislative focus on the wreck site is in keeping with the maritime archaeology objective of preserving entire wreck sites *in situ* as “time capsules”, it arguably does not take into account the reality that most New Zealand wrecks have broken apart, scattered, or drifted from the original wreck site. The Act does not explicitly protect wreck material or artefacts found outside designated wreck sites, which may be treated as “find spots”, rather than as part of the original archaeological site. The Act also does not deal with the problem of wreck material or artefacts that have been removed from designated wreck sites and on-sold to third parties. The protection afforded by the Act to historical wreck material and artefacts would therefore seem to be less than comprehensive.

¹⁹ A. Dodd ‘Opportunities for Underwater Archaeology in New Zealand’ (2003) 46 *Archaeology in New Zealand* 151, 154–155. So too Blackie, *supra* note 13, at p. 39, who describes the cut-off date as “illogical and short sighted”; and Dr Rick McGovern-Wilson, New Zealand Historic Places Trust (letter, 1 June 2005) who argues for an urgent change to the Act to protect significant eighteenth and nineteenth century maritime heritage in New Zealand. Although the Historic Places Act 1993 s. 9(2) does allow the Trust to protect post-1900 significant archaeological sites by declaration, this power has not been much utilised in practice.

²⁰ Dodd, *supra* note 19, at p. 154. The Historic Places Amendment Bill 2005 only makes minor technical amendments to the definition of historic places.

²¹ See Locker-Lampson and Francis, *supra* note 9, at pp. 122–124, for a description of these aircraft wreck sites.

Fifthly, the Act does not define “wreck”, which potentially results in further uncertainty. It is not clear whether “wreck” should be construed in the stricter common law sense of the concept, as including only ships, cargo, materials or artefacts washed ashore with the ebb and flow of the tide after shipwreck,²² or whether the coverage of the Act also extends to wrecks in the broader sense of any lost vessels, cargo, materials or artefacts remaining *in situ* in the sea or upon the seabed.²³ If New Zealand courts favoured the stricter common law definition, the Historic Places Act regime would largely be rendered ineffective as far as *in situ* preservation of historic shipwreck sites is concerned.

A key provision of the Act is that any person who wants to destroy, damage or modify the whole or any part of an archaeological site has to apply to the Historic Places Trust for authority to do so. The process by which the Trust declines or accepts the application is set out in the statute. The Act provides the power to prosecute for breaches with significant maximum fines: NZ\$100,000 for destruction and NZ\$40,000 for damage or modification of an archaeological site.²⁴

There have been a limited number of prosecutions under the Historic Places Act 1993 and its predecessor, the Historic Places Act 1980. Most of these have related to land-based archaeological sites. In *Police v. Durey*,²⁵ a prosecution was brought against a diver over the wreck of the *Taupo* not long after the 1980 Act came into force. Although the prosecution was initially successful, it was reversed on appeal²⁶ because the Crown was not able to prove *mens rea*. The wording in the 1980 Act required the police to prove that the defendant “wilfully” destroyed, damaged or modified the archaeological site.

This wording was changed in the 1993 Act. Section 99 now provides that every person commits an offence who, “knowingly or having reasonable cause to suspect that a site is an archaeological site”, destroys, damages or modifies that site. However, section 106(1) of the Historic Places Act states that any prosecution under section 99 is a strict liability offence and “it is not necessary to prove that the defendant intended to commit the offence”. This creates a fundamental conflict between sections 99 and 106.²⁷

Although this conflict may be unfortunate from a legal point of view, it may be quite useful from a practical perspective. Most underwater wreck sites are covered by sand or mud. They will often be difficult to identify without removing some of the sand or mud, which immediately creates a risk of damage to, or modification of, the wreck site. Although the whereabouts of approximately 150 New Zealand wreck sites are known, most wrecks have broken up and been scattered, so it may be difficult to know if wreck

²² *Robinson v Western Australian Museum* (1977) 138 *Commonwealth Law Reports* 283; 16 *Australian Law Reports* 623.

²³ Another argument is that the broader statutory definition of “wreck” in the Maritime Transport Act 1994 s. 98, discussed in Section 2.2.2 below, should be applied.

²⁴ Historic Places Act 1993 ss. 11, 12, 14–16, 20, 99.

²⁵ (1983) 1 *Criminal Reports of New Zealand* 99 (DC).

²⁶ *Durey v. Police* (1984) 1 *Criminal Reports of New Zealand* 392 (HC).

²⁷ In *Higgins Contractors Ltd. v. New Zealand Historic Places Trust* (unreported, 30 April 2002, High Court Wellington) the High Court approached s. 99 on a *mens rea* basis. However, in *Historic Places Trust v. Northern Projects Ltd.* [2000] *District Court Reports* 478 and *New Zealand Historic Places Trust v. Archer* [2001] *New Zealand Administrative Reports* 688 the District Court characterised s. 99 as a strict liability offence.

remains constitute an archaeological site. As a consequence, a completely strict liability regime could be unfair.

In any event, prosecutions are a very expensive way of preventing damage to archaeological sites. Success can turn on relatively fine points, as the *Durey* case illustrated. It may well be more effective to encourage a positive relationship between the Historic Places Trust, the government departments concerned, and the diving community.

2.1.2 *Antiquities Act 1975*

The Act was passed in order to protect against the illegal removal and export of antiquities and artefacts. Section 2 of the Act provides that an “antiquity” can include any ship, boat or aircraft and the parts of any ship, boat or aircraft wrecked in New Zealand or within New Zealand territorial waters for more than 60 years provided it is of national, historical, scientific, or artistic importance. “Artifacts” are defined as:

any chattel, carving, object, or thing which relates to the history, art, culture, traditions, or economy of the Maori or other pre-European inhabitants of New Zealand and which was or appears to have been manufactured or modified in New Zealand by any such inhabitant, or brought to New Zealand by an ancestor of any such inhabitant, or used by any such inhabitant, prior to 1902.

There could be Māori waka bailers or paddles which are not “antiquities” under the Act, but which come within the statutory definition of “artifacts”.

The restriction on the export of antiquities from New Zealand is achieved by requiring a written certificate of permission from the Chief Executive of the relevant government department, unless it is an antiquity coming under any particular class or classes of antiquities that have been exempted.²⁸ The current maximum fine for breach of this section without reasonable excuse is NZ\$1,000.

The provisions in relation to the disposal of artefacts are more detailed,²⁹ but once again the penalty is not substantial: a maximum fine of NZ\$1,000. Anyone finding an artefact is required to notify the Chief Executive or the nearest public museum within 28 days. Artefacts found in New Zealand or within the territorial waters of New Zealand are deemed to be *prima facie* property of the Crown.³⁰ In practice the Crown endeavours to find the proper ownership of every found Māori artefact.³¹ The Antiquities Act, operating in conjunction with the Historic Places Act, therefore does provide an additional level of protection against the removal of items from a wreck, if there is an intention to export the items concerned.

The government has been reviewing the Antiquities Act for a number of years. The Protected Objects Amendment Bill was introduced into Parliament in February 2005 to extend and update the Antiquities Act. The Bill is intended to enable New Zealand to participate in the UNESCO Convention on the Means of Prohibiting and Preventing the

²⁸ Antiquities Act 1975 s. 5.

