

**National Interest Analysis [2022] ATNIA 1
with attachment on consultation**

Convention on the Protection of the Underwater Cultural Heritage

(Paris, 2 November 2001)

NATIONAL INTEREST ANALYSIS: CATEGORY 1 TREATY

2001 Convention on the Protection of the Underwater Cultural Heritage

(Paris, 2 November 2001)

[2022] ATNIA 1

[2022] ATNIF 1

Nature and timing of proposed treaty action

1. The proposed treaty action is Australia's ratification of the UNESCO 2001 *Convention on the Protection of the Underwater Cultural Heritage* (the Convention). As at 22 June 2021, there were 69 States Parties to the Convention.
2. The Convention entered into force generally on 2 January 2009, three months after the date of the deposit of the twentieth instrument (Article 27). Under Article 27, the Convention shall enter into force for Australia three months after the date on which Australia deposits its instrument of ratification. The instrument shall be deposited with the Director-General of UNESCO (Director-General) in accordance with Article 26(3) of the Convention.
3. It is proposed that Australia's ratification occur as soon as practicable after the completion of domestic treaty-making requirements, including the passage of implementing legislation by the Australian Parliament (further details provided at paragraphs 44-45).
4. In Australia, underwater cultural heritage (UCH) is collaboratively protected and managed by the Commonwealth, New South Wales, Northern Territory, Queensland, South Australian, Tasmanian, Victorian and Western Australian Governments. The States and the Northern Territory are responsible for managing all UCH, aside from shipwrecks, located in their coastal waters (i.e. waters out to three nautical miles from the territorial sea baseline) and all UCH in waters landward of the territorial sea baseline. The Commonwealth is responsible for managing all UCH located in Commonwealth waters – i.e. beyond coastal waters, out to the limit of Australia's continental shelf – and shipwrecks located within coastal waters.
5. These responsibilities were clarified in the 2010 *Australian Underwater Cultural Heritage Intergovernmental Agreement* (Intergovernmental Agreement), in which the States, Northern Territory and Commonwealth Government stated the intention to 'meet international best practice management of Australia's UCH' as outlined in the Rules in the Annex to the Convention, titled *Rules Concerning Activities Directed at Underwater Cultural Heritage* (the 'Annex Rules'). The Intergovernmental Agreement commits the States and Northern Territory to ensuring their legislation is compatible with any amended Commonwealth legislation. The *Underwater Cultural Heritage Act 2018* (UCH Act) maintained this division of responsibilities and

replaced the *Historic Shipwrecks Act 1976* to align Commonwealth legislation with the Convention.

6. In line with Australia's legislative framework described above, and in accordance with Article 29 of the Convention – which allows a State Party to make, upon ratifying, accepting, approving or acceding to the Convention, a temporary declaration to the geographical scope of the Convention – it is proposed that Australia make a declaration that the Convention shall not be applicable immediately to internal waters, nor applicable in full to specific parts of the territorial sea:

“For the purposes of Article 9(2) of the Convention, Australia declares that the reports will be transmitted in the manner stipulated in Article 9(1)(b)(ii).

For the purposes of Article 29 of the Convention and consistent with Australia's constitutional arrangements, the Convention shall not apply to the following areas which are subject to the laws of each Australian State and the Northern Territory:

(i) for all underwater cultural heritage except sunken vessels, the area between the territorial sea baseline and the line which is three nautical miles seaward of the territorial sea baseline, and waters landward of the territorial sea baseline, including waters which are within the limits of each Australian State and the Northern Territory, and

(ii) for underwater cultural heritage which is a sunken vessel only, waters which are within the limits of each Australian State and the Northern Territory.

Pursuant to Article 29 of the Convention, Australia undertakes, to the extent practicable and as quickly as possible, to promote conditions under which this Convention will apply to the areas specified above.”