²⁹ *Ibid.* s. 13.

³⁰ *Ibid.* s. 11.

³¹ See the evidence of Mackenzie and Stubbs in the *Urewera Inquiry* – Waitangi Tribunal WAI 894 para. L16.

Illicit Import, Export and Transfer of Ownership of Cultural Property 1970, and the UNIDROIT Convention on Stolen or Illegally Exported Cultural Objects 1995. One of the key purposes of the Bill is to fill a gap in the Antiquities Act, which does not currently provide the means to recover objects that have been stolen or illegally exported. The penalties under the Antiquities Act, which are now ridiculously low because of inflation over the last 30 years, will be updated and significantly increased in order to provide a real deterrent to the illegal trade in antiquities and artefacts.

2.2 Maritime law statutes

2.2.1 *Salvage regime: Part XVII of the Maritime Transport Act 1994*

The Shipping and Seamen Acts 1908 and 1952 followed the precedent of the UK Merchant Shipping Act 1894 of awarding a “reasonable amount of salvage”³² to successful³³ salvors in respect of salvage of maritime property and, by extension, aircraft and lives. Traditional salvage law focused almost exclusively on commercial property rights and paid little or no heed to environmental, historical or cultural concerns.

The Maritime Transport Act 1994 enacted statutory provisions that anticipated the incorporation of the International Convention on Salvage 1989 into New Zealand domestic law.³⁴ New Zealand only acceded to the Salvage Convention in 2002, and the Salvage Convention acquired the force of law in New Zealand on 16 October 2003.³⁵

Unfortunately, however, New Zealand has failed to reserve the right not to apply the Salvage Convention to “maritime cultural property of prehistoric, archaeological or historic interest . . . situated on the sea bed”.³⁶ It could be argued that historic wrecks fall outside the ambit of the Salvage Convention, because the Convention defines salvage operations as involving assistance of a vessel or any other property *in danger* in navigable waters.³⁷ However, this argument is at odds with the historical development of New Zealand maritime law, which – like English maritime law – has always tended to regard salvage from wrecks as a maritime claim “in the nature of salvage”.

³² What is considered “reasonable” will, of course, depend on the circumstances of each individual salvage operation and on judicial attitudes: see P.A. Myburgh ‘New Zealand Salvage Awards: Short-Changing Our Saviours?’ [1993] *New Zealand Law Journal* 46.

³³ On the principle of “no cure no pay” and traditional New Zealand salvage law generally, see P.A.D. Davies ‘Salvage on the New Zealand Coast’ [1982] *New Zealand Law Journal* 39. Under the Admiralty Act 1973 s. 4(1)(i) claims “in the nature of salvage” can be enforced by means of an action *in rem* brought against the salvaged vessel. Such claims enjoy a high-priority maritime lien.

³⁴ Maritime Transport Act 1994 Part XVII and Schedule 6.

³⁵ Maritime Transport Act Commencement Order 2003 (SR 2003/259); *CMI – Status of the Ratifications* at <http://www.comitemaritime.org/ratific/imo/imo13.html>.

³⁶ Art. 30(1)(d). For arguments in favour of exercising the art. 30(1)(d) reservation, see P.A. Myburgh ‘1989 Salvage Convention: Casualty or Cure?’ [1996] *New Zealand Law Journal* 267.

³⁷ *CMI – Implementation of the 1989 Salvage Convention* at <http://www.comitemaritime.org/cmidoocs/impl.html>.

New Zealand's failure to exercise an article 30(1)(d) reservation is disappointing. Exercising the reservation would have ensured that the Salvage Convention does not apply to UCH in New Zealand law. The failure to do so creates significant tension between the commercial salvage regime in the Maritime Transport Act and the cultural heritage protection regime in the Historic Places Act. It will also create a sticking point for New Zealand's ratification of the UNESCO Convention 2001, given the imperative in article 4 of the UNESCO Convention that activities relating to UCH covered by the Convention "shall not be subject to the law of salvage or law of finds", except in strictly limited circumstances. If New Zealand were to ratify the UNESCO Convention without exercising the relevant reservation to the Salvage Convention, New Zealand courts could be faced with the unenviable task of reading down one or the other of the apparently irreconcilable international legal obligations created by the clash of these two Conventions.³⁸

2.2.2 *Wreck regime: Part IX of the Maritime Transport Act 1994*

Part IX of the Shipping and Seamen Acts 1908 and 1952, which were largely modelled on Part IX of the UK Merchant Shipping Act 1894, contained a comprehensive regime regulating the finding, reporting, receipt, and removal of wrecks. The wreck regime in the Shipping and Seamen Acts, which dated from an era when shipwrecks were more common, was aimed at recovering property, protecting public order and safety, providing an award for the finder, and securing revenue to the Crown. The Acts provided for the Minister of Marine, and later the Minister of Transport, to appoint Receivers of Wreck, who were granted significant powers to deal with wrecks and hold official enquiries. The Acts required wrecks that were found or washed ashore to be delivered to the appropriate Receiver and outlined procedures to be followed in determining wreck claims, settling disputes, and removing and selling wrecks.³⁹

The traditional wreck regime was carried over and re-enacted as Part IX of the Maritime Transport Act 1994. However, in 1995, in the course of reviewing and ultimately repealing the Harbours Act 1950, the Ministry of Transport re-examined the existing wreck provisions in both the Harbours Act and the Maritime Transport Act.⁴⁰ The

³⁸ It may be argued that New Zealand's ratification of the later UNESCO Convention would amount to an implied reservation in respect of the earlier Salvage Convention: see e.g. Blackie, *supra* note 13, at p. 30. Although politically attractive, this line of argument is unlikely to withstand critical legal scrutiny. It seems more likely that New Zealand will have to denounce the Salvage Convention and then re-ratify while exercising an art. 30(1)(d) reservation, before ratifying the UNESCO Convention. Another possible alternative is to define "salvage operations" or "property" more narrowly in the Maritime Transport Act 1994 in order to exclude UCH. In the event of a legal challenge, however, it is possible that the courts will override such domestic legal definitions to give full effect to the Salvage Convention: *cf. Sellers v. Maritime Safety Inspector* [1999] 2 *New Zealand Law Reports* 44 (C.A.).

³⁹ See generally P.A.D. Davies 'Wrecks on the New Zealand Coast' [1983] *New Zealand Law Journal* 202.

⁴⁰ Ministry of Transport *Harbours Management: A Review of the Harbours Act 1950* (Wellington, 1995) pp. 37–41.

review concluded that wreck law has two basic purposes: to eliminate or minimise navigational hazards presented by wrecked ships, aircraft and cargo, and to protect the property interests of wreck owners. The review considered the arguments for and against continuing with the established international model of statutory wreck protection, and largely came down in favour of abolition, on the grounds that modern advances in marine technology, charting and navigation systems had significantly reduced the number of shipwrecks in New Zealand waters; general legal principles and criminal sanctions (enforced by the police rather than by Receivers of Wreck) were adequate to protect wreck against theft and damage; and shipowners could make their own private commercial arrangements to protect their wrecks. Although the review suggested that the Receiver of Wreck's statutory role was largely redundant, it noted that some aspects of the law relating to rights of access to, and disposal of, wrecks remained relevant.⁴¹

Following on from this review, the Maritime Transport Amendment Act 1999 largely eviscerated the traditional wreck regime. The 1999 Amendment Act abolished the office of Receiver of Wreck and vested the Receivers' remaining powers and duties in the Director of Maritime New Zealand (MNZ) and the police. As recommended in the review, specific provisions regarding the offences of plunder and concealment of wreck and their penalties were repealed. The intention is that these issues will now be dealt with under the general provisions of the Crimes Act 1961. The 1999 Amendment Act also repealed the detailed administrative procedures of the old wreck regime. Such issues will now have to be dealt with in accordance with general principles of the law of personal property.

The 1999 Amendment Act updated the definition of "wreck". For the purposes of Part IX of the Maritime Transport Act, wreck now includes:

- (a) Any ship or aircraft which is abandoned, stranded, or in distress at sea or in any river or lake or other inland water, or any equipment or cargo or other articles belonging to or separated from any such ship or aircraft or belonging to or separated from any ship or aircraft which is lost at sea or in any river or lake or other inland water; and
- (b) Shipping containers and property lost overboard or similarly separated from a ship, other than cargo lost in the course of its unloading or discharge from the ship while the ship is in a port.⁴²

Although the primary focus of the wreck regime in the Maritime Transport Act is clearly on modern wrecks, the definition is broad enough to cover historic shipwrecks and sunken aircraft, as well as artefacts from historic wrecks. The Maritime Transport Act provides that the Director of MNZ may give orders "for the preservation of" wrecks,⁴³ but it is obvious from the context that these provisions are aimed at the physical preservation of ships and aircraft in current emergencies, rather than preservation in the archaeological sense.

⁴¹ *Ibid.* pp. 37–39.

⁴² Maritime Transport Act 1994 s. 98. "Wreck" was previously defined, less than helpfully, as including "any property that a Receiver is required or authorised by this Part of this Act to take into his or her possession".

⁴³ Maritime Transport Act 1994 ss. 100, 100A, 101.

Section 105 of the Maritime Transport Act requires anyone who “finds or takes possession of any wreck within the limits of New Zealand, or takes possession of and brings within the limits of New Zealand any wreck found outside those limits” to notify the Director of MNZ.⁴⁴ Failure to comply with section 105 “without reasonable excuse” is an offence, resulting in the finder losing any salvage claim against the wreck and a fine of double the value of the wreck. If the finder is not the owner of the wreck, he or she must deliver it to the police, or allow the police to take possession of it. This is clearly inappropriate in the case of historical wreck items, which often require immediate and specialised care to preserve them; a task that would seem to be well beyond the expertise and job description of the New Zealand police. The Act provides that the Director of MNZ “may” share information regarding the wreck with persons or agencies “as the Director thinks appropriate”, but falls short of making information sharing with the Historic Places Trust mandatory in the case of historic shipwrecks (even if the Historic Places Act 1993 might apply to them). MNZ does not have in place specific procedures or protocols for consultation with other agencies when wrecks are reported to the Authority,⁴⁵ and seems to deal with each reported wreck on an *ad hoc* basis.

Section 110 of the Act gives the Director of MNZ powers to remove and sell wrecked or derelict ships or aircraft considered to be a hazard to navigation if the owner fails to make arrangements to secure and remove the hazard, and the wreck does not lie within the jurisdiction of a regional council. The wreck removal regime is, again, clearly aimed at modern hazards to navigation, but its scope is broad enough to cover historic wrecks that have surfaced or been washed ashore and pose a threat to navigation. As with the wreck protection provisions, there is no requirement for the Director of MNZ to consult with the Historic Places Trust before exercising wreck removal powers in respect of historic shipwrecks.⁴⁶

⁴⁴ Interestingly, s. 106 of the Act, which required articles washed ashore to be delivered to the appropriate authorities, has been repealed, presumably because the wording “finds or takes possession” in s. 105 was considered sufficiently broad to cover the discovery of wreck items washed ashore. As S. Dromgoole ‘United Kingdom’ in S. Dromgoole (ed.) *Legal Protection of the Underwater Cultural Heritage* (The Hague, 1999) p. 185 points out in respect of the equivalent UK provision, however, “finds” probably carries the narrow technical meaning of recovery, rather than merely discovery, of wreck items. If the New Zealand courts adopt a similar interpretation of “finds” in respect of s. 105, the repeal of s. 106 will have created a *lacuna* in the wreck protection regime.

⁴⁵ Sarah Boys, MNZ (email, 2 May 2005). McGovern-Wilson, *supra* note 19, confirms that it is more likely to be members of the public who alert the Historic Places Trust to wreck finds. His view is that s. 105 of the Maritime Transport Act “shows how clearly we need better cross-relationships between statutes” in New Zealand.

⁴⁶ The Maritime Transport Act 1994 s. 110(1)(d) requires the Director of MNZ to comply with the Resource Management Act in removing the wreck, but does not require compliance with the Historic Places Act. The Local Government Act 1974 s. 650K confers on regional councils similar wreck removal powers in respect of wrecks within their jurisdiction that constitute a hazard to navigation, and also does not require them to consult with the Historic Places Trust before removing historic shipwrecks.

2.3 Statutes affecting UCH

2.3.1 *Resource Management Act 1991*

The Resource Management Act 1991 is the key statute regulating the use of land, air and water resources in New Zealand. The Act extends to control the coastal marine area, which includes the seabed and coastal water to the outer limits of the territorial sea. In 2003, the Act was amended to include explicit protection for historic heritage. Section 12(1)(g) of the Act now provides that no-one may “destroy, damage, or disturb any foreshore or seabed (other than for the purpose of lawfully harvesting any plant or animal) in a manner that has or is likely to have an adverse effect on historic heritage”, unless this is expressly permitted by a rule in a regional coastal plan, or unless a resource consent has been granted by a regional council.

“Historic heritage” is defined in section 2 of the Act as meaning “those natural and physical resources that contribute to an understanding and appreciation of New Zealand’s history and cultures” and includes historic sites, structures, places and areas, archaeological sites, and sites of significance to Māori. Although the definition of historic heritage does not expressly refer to UCH or wreck sites, it is sufficiently broadly framed to cover such sites. Indeed, the definition is broader than that contained in the Historic Places Act, and is not subject to a specific age requirement. Section 6(f) of the Act further requires councils to take into account matters of national importance when implementing the Act, including “the protection of historic heritage from inappropriate subdivision, use, and development”.

The response of regional councils to the inclusion of “historic heritage” in the Act in 2003 has been uneven. Some regional councils have taken no concrete steps in their regional plans to protect UCH sites within their jurisdiction. Others have been far more pro-active. So, for example, the Auckland Regional Council has developed, as part of its Cultural Heritage Inventory, a register of maritime cultural heritage sites, buildings, places and areas that are either categorised as Schedule 1: “for preservation”, or Schedule 2: “for protection”.⁴⁷ In the former category, no intervention or modification is permitted unless necessary for the purpose of maintaining intrinsic heritage values. In the latter category, modification may be permitted. These Schedules, which form part of the Auckland regional coastal plan, currently provide protection for over 90 sites, including shipwrecks dating between 1863 and 1922, hulks, and the site of the *Rainbow Warrior* bombing in Auckland harbour in 1985. The inventory also includes protection for wharves, shipyards, midden sites, fish traps, a lighthouse, and seawalls.