7. Making this declaration would ensure that, in line with Australia's current legislative framework, the Convention would only immediately apply to UCH located in areas of Commonwealth jurisdiction, and in respect of sunken vessels located in coastal waters. This declaration would ensure that each State and the Northern Territory has an appropriate period of time to amend its legislation to enable the Convention to apply fully outside these areas.
8. The Commonwealth Government has agreed with the States and Northern Territory Governments that Australia would not make a declaration under Article 28 of the Convention, which provides that a State Party can extend the application of the Convention to its inland waters not of a maritime character (including lakes, rivers, inlets and bays, for example), upon ratifying the Convention. Accordingly, the Convention would not apply to Australia's inland waters not of a maritime character. If in the future each jurisdiction agreed to extending the applicability of the Convention, Australia would be able to make a declaration pursuant to Article 28 in order for the Convention to apply to inland waters not of a maritime character.

9. Article 6(3) makes clear that the Convention does not alter the rights and obligations of States Parties regarding the protection of sunken vessels arising from other bilateral, regional or other multilateral agreements concluded before its adoption. Accordingly, ratification would not affect any existing treaties, such as the 1972 *Agreement between the Netherlands and Australia Concerning Old Dutch Shipwrecks* in relation to the protection of UCH.

Overview and national interest summary

10. In ratifying the Convention, Australia would embrace a contemporary, internationally consistent standard for collaboration and communication to protect UCH.
11. Ratification would provide a framework for discussions between the Commonwealth Government and each State and the Northern Territory to harmonise legal regimes for the protection of UCH in Australian waters.¹ This has particular significance for developing a consistent protection and management regime for Aboriginal and Torres Strait Islander UCH.
12. Ratification would also provide an international legal basis for Australia to enforce the protection of UCH, including in waters of Australia's exclusive economic zone outside of the 24 nautical mile contiguous zone, where Australia currently has limited enforcement powers over foreign nationals and vessels.
13. Through ratification Australia would join the international community's response to illegal salvaging activities and would also demonstrate, both domestically and internationally, the value Australia places on UCH, including the associated remains of Australia's military personnel.
14. The *United Nations Convention on the Law of the Sea* [1994] ATS 31 (UNCLOS), to which Australia is party, obliges States to cooperate for the purpose of protecting objects of an archaeological and historical nature found at sea. However, it does not set out a comprehensive regime for the protection of UCH. By contrast, the Convention clearly articulates the practical mechanisms of protection, cooperation and information sharing required to globally elevate the protection of UCH to its equivalent on land. Further, Article 3 specifically provides that the Convention shall not prejudice States' rights, jurisdiction and duties under international law, including UNCLOS. It also provides that the Convention shall be interpreted and applied consistently with international law, including UNCLOS.

¹ 'Australian waters' is defined in the UCH Act to include Australia's territorial sea (including coastal waters, i.e., waters from the territorial sea baseline to 3nm seaward of the territorial sea baseline) and all sea above the continental shelf of Australia (s 11).

Reasons for Australia to take the proposed treaty action

Enabling Australia's governance and protection of UCH outside Australian waters

15. The Convention provides a legal basis for Australia to protect UCH beyond its territorial sea and contiguous zone, out to its exclusive economic zone and continental shelf, from actions inconsistent with international law and Australia's domestic legal regime. This includes protection from inconsistent actions by foreign persons and foreign flagged vessels.
16. Ratification would also facilitate the full alignment of our domestic laws with international standards governing the protection of UCH, bolstering Australia's governance and protection of UCH.
17. The Convention encourages agreements to be put in place between States Parties to ensure that UCH is managed cooperatively and appropriately (Article 6(1)). This is increasingly important as technological developments during the 20th century have facilitated access to the seabed, which has resulted in an unprecedented destruction of this UCH.
18. Australia has significant UCH located in the waters of other countries, including sovereign vessels from the First World War and Second World War located in: Egypt, Indonesia, Libya, Papua New Guinea, the Philippines, Solomon Islands, Sri Lanka, Timor-Leste and Turkey. Of these countries, only Libya (2005) and Egypt (2017) have to date ratified the Convention. Potentially, other sovereign vessels may have been lost in the Federated States of Micronesia (ratified 2018), Malaysia, the Republic of Korea and Vietnam. Taking into account lost vessels carrying Australian Prisoners of War, lost military aircraft, merchant navy ships, merchant vessels and passenger vessels, the list of countries that have Australian UCH in their waters increases significantly.