Regional coastal plans must conform to the New Zealand Coastal Policy Statement. Because the Policy Statement was produced in 1994, before historic heritage was included in the Resource Management Act regime, it currently contains little guidance on the preservation of New Zealand’s coastal UCH. The Department of Conservation is currently reviewing the Coastal Policy Statement. It is to be expected that the revised version of the Statement will contain more robust and detailed guidelines on the preservation of coastal UCH. Regional councils will then be required to ensure that

⁴⁷ See <http://www.arc.govt.nz/environment/cultural-heritage/maritime-heritage.cfm>.

their regional coastal plans adequately identify and protect coastal UCH within their jurisdictions.

2.3.2 *Marine Reserves Act 1971*

The Marine Reserves Act 1971 provides that marine reserves are to be established and maintained in their natural state within the territorial sea or internal waters or foreshore of the coast of New Zealand, and that the public is to have a right of entry.⁴⁸ Marine reserves have been established in a number of places off the coast of the main islands of New Zealand and around the Kermadec Islands and the Auckland Islands. There are wrecks in at least two of these marine reserves.

There is no specific provision in the Marine Reserves Act, as there is in the Historic Places Act, that spells out that these wrecks are not to be damaged, modified or destroyed.⁴⁹ However, section 18(4)(c) provides that every person commits an offence who “wilfully” interferes with or disturbs in a marine reserve any marine life, foreshore or seabed or any of the natural features. If there is a significant disturbance of a wreck, it would also probably interfere with or disturb some marine life or the foreshore and seabed. The wording of this provision gives rise to the same issues that arose over the use of “wilfully” in the Historic Places Act 1980. It is definitely a *mens rea* offence, rather than a strict liability offence. The section also provides that the person has to act without lawful authority or reasonable excuse. The maximum penalty is not particularly substantial: imprisonment for a term of three months, a fine of NZ\$5,000, or both.

As a consequence, if there was any damage, modification or destruction of a wreck in a marine reserve, the logical approach would be to use the Historic Places Act provisions. However, the Marine Reserves Act could apply to historic wrecks that sank after 1900, whereas the Historic Places Act does not.

2.3.3 *Other statutes and conventions*

A number of other statutes also have a potential impact on UCH in New Zealand:

- *Foreshore and Seabed Act 2004*. This Act was passed after considerable political debate and has subsequently been criticised by the United Nations Committee on the Elimination of Racial Discrimination. It covers the marine area bounded by the line of mean high-water springs and the outer limits of the territorial sea. The first purpose of the Act is to declare that the public foreshore and seabed is preserved in perpetuity as a common heritage for all New Zealanders. To achieve this, full legal and beneficial ownership of the public foreshore and seabed is vested

⁴⁸ Marine Reserves Act 1971 ss. 2, 3 and 4.

⁴⁹ In fact, the Marine Reserve (Auckland Islands-Motu Maha) Order 2003 cl. 4 expressly permits salvage or recovery of shipwrecks, including the *General Grant*, in the Auckland Islands marine reserve if approved by the Director-General of Conservation. In deciding whether to give his or her approval, the Director-General must have regard to the extent of any adverse effects that a salvage or recovery operation would have on the “natural and physical resources and historic heritage in the marine reserve”. See also the Marine Reserve (Long Island-Kokomohua) Order 1993 cl. 3(a), which expressly preserves any ownership rights over the wreck *Elsie* situated in the reserve.

in the Crown. The second purpose is to allow public access. The third purpose is to provide for possible customary rights that may have been held by Māori and to allow a method of dealing with customary territorial rights that would otherwise have led to customary title or aboriginal title.⁵⁰ This Act could have an effect in relation to UCH in three areas. First, access and navigation rights in sections 7 and 8 have not been specifically worded to take into account salvage operations and wreck excavations. Salvage operations are protected by section 8(7), which says that navigation rights within the marine area do not affect any binding international law obligations. This would apply to the Salvage Convention 1989, as given domestic effect by the Maritime Transport Act 1994. Wreck excavations are probably covered by section 8, but there is the possibility of uncertainty. Secondly, the provisions protecting wāhi tapu could conceivably clash with wreck excavations.⁵¹ Thirdly, there is the possibility that some customary right or territorial customary right could clash with proposed wreck excavations.

- *Fisheries Act 1996*. Section 186 enables the Governor-General to make regulations recognising and providing for customary food gathering by Māori, which may impact on UCH sites.
- *Crown Minerals Act 1991*. This Act applies to minerals in land covered by water and includes the foreshore and seabed out to the outer limits of the territorial sea. Licensing of mineral exploration and retrieval may affect UCH sites.
- *Continental Shelf Act 1964*. This Act applies, *inter alia*, to minerals in the seabed or subsoil of the continental shelf. Mineral exploration or excavation may affect UCH sites on the continental shelf.

New Zealand is also a party to the UNESCO Convention Concerning the Protection of World Cultural and Natural Heritage 1972 and has three listed World Heritage sites. One of these World Heritage sites is the New Zealand Sub-Antarctic Islands. Several important wrecks, including the *General Grant*, lie near the Auckland Islands, which are part of this site. However, the Sub-Antarctic Islands have been listed for their natural heritage rather than for their cultural heritage.⁵² As a consequence, although some additional protection may be afforded to wrecks within World Heritage sites – for example, oil exploration is prevented in World Heritage sites – this protection will be indirect rather than direct. Whether an application will be made to obtain World Heritage site status for other New Zealand sites is presently being considered. This may include sites with UCH. However, it will be difficult for any of the known shipwreck sites around New Zealand to come within the article 1 definition of cultural heritage as “including archaeological sites which are of outstanding universal value from the historical, aesthetic, ethnological or anthropological point of view.”

⁵⁰ Foreshore and Seabed Act 2004 ss. 4, 5, 13 and 32.

⁵¹ *Ibid.* s. 54. A wāhi tapu is a place sacred to Māori: see the Historic Places Act 1993 s. 2. Wāhi tapu are also protected by the Resource Management Act 1991 and the Historic Places Act 1993.

⁵² See G. Law and K. Greig ‘Protecting Archaeological Heritage through Public Heritage Lists’ (2004) 47 *Archaeology in New Zealand* 99.

2.4 Ownership of wrecks

Under New Zealand law, the ownership of a wreck continues with the owner of the vessel unless it is actually abandoned. In many instances, the owner of the wreck had it insured and the insurer becomes the successor to the ownership rights after reimbursing the insured. The insurer may itself be taken over, and its rights and interests passed on to its successors. These rights are usually handled through the Salvage Association of London.