Domestic alignment with global best practice

19. The Annex Rules are consistent with best practice maritime archaeology and UCH management. Ratification of the Convention would enable the use of the Annex Rules in Australian waters as a common, effective professional guideline on how to intervene in, and research, UCH. The Annex Rules would be used as the basis for the development of uniform national standards that clearly articulate the responsibilities of individuals, non-government organisations and business when undertaking activities in the marine environment.

Education and capacity building

20. Education is one of the main methods through which the Convention seeks to facilitate the protection of UCH, with States Parties required to raise public awareness about UCH and cooperate in training in conservation techniques. Through increased cooperation and sharing of best practice among States Parties, Australian universities

would be in an improved competitive position to attract international students and deliver world leading best practice education on UCH.

21. Multilateral cooperation under the Convention would also better position Australia to share its rich knowledge base around maritime archaeology and the protection of UCH, and advocate for increased protection of UCH globally.

Obligations

22. Obligations imposed on States Parties under the Convention include: encouraging responsible non-intrusive access to underwater sites (except where incompatible with protection and management); preservation of UCH for humanity; individually or jointly using best practicable means to protect UCH; responsibility for long term collection, management and conservation of recovered artefacts; and respect for human remains (Article 2).
23. Importantly, Article 2(7) also provides that UCH shall not be commercially exploited. Rule 2 of the Annex Rules expands on this principle, providing that ‘the commercial exploitation of UCH for trade or speculation or its irretrievable dispersal is fundamentally incompatible with the protection and proper management of underwater cultural heritage’. Further, ‘[u]nderwater cultural heritage shall not be traded, sold, bought or bartered as commercial goods’.
24. Article 5 requires each State Party to use the best practical means at its disposal to prevent or mitigate any adverse effects that might arise from activities under its jurisdiction incidentally affecting UCH.
25. Article 7 requires States Parties to apply the Annex Rules to activities directed at UCH in their internal waters, archipelagic waters and territorial sea, and in their contiguous zone (Article 8).
26. Articles 9 and 11 impose new obligations for Australia associated with notifying UNESCO of activities directed at UCH in Australia’s exclusive economic zone or on its continental shelf, and reporting discoveries of UCH, including discoveries made in the exclusive economic zone or on the continental shelf of another State Party and in the Area. Notification enables States Parties with a shared heritage interest to declare an interest in being consulted on how to ensure the effective protection of the site.
27. Article 13 excludes vessels with sovereign immunity, operated for non-commercial purposes, from being obliged to report discoveries under Articles 9-12. However, States Parties are required to adopt measures, not impairing such vessels’ operations or operational capabilities, to ensure compliance with reporting obligations under the Convention as far as is reasonably practicable.
28. Article 14 requires States Parties to control the entry into their territory, dealing in and possession of UCH illicitly exported and/or recovered contrary to the Convention.

29. Articles 15 and 16 oblige States Parties to prohibit the use of their territory in support of any activity directed at UCH not in conformity with the Convention, and to take all practicable measures to ensure nationals and vessels flying their flag do not engage in activity not in conformity with the Convention.
30. Article 17 reinforces these requirements by requiring States Parties to impose sanctions for the violation of measures they have taken to implement the Convention. Article 18 requires States Parties to seize and dispose of UCH that has been recovered in any activity not in conformity with the Convention.
31. Article 19 sets out how States Parties shall cooperate and assist each other in the protection and management of UCH. Shared information must generally be kept confidential and reserved to the competent authorities.
32. Articles 20 and 21 require States Parties to take all practicable measures to raise public awareness regarding the value and significance of UCH and the importance of protecting it under the Convention, and to cooperate in the provision of training in underwater archaeology and archaeological conservation.
33. Article 22 requires States Parties to ensure the implementation of the Convention through a competent authority responsible for an inventory of UCH and the effective protection, conservation, presentation, management, research and education of/on UCH.
34. Article 25 provides that any disputes between States Parties concerning the interpretation or application of the Convention shall be subject to negotiations or other peaceful means of dispute settlement. If those mechanisms fail to resolve the dispute, the dispute may be submitted to UNESCO for mediation, by agreement of the States Parties concerned. If the dispute cannot be resolved by mediation, or there is no settlement by mediation, the provisions in Part XV of the *United Nations Convention on the Law of the Sea* apply to the dispute.
35. Article 29 requires States Parties that declare a limitation to the geographical scope of the Convention, to promote conditions to allow the Convention to apply to the areas exempted, and to withdraw the declaration in whole or in part as soon as that application has been achieved.

Obligations regarding consultation and Coordinating States

36. Ratification requires the establishment of a mechanism to enable a State Party with a verifiable link to UCH located in the exclusive economic zone or on the continental shelf of Australia, to declare to Australia an interest in being consulted on how best to ensure its effective protection (Article 9(5)).
37. Under Article 10, States Parties in whose exclusive economic zone or continental shelf UCH is located, can choose on a case-by-case basis to coordinate with other

States Parties that have declared an interest in being consulted on how to ensure effective protection of that UCH. Coordinating States are required to: notify UNESCO, implement measures of protection which have been agreed by the consulting States and issue authorisations for such agreed measures. The Coordinating State must also act on behalf of the States Parties as a whole and not in its own interest. This is a fundamental part of the collaborative regime to protect UCH, which underpins the Convention.

38. After ratification, if Australia chooses not to coordinate consultations with respect to UCH located in its exclusive economic zone or on its continental shelf, other States Parties which have declared an interest must appoint a Coordinating State to take on this role (Article 10(3)(b)).
39. With respect to UCH located in the Area, States Parties that have declared an interest in being consulted are required to appoint a Coordinating State to coordinate these consultations (Article 12). In addition to notifying UNESCO and implementing and issuing authorisations for agreed measures, the Coordinating State must act for the benefit of humanity as a whole, on behalf of all States Parties.

Obligations owed to Australia

40. As outlined above, the principal obligations that would be owed to Australia if it were to ratify the Convention are the quid pro quo of the obligations Australia would assume under Articles 2, 5, 7, 9, 10, 11, 19 and 21.

Implementation

41. Australia is already substantially compliant with the obligations imposed by the Convention through the legislative provisions of the UCH Act and *Protection of Movable Cultural Heritage Act 1986* (Cth). In addition, the best practice principles outlined in the Annex Rules align with current government policy, and the intent set out in the Intergovernmental Agreement.
42. The UCH Act is administered by the Department of Agriculture, Water and the Environment through the Australian UCH Program (UCHP), in collaboration with the Australian States and the Northern Territory. The UCHP co-regulatory system has operated since 1983, and greatly assists in the protection of UCH, delivery of nationally consistent requirements for proponents, and compliance and enforcement. Under the UCH Act, the Minister delegates certain day-to-day functions to the senior heritage officials in each Australian State and the Northern Territory, who are responsible for that jurisdiction's UCH legislation. The Commonwealth undertakes these functions with respect to certain Australian waters which are not adjacent to the coast of the States and Northern Territory, namely the Coral Sea Territory, Norfolk Island, Christmas Island, Cocos Keeling Island, Heard and McDonald Islands and the Australian Antarctic Territory. However, Macquarie Island is administered by Tasmania.