There will be instances where no ownership can be established, which may result in the wreck becoming Crown property in accordance with the *bona vacantia* principle. The Ministry of Transport, through the office of Receiver of Wrecks, traditionally dealt with questions of ownership of wrecks and issued letters granting salvage rights to abandoned wrecks, including historic shipwrecks. This system, which was introduced in the late 1960s or early 1970s, was designed to grant exclusive salvage rights for a period of twelve months, and to protect salvors of abandoned wrecks from liability for unlawful interference with Crown property.⁵³

However, in its 1995 review of wreck law, the Ministry of Transport decided that, as “a policy, rather than an operational agency”, it was no longer in a position to enforce conditions of salvage grants or monitor compliance with the relevant statutory requirements. The review concluded that the Maritime Safety Authority (the predecessor of MNZ), or the Department of Conservation, would be “better suited to this role”.⁵⁴ The Ministry therefore discontinued its former practice of granting salvage rights to shipwrecks. No substitute regime has been implemented and no agency or government department currently takes responsibility for determining the question of ownership of shipwrecks, or for licensing their salvage in the event that they are *bona vacantia*.⁵⁵ Although the Minister of Finance and the Treasury are ultimately charged with exercising the Crown’s rights and powers in respect of *bona vacantia*,⁵⁶ no procedures or guidelines have been developed in this regard. It would appear that the issue of ownership of abandoned wrecks is looked upon as a nuisance in New Zealand, with no government department keen to take responsibility.

2.5 Crown and foreign State immunity

There is no separate legislation specifically relating to sunken New Zealand Crown-owned or foreign State-owned ships or aircraft. Sunken State vessels and aircraft are generally covered by the Maritime Transport Act, Historic Places Act and the other legislation previously referred to, with two exceptions. First, an admiralty action *in rem* cannot be brought against New Zealand Crown-owned vessels to enforce salvage or property claims; such claims have to be enforced by bringing an action *in personam* against the Crown.⁵⁷ Secondly, the Salvage Convention 1989 does not apply to foreign

⁵³ Roger Brown, Ministry of Transport (email, 15 April 2005).

⁵⁴ Ministry of Transport, *supra* note 40, p. 40.

⁵⁵ Roger Brown, *supra* note 53.

⁵⁶ Public Finance Act 1989 s. 75(1).

⁵⁷ Crown Proceedings Act s. 28, discussed in P.A. Myburgh ‘New Zealand Transport Law’ in

State-owned warships or other non-commercial vessels entitled, at the time of salvage, to sovereign immunity unless the foreign State waives the right to immunity.

Although New Zealand does not have state immunity legislation like the UK and USA, New Zealand courts recognise the restrictive theory of sovereign immunity, based on the distinction between acts of State done *iure imperii* and acts done *iure gestionis*.⁵⁸ The New Zealand courts apply the restrictive theory of sovereign immunity to both actions *in rem* and actions *in personam*.⁵⁹

There are not many known New Zealand wreck sites of foreign State-owned vessels. A number of British warships and vessels, like HMS *Orpheus*, were wrecked during the nineteenth century, but most of these wrecks have disappeared. There is at least one vessel, the *Alcmene*, a French government corvette, which was lost in 1851. The wreck was discovered in 1976 by Kelly Tarlton and one iron cannon, two anchors, and two bronze swivel guns were recovered. Ownership of the wreck was purchased from the French government for a nominal sum. The New Zealand government granted financial aid for the restoration of these artefacts.

3. Overall Assessment of the Current Position

3.1 Improvements to the legislative framework

The current legislative regime for UCH in New Zealand is fragmentary and inefficient.⁶⁰ Regulation of different aspects of UCH is administered under a number of statutes by a variety of departments and agencies. This has led to unfortunate gaps, and to different departments and agencies talking past each other by implementing policy in a narrow fashion without reference to the whole sector (such as occurred in the implementation of the Salvage Convention in New Zealand without apparent reference to UCH issues).⁶¹

M. Huybrechts (ed.) *International Encyclopaedia of Transport Law* (2nd issue, Kluwer, Deventer, 2002) pp. 60–62. The Maritime Transport Act 1994 s. 217 provides that, subject to the Crown Proceedings Act, the Salvage Convention 1989 applies to salvage of New Zealand warships, or any other New Zealand State-owned ships or other property.

⁵⁸ *Buckingham v. Hughes Helicopter* [1982] 2 *New Zealand Law Reports* 738, 739, discussed in Myburgh, *supra* note 57, at pp. 62–65.

⁵⁹ See *Marine Steel Ltd. v. Government of the Marshall Islands* [1981] 2 *New Zealand Law Reports* 1, 8–9; *Reef Shipping Co. Ltd. v. The Ship "Fua Kavenga"* [1987] 1 *New Zealand Law Reports* 550, 568–570, declining to follow dicta in *The Philippine Admiral* [1977] *Appeal Cases* 373 (PC) and preferring the approach in *I Congreso del Partido* [1983] 1 *Appeal Cases* 244 (HL).

⁶⁰ Blackie, *supra* note 13, at p. 38, refers to “a ‘scatter-gun’ approach aimed at various particular areas”.

⁶¹ McGovern-Wilson, *supra* note 19, also cites the recent example of the Ministry for Economic Development receiving and processing a mining application for the extraction of iron sand off the North Taranaki-Waikato coast without reference to the Historic Places Trust or the Historic Places Act, despite the fact that over 120 historic shipwrecks are located along this coastline.

There is a pressing need for “joined-up thinking”⁶² and a co-ordinated, holistic legal approach to the preservation of UCH in New Zealand.

3.2 Recording of UCH

There is no comprehensive national register of UCH in New Zealand. Some items of UCH are recorded, but many are not, and the records are not necessarily integrated, as they are held by different bodies for different purposes. Some of the records are computerised and others are out of date. The New Zealand Archaeological Association (NZAA) has over 57,000 file records. Almost all relate to land-based sites; only 97 specifically relate to shipwrecks, hulks or anchors. The NZAA records are currently being updated and a computerised database created.⁶³ The Department of Conservation also records information relating to shipwrecks, but only those on the foreshore of reserves that the Department administers. The Historic Places Trust has a limited number of UCH items registered as historic places: two wrecks, 22 wharves, jetties, breakwaters and seawalls, and two reefs registered as wāhi tapu areas.⁶⁴ The Auckland Regional Council’s Cultural Heritage Inventory has a comprehensive and detailed schedule of shipwrecks, hulks and other UCH items within its jurisdiction. If all regional councils were able to prepare records as accurate and comprehensive as the Auckland Regional Council, this would be a valuable first step towards improving the recording situation. However, other regional councils do not have the same funding base and may not have the same priorities as the Auckland Regional Council.

An important project would be to compile a comprehensive, detailed, current and accurate register of all UCH sites in New Zealand.⁶⁵ The key issues would be: (a) how is this to be done; (b) who is to administer it; and (c) most importantly, who is to pay for it? Some additional government funding would need to be allocated to this project as the Historic Places Trust and the various government departments currently involved in maritime issues are already working on limited funding. It is very important that any register of UCH sites should be accessible to the general public and be checked and taken into account by all relevant bodies at national, regional and local levels before drafting their strategic plans, developing projects, or commencing on any work that might affect UCH.⁶⁶

⁶² P. Roberts and S. Trow *Taking to the Water: English Heritage’s Initial Policy for the Management of Maritime Archaeology in England* (London, 2002) p. 16 (available at <http://194.164.61.131/filestore/pdf/archaeology/maritime.pdf>).

⁶³ L. Walter ‘The NZAA Site Recording Scheme Upgrade Project’ (2005) 48 *Archaeology in New Zealand* 6 and 83.