43. Upon ratification, the Department of Agriculture, Water and the Environment, as the Australian Government's lead agency in UCH management, would lead management of Defence UCH outside Australian waters in close collaboration with Defence.
44. Ratification will require additional administrative measures and amendments to the UCH Act, including to:
1. refer to implementation of the Convention as an object of the UCH Act;
 2. empower subordinate legislation to give effect to the Convention's Annex Rules;
 3. refer to the Convention as a matter to which the Minister must have regard when deciding whether to grant a permit;
 4. clarify the Minister's powers and obligations to seize protected UCH;
 5. enable the Australian Government to form agreements with other States Parties, in conformity with the provisions of the Convention, to jointly manage a shipwreck, aircraft or other UCH that has shared heritage values, located either in another State Party's waters or in international waters (Article 6);
 6. prohibit the use of territory in support of any activity directed at UCH not in conformity with the Convention (Article 15); and
 7. include a mechanism for Australia to report to UNESCO; to consult, cooperate and share information with other States Parties to the extent compatible with the purposes of the Convention; to prohibit Australian nationals and vessels flying the Australian flag from impacting upon UCH not in accordance with the Convention; to raise public awareness; to cooperate with other States Parties in the provision of training; and to recognise a competent authority (Articles 9, 10, 11, 12, 18, 19, 20, 21 and 22).
45. These amendments will also facilitate the development of a nationally consistent approach for activities incidentally affecting UCH, in line with the requirements of Article 5.
46. Legislative amendments will be required by the Australian States and the Northern Territory to ensure compliance with the Convention, including the application of the Annex Rules when assessing a proposed action in coastal waters. Noting the application of Australia's proposed declaration (discussed above at paragraphs 6 - 8), ratification can proceed while work continues with the Australian States and Northern Territory in this regard.

Costs

47. Ratification of the Convention will not create additional costs. However, minor costs could arise if an Australian expert was invited to participate on the Advisory Body and the appointment was supported by the Australian Government.

48. Ratification will contribute to the Australian Government's initiative of reducing regulatory burden by enabling the introduction of nationally consistent requirements, including in relation to permits in the offshore environment. Costing done by the Department of Environment in 2013/2014 assessed the savings value to industry of regulatory streamlining of information for and reporting on UCH to be approximately \$1.2 million per annum.

Future treaty action

49. Article 31 of the Convention outlines the process for amending the Convention. Article 31(1) requires a State Party to write to the Director-General of UNESCO about any proposed amendments to the Convention. The Director-General then circulates the proposed amendment to all States Parties. If, after six months from the date of the Director-General's communication, not less than half of the States Parties reply favourably to the request, the proposal is brought forward at the next meeting of State Parties for discussion and possible adoption.

50. Amendments are adopted by a two-thirds majority of States Parties present and voting. Once adopted, amendments are subject to ratification, acceptance, approval or accession by State Parties and amendments shall only enter force with respect to the States Parties that have ratified, accepted, approved or acceded to them, three months after two thirds of States Parties have deposited their instrument. For those Parties that ratify, accept, approve or accede to the amendment at a later date, it shall enter into force for those States Parties three months after they have deposited their instrument. Accordingly, should Australia ratify the Convention, any future amendments would be subject to domestic treaty-making requirements.

51. While the Convention encourages Parties to enter into bilateral, regional or multilateral agreements for the preservation of UCH, provided those agreements are in conformity with the Convention and do not dilute its universal character (Article 6), the Convention is silent on the negotiation of further annexes or a protocol to the Convention.

52. As technological changes are increasingly giving easier access to deep-water wreck sites and other UCH to more individuals, there is potential for the Annex Rules in the future to be amended through the Article 31 process to address these changes. Any amendments will be subject to Australia's domestic treaty-making requirements.

53. In line with Article 29, Australia will withdraw its declaration after relevant legislation of the Australian States and Northern Territory have been amended.

Withdrawal or denunciation

54. Article 32 provides for denunciation of the Convention by a State Party, through written notification to the Director-General of UNESCO. A denunciation would take effect twelve months after the date of receipt of the notification, or on a specified date

after that time, but in the interim would not reduce the duty of the State Party to fulfil the obligations embodied in the Convention.

Contact details

Cultural Heritage Section
Heritage, Reef and Wildlife Trade Division
Department of Agriculture, Water and the Environment

ATTACHMENT ON CONSULTATION

Convention on the Protection of the Underwater Cultural Heritage

(Paris, 2 November 2001)

[2022] ATNIF 1

CONSULTATION

Consultations with State and Territory Governments

55. The Convention will require legislative amendments by State and Territory Governments, including as outlined in paragraph 45.4 – 45.6 for example. With the support of the Heritage Chairs and Officials of Australia and New Zealand, Australia's consideration of ratification and the associated implications, including legislative and policy changes to give effect to the Convention, were raised with State and Territory Governments at meetings of the former Environment Protection and Heritage Council (EPHC) Standing Committee between 2007-2009.
56. On 5 July 2010, the EPHC endorsed the Intergovernmental Agreement to ensure an ongoing cooperative national approach to the management of Australia's UCH and as a precursor to Australia ratifying the Convention. In this Intergovernmental Agreement, all parties agreed to undertake all necessary activities to enable the Commonwealth to determine whether it could ratify the Convention.
57. The UCH Delegates - officials in each State and the Northern Territory with responsibility under State or Territory legislation to protect UCH in state internal waters - have been regularly kept informed of the Australian Government's position and progress in ratifying the Convention through 29 meetings since 2000. The last such meeting was on 4 November 2020.
58. Due to the large overlap in membership between the UCH Delegates and the Heritage Chairs and Officials of Australia and New Zealand, the Chairs and Officials Group were only periodically kept informed of the Australian Government's position and progress in ratifying the Convention.

Consultation and coordination within the Commonwealth

59. Consultation with Commonwealth departments and agencies concluded in mid-2020. All impacted portfolios provided in principle support for consideration of ratification to proceed.
60. Particular support was given by the Department of Veterans' Affairs and Defence for the protection of human remains and military aircraft and vessels outside Australian waters.

Consultations with industry members, industry groups and non-governmental organisations

61. On 4 June 2009, a discussion paper was released on the review of the *Historic Shipwrecks Act 1976* (the HS Act) and consideration of the requirements arising from the Convention. The purpose of the discussion paper was to encourage input from industry, non-government organisations and the public into the review, by inviting written submissions.
62. Thirty-eight written public submissions were received during the review.
63. The following industry stakeholders and non-governmental organisations provided written submissions or were involved in targeted consultations during the review: Australia International Council on Monuments and Sites; Australasian Institute for Maritime Archaeology; Collections Council of Australia Ltd; Heritage Council of Victoria; Heritage Council of Western Australia; Maritime Archaeology Association of Victoria; Museums Australia; Technical Diving International / SCUBA Diving International (TDI/SDI); Professional Association of Diving Instructors (PADI) Asia Pacific Pty Ltd; Ocean Trek Diving Resort; Cosmos Archaeology Pty Ltd; Ellengowan Enterprises; SCUBA divers Federation of Victoria; South Pacific Divers Club; and The Sydney Project.
64. The community response was in support of Australia amending the *Historic Shipwrecks Act 1976* and ratifying the Convention.
65. The UCH Act came into force on 1 July 2019, in line with the Intergovernmental Agreement and outcomes from the review. Ratification places no further burden on industry than that already placed on them under the UCH Act.
66. Additionally, a number of journal articles have been published by researchers on considerations in regard to Australia's ratification of the Convention, how it will assist in protecting our UCH outside territorial waters and implications for day-to-day management of protected underwater cultural heritage, particularly shared heritage. All these articles were supportive of Australia's ratification.