⁶⁴ McGovern-Wilson, *supra* note 19.

⁶⁵ Dodd, *supra* note 19, at p. 155, argues that the development of a national database for shipwrecks is essential for the management of UCH in New Zealand, and advocates the undertaking of a national shipwreck survey similar to Australia’s National Historic Shipwrecks Programme.

⁶⁶ Roberts and Trow, *supra* note 62, at p. 17.

3.3 Education

Educating the diving fraternity and the general public on the issues relating to UCH is another important issue. New Zealand has a long history of public access to a large proportion of the coastline, and some members of the public seem to believe that artefacts and wrecks are matters of public property which they can purloin with no feelings of guilt.⁶⁷

3.4 Incentives for *in situ* preservation

Experienced divers have suggested that: (a) there should be a system of rewards or other recognition for reporting discoveries of underwater wrecks; and (b) financial grants should be made easily available to those who discover underwater wrecks and who are prepared to be involved in the careful ongoing survey and exploration of the site.⁶⁸ Although reward or finder's fee regimes have their critics, they have been successfully implemented in other countries⁶⁹ and their use should be explored in New Zealand. Experience in Australia indicates that, although the payment of rewards is significant in the initial period after the legislation is enacted, it tends to be of decreasing importance as time goes by and the emphasis tends to be more on adequate recognition and widespread praise for the finder rather than on financial reward.⁷⁰ The present regime provides few incentives to disclose wreck discoveries to the authorities and there is evidence suggesting that the whereabouts of some wreck sites are being suppressed because the current regime is perceived as being unnecessarily hostile towards divers.

3.5 Increased funding for preservation facilities

The preservation of items recovered from the seabed is always a matter of urgency. Often it is only a matter of hours before the items deteriorate. MAANZ's laboratory has a limited ability to deal with certain types of items: for example, large wooden artefacts.⁷¹ Additional government or private sector funding needs to be made available to assist in the preservation of recovered items.

3.6 Increasing protection of UCH

In addition to recording sites, what is the best way of protecting those sites that are recorded? There has been difficulty in protecting land-based sites where the recording

⁶⁷ New Zealand Archaeological Association Inc *Submission on Oceans Policy Working Paper 7: Marine Cultural Heritage*, 7 April 2003; McGovern-Wilson, *supra* note 19, is of the view that "many recreational divers regularly flout the law" and that "ratifying the Convention will need a major educational programme amongst the dive and salvage community".

⁶⁸ Dave Moran (discussion, 13 May 2005); Keith Gordon (email, 7 March 2005).

⁶⁹ See e.g. Maritime Archaeology Act 1973 (W.A.) s. 18; Historic Shipwrecks Act 1976 (Cth.) s. 18; National Monuments (Amendment) Act 1994 (Ireland) s. 10.

⁷⁰ Information from Mike McCarthy, Western Australian Maritime Museum (email, 13 June 2005); Patrick O'Keefe (email, 9 June 2005).

⁷¹ New Zealand Archaeological Association, *supra* note 67.

and archaeological issues are much further advanced.⁷² Most local authorities do not have jurisdiction below the mean high-water springs. Regional councils do have jurisdiction within the territorial sea. However, only the Auckland Regional Council has a significant heritage list relating to UCH at this stage. Although there is a limited range of protection tools in the marine environment compared to on land, there are Resource Management Act tools available, which need to be taken up more resolutely.⁷³

4. Prospects for the UNESCO Convention 2001 in New Zealand

4.1 Ratification of the Convention

New Zealand is not a party to the UNESCO Convention 2001 and the New Zealand government has not yet reached a decision whether to ratify the Convention. The official government view of the Convention may fairly be characterised as cautious. Although the Ministry for Culture and Heritage supports, in principle, the Convention's objectives and general intent, it is unwilling to commit to a specific position on ratification of the Convention until "a balanced analysis of potential legislative and regulatory implications, as well as associated benefits and costs"⁷⁴ has been carried out. Such a national interest analysis forms part of the standard international treaty examination process undertaken before any international obligations are assumed by New Zealand.⁷⁵

The rub, however, is that the national interest analysis required to decide on ratification of the Convention does not form part of the Ministry for Culture and Heritage's existing working programme, nor are there plans to include it at this stage. The Ministry has not ruled out ratification of the Convention, but it seems clear that the issue of New Zealand's ratification of the Convention is unlikely to be actively considered in the immediate future. This may well change, however, if key maritime nations accede to the Convention.

There would seem to be a number of reasons for the current situation, which will now be discussed in turn.

4.1.1 Priorities

UCH is not a high profile issue in New Zealand. The New Zealand UCH resource is relatively small and commercially inconsequential by international standards, and has therefore not been subjected to concerted exploitation by professional salvors. This seems to have influenced the view of the Ministry for Culture and Heritage that immediate ratification of the Convention is not necessary.

⁷² G. Law and K. Greig, *supra* note 52.

⁷³ Oceans Policy Secretariat *Working Paper 7: Marine Cultural Heritage*, 14 March 2003 pp. 9–10.

⁷⁴ Jane Kominik, Deputy Chief Executive, Ministry for Culture and Heritage (letter, 2 May 2005).

⁷⁵ All multilateral treaties are required to be presented to the New Zealand Parliament for examination by the Foreign Affairs, Defence and Trade Select Committee (FADTC), before binding treaty action is taken (Standing Order 384, Cabinet Manual paragraph 5.83).

Nonetheless, anecdotal evidence suggests that unlawful disturbance of historic wreck sites and clandestine removal of artefacts by divers is an ongoing issue. Equally, responsible divers are frustrated by the lack of a clear legislative framework and believe that the administrative processes under the Historic Places Act tend to be lengthy and frustrating when they want to take part in legitimate exploration of UCH. The low priority currently accorded to UCH and the fragmentary nature of the current legislative framework have arguably contributed to a climate where less scrupulous divers and finders are not reporting sites or finds to the authorities. The UCH that they discover is not being scientifically assessed and is being lost to the New Zealand public. Ratification of the UNESCO Convention 2001 would assist in providing a focus for reviewing the current legislative framework and administrative processes, and in providing a clearer and more effective regime for protection of UCH.

A related argument is that there are other heritage conventions that should enjoy a higher legislative priority than the UNESCO Convention.⁷⁶ New Zealand lags behind other States in terms of its track record of ratifying heritage conventions and is in the process of catching up. As discussed above, the Protected Objects Amendment Bill, currently before Parliament, will result in significant improvements in the protection of New Zealand artefacts, including those taken from UCH sites within New Zealand territorial waters. There is a view that the Ministry for Culture and Heritage should adopt a staged process to reviewing other heritage conventions and that ratification of the Hague Convention on Protection of Cultural Heritage in the Event of Armed Conflict 1954 and its Protocols is the next most urgent priority.⁷⁷

The difficulty with postponing ratification of the UNESCO Convention 2001, however, is that the domestic legislative framework regarding *in situ* preservation of UCH sites will remain manifestly inadequate,⁷⁸ particularly in respect of sites falling outside New Zealand's territorial sea, which currently enjoy no legal protection. The enactment of the Protected Objects Amendment Bill will only provide a partial solution to preserving the integrity of New Zealand's UCH. Further, although ratification of the Hague Convention 1954 is a worthwhile cause and is long overdue, the introduction of a regime effectively protecting New Zealand's own UCH resource seems to the authors to be a rather more pressing issue.

4.1.2 Resource constraints

The Historic Places Trust has an extremely limited budget. Its inadequate financial resources are already strained by conserving terrestrial heritage sites. The Trust has also been required to undertake an ever-increasing range of heritage functions and obligations at national, regional and local community level, to the extent that it has been

⁷⁶ Professor Campbell McLachlan (email, 29 March 2005).

⁷⁷ *Ibid.*

⁷⁸ McGovern-Wilson, *supra* note 19, believes that there is a need to improve and strengthen domestic legislation before ratifying the Convention. However, a focused, comprehensive, cross-departmental review of all legislation affecting UCH is highly unlikely to occur unless the government has made a positive commitment to work towards ratifying the Convention.

described as “coming apart at the seams”.⁷⁹ There are comparatively few heritage and archaeological consultants specialising in UCH in New Zealand, and the Historic Places Trust does not employ specialist staff to deal solely with underwater archaeological issues.

If the UNESCO Convention 2001 is ratified in New Zealand, implementation of the Convention will undoubtedly have to be accompanied by a meaningful commitment to properly resource underwater archaeology in New Zealand, either by providing the Historic Places Trust with additional resources, or by funding a dedicated maritime archaeology unit.⁸⁰ It has been suggested that, given the scarce resources available to the cultural heritage sector, it would not be wise to stretch these even thinner to accommodate the Convention’s regime.

This argument overlooks the fact that the New Zealand government has already made a commitment to preserve and protect underwater archaeological sites under the Historic Places Act. Since 2003, regional councils also have a statutory duty to protect UCH sites within their jurisdictions. With a few exceptions, however, they are still struggling to come to grips with their land-based cultural heritage responsibilities and do not necessarily have the expertise or fiscal resources to protect UCH at the regional level. Funding a specialised marine archaeology unit, either within the Historic Places Trust or on an independent basis, would provide a central pool of expertise that can be used to protect UCH at both the national and regional levels.

Regardless of whether the UNESCO Convention 2001 is ratified, increased funding, or a more imaginative and collaborative use of existing resources in other government departments or agencies,⁸¹ is crucial to meeting existing responsibilities in respect of UCH sites under the Historic Places and Resource Management Acts. The current climate of chronic under-funding does not provide a sound justification for refusing to ratify the Convention.

4.1.3 Compliance costs

There are significant concerns that ratifying and complying with the Convention will give rise to additional costs.⁸² It is obviously difficult to assess the level of such compliance costs in advance, but they would not seem to the authors to present a hurdle to ratifying the Convention. Apart from the standard initial costs of undertaking the treaty examination process and drafting amending legislation implementing the Convention’s provisions in New Zealand (which might involve a stand-alone statute on UCH,

⁷⁹ H. Allen *Protecting Historic Places in New Zealand* (Auckland, 1998) at p. 64 (available at <http://www.arts.auckland.ac.nz/ant/harry.pdf>).

⁸⁰ Andrew Dodd (email, 26 April 2005).

⁸¹ For example, Dr Bridget Buxton (discussions, 23 May and 2 June 2005) makes the point that the costs of assessing and preserving UCH sites can be minimised by utilising the existing capabilities of government departments and agencies, such as the National Institute of Water and Atmospheric Research, or by encouraging the development of marine archaeology as an academic discipline and the establishment of marine archaeology laboratory facilities in one or more New Zealand universities. What is really needed is government leadership and a commitment to a co-ordinated approach to UCH in New Zealand.

⁸² These concerns are noted by McGovern-Wilson, *supra* note 19; Kominik, *supra* note 74.

but is more likely to take the form of amendments to the Historic Places Act, the Protected Objects regime, the Maritime Transport Act and perhaps the Resource Management Act), the ongoing costs of implementing the Convention are unlikely to be substantial.

One of the main areas in which extra compliance costs will be incurred are the reporting and notification requirements under articles 9, 10 and 11 of the Convention. These requirements will be invoked infrequently, as they relate to wrecks beyond territorial waters and the bulk of New Zealand's shipwreck sites are along the coastline. Notifications to other States Parties and consultations, if required, can be arranged through diplomatic exchanges. It seems unlikely that the cost of these would be high.⁸³

Article 19 of the Convention requires States Parties to co-operate and share information concerning UCH, but does not specify where the costs of this exercise should fall. If, for example, experts from another State Party want searches made of New Zealand shipping records, the Convention places no obligation on New Zealand to provide this information free of charge. It is thus unlikely that this provision will generate undue compliance costs for New Zealand.⁸⁴

Article 23 requires that Meetings of States Parties be held at least every two years. The Meeting "shall decide on its functions and responsibilities". The first States Parties to ratify the Convention will therefore be in a very strong position to influence the procedures, functions and responsibilities of the Meetings of States Parties to ensure that expenses associated with these Meetings are minimised.⁸⁵ The enactment of the UNESCO Convention 1970 in the Protected Objects Amendment Bill represents a move towards greater New Zealand involvement in UNESCO's activities.⁸⁶ Ratification of the UNESCO Convention 2001 would simply represent a further step in the same direction. It is therefore unlikely that Meetings of States Parties will impose substantial compliance costs.

Article 7 of the Convention, which requires that the Rules in the Annex to the Convention be applied to UCH in States Parties' internal waters, archipelagic waters and territorial sea, should not create extra compliance costs for parties discovering UCH artefacts or sites in New Zealand waters. The only aspect of the Rules that may generate additional costs is that any activities directed at UCH must be regulated and conducted in accordance with proper marine archaeological practice, which is a reasonable requirement. Article 7(3) also encourages international information sharing and co-operation with regard to sunken foreign State vessels and aircraft in New Zealand waters. Such international research co-operation is likely to be beneficial to New Zealand.

It may also be argued that ratification of the UNESCO Convention 2001 will give rise to cost savings, particularly as it will result in a clearer definition of UCH, clarify that *in situ* preservation of UCH sites is the primary aim and that commercial salvage law is inapplicable to UCH, and lay down more robust guidelines for reporting discoveries of, and activities dealing with, UCH. The *Durey* case and other prosecutions and

⁸³ Patrick O'Keefe (email, 25 April 2005).

⁸⁴ *Ibid.*

⁸⁵ *Ibid.*

⁸⁶ McLachlan, *supra* note 76.

administrative challenges brought under the Historic Places Act illustrate the wasted costs of protecting cultural heritage through litigation. The scheme of the UNESCO Convention 2001 ensures a greater degree of legal certainty and provides for more efficient cultural heritage administration: more “time can now be spent on actual site evaluation and formulating appropriate management schemes, rather than fighting in court”.⁸⁷

4.1.4 Adequacy of existing legal framework

There is a perception that the existing domestic legislative framework for heritage management already addresses many of the issues covered in the Convention.⁸⁸ Although it is true that UCH is protected to varying extents by the Historic Places Act, the new Protected Objects regime, and – since 2003 – the Resource Management Act, the domestic legislative framework nonetheless fails to deal with the issue of protection of UCH in a comprehensive or co-ordinated manner. There are a number of shortcomings in the Historic Places Act, not least the enforcement provisions and the 1900 trigger-date for archaeological sites, and none of the existing statutes afford any protection to New Zealand’s UCH on the continental shelf or EEZ, let alone on the high seas, or on the deep sea-bed.⁸⁹

The current legislative framework also neither requires nor assists international cooperation in respect of UCH of significance to New Zealand. By contrast, article 6 of the UNESCO Convention encourages States Parties to enter into bilateral, regional or multilateral arrangements that further the aims of the Convention. A number of shipwrecks in New Zealand waters are of foreign origin. The Convention will allow for, and encourage, international collaborative and co-operative research programmes in respect of such wrecks. New Zealand-built UCH has also ended up in other countries’ waters. For example, the *Stirlingshire*, the largest wooden ship built in New Zealand was ‘hulked’ in Ireland. Combined investigation with Irish institutions into the construction and maintenance of such a vessel may provide important information on the history of wooden shipbuilding in New Zealand.⁹⁰ Ratifying the Convention would give New Zealand enhanced access to maritime archaeological resources and expertise in other countries.

Finally, and perhaps most importantly, because New Zealand has not exercised the UCH reservation to the Salvage Convention 1989, the current domestic legislative framework for heritage management is subject to challenge from salvors attempting to exercise their commercial property rights under the Salvage Convention. Ratifying the UNESCO Convention 2001 will ensure that the relevant statutes are reviewed, co-ordinated and amended to afford adequate *in situ* protection to the whole of New Zealand’s UCH resource in accordance with international legal norms.

⁸⁷ O’Keefe, *supra* note 83.

⁸⁸ Kominik, *supra* note 74.

⁸⁹ McGovern-Wilson, *supra* note 19: “The Convention will serve to strengthen our ability to control what happens out to the edge of the continental shelf, and to seek the return of material that may have been illegally removed.”

⁹⁰ Dodd, *supra* note 80.

4.1.5 Treaty of Waitangi obligations

It has been suggested that the UNESCO Convention 2001 fails to address important maritime cultural heritage issues for New Zealand, such as protection for structures other than shipwrecks, including, in particular, sites of significance to Māori.⁹¹ Considerations of the Crown's Treaty of Waitangi obligations have been raised as relevant to whether New Zealand will ratify the Convention.

Full and appropriate consultation with Māori will, of course, be crucial for the success of New Zealand's ratification of the Convention. The recent enactment of the Foreshore and Seabed Act has undoubtedly made for a more fraught political climate in respect of maritime issues. In addition, the balance of the parties in Parliament following the 2005 General Election has only added to the uncertainty and heightened sensitivities in respect of these issues.

However, it is difficult to see that this issue is problematic from a legal perspective, given the broad definition of UCH in article 1(1)(a) of the Convention as including "all traces of human existence having a cultural, historical or archaeological character". The Convention is expressly made applicable to "sites, structures, buildings, artefacts and human remains, together with their archaeological and natural context". As such, the Convention's definition of cultural heritage is broader than that currently found in the Historic Places Act 1993. As an international instrument, it is not surprising that the UNESCO Convention 2001 does not make reference to specific peoples' cultural values. Equally, however, there is absolutely nothing in the Convention that prevents its regime from being supplemented with appropriate indigenous heritage management practices, provided that proper marine archaeological practices are observed in accordance with the Rules. Indeed, article 7(1) of the Convention expressly recognises that States Parties "in the exercise of their sovereignty, have the exclusive right to regulate and authorise activities directed at UCH in their internal waters, archipelagic waters and territorial sea". Questions of consultation, co-operation and co-management of Māori cultural heritage sites are internal political and administrative matters which are, quite rightly, not regulated by the UNESCO Convention.

4.1.6 A divided constituency

The Ministry for Culture and Heritage has noted that there has not been significant pressure from the wider heritage sector in New Zealand to make any further commitment to the UNESCO Convention 2001.⁹² Protection of UCH is, of necessity, a highly specialised area. As discussed above, there are comparatively few experts in New Zealand specialising in marine archaeology. Our informal survey of relevant government departments, academia, the diving community and the broader heritage community suggests that the provisions and implications of the Convention are generally not well known or understood in New Zealand. More information dissemination and education will be required before one can draw any meaningful conclusions from lack of pressure to ratify the Convention. The marine archaeology experts we consulted wholeheartedly sup-

⁹¹ Kominik, *supra* note 74, referring to a report from a participant in the Asia-Pacific Regional Workshop on the UNESCO Convention 2001.

⁹² Kominik, *supra* note 74.

port the Convention's objectives and principles.⁹³ Some of the members of the diving community who are *au fait* with the Convention's provisions are also supportive, provided ratification of the Convention leads to clearer and more efficient administrative procedures and particularly if adoption of the Convention's regime is supplemented with a scheme for rewarding or recognising discovery of UCH sites.⁹⁴

The Convention's emphasis on *in situ* preservation and its exclusion of traditional commercial salvage law from the area of UCH is, of course, controversial. There are those who suggest that the balance between competing interests may have tipped too far in favour of *in situ* preservation.⁹⁵ On the other hand, there is a compelling argument that, because UCH is a non-renewable resource, its exploitation is unsustainable and commercial rights should not apply:

The archaeological record contains information important to the understanding of New Zealand history and past standards of living that is often not available in any other form. . . . [H]istoric shipwrecks in New Zealand waters are the shared property (and heritage) of all New Zealand and not just those that have the resources and desire to exploit them for commercial gain.⁹⁶

4.2 Influence of the Convention's principles

Regardless of whether the UNESCO Convention 2001 is ratified in New Zealand, it is possible – and, in the opinion of the authors, highly desirable – that it should influence the future development and reform of domestic legislation relating to New Zealand's UCH. The value of the Convention in setting international standards of best practice in relation to UCH has already been recognised by the Oceans Policy Secretariat.⁹⁷ The Ministry for Culture and Heritage also regards it as “plausible” that the Convention will be referred to for guidance in the event that cultural heritage legislation comes up for review.⁹⁸ Assuming that the Convention enters into force internationally, the hortative effect of the Convention principles and rules will be significantly increased.⁹⁹

⁹³ Dodd, *supra* note 80; McGovern-Wilson, *supra* note 19.

⁹⁴ Moran, *supra* note 68; Gordon, *supra* note 68.

⁹⁵ Kominik, *supra* note 74, notes that concerns were raised about the balance of the Convention in consultations prior to negotiation of the final Convention text; McLachlan, *supra* note 76, wonders whether the UNESCO Convention 2001 “goes too far”.

⁹⁶ Dodd, *supra* note 80. So too McGovern-Wilson, *supra* note 19: “I do not believe there is such a thing as a ‘balance’ between *in situ* protection and commercial/individual property rights.”

⁹⁷ Oceans Policy Secretariat, *supra* note 73, at p. 2. The Oceans Policy Secretariat also mentions the significance of the ICOMOS Charter for the Protection and Management of Archaeological Heritage 1990 and the ICOMOS Charter of the Protection and Management of Underwater Cultural Heritage 1996 in this regard.

⁹⁸ Kominik, *supra* note 74.

⁹⁹ Dodd, *supra* note 80.

