

## Part 1: Questions Raised in this Discussion Paper

Key questions interspersed throughout this discussion paper are posed primarily as 'thought starters' and are not intended to limit comments or submissions on the Act. They are consolidated here for convenience.

### Jurisdiction of the Act

- Q.1 Should the Act continue to apply to all waters from the low water mark extending to the outer limit of the continental shelf? If not, what waters should the Act apply to?

Yes to maintain consistent coverage the Act should continue to apply from the LWM and continue to outer limits of 200nm (EEZ) and continental shelf limits in all Australian territorial waters. This is consistent with Article 10 in the UNESCO Convention on the Protection of the Underwater Cultural Heritage.

- Q.2 Should the Act allow the Minister to continue to delegate some powers to State and Territory officials as is currently the case? If not, what other models could be used to administer the Act effectively?

Yes the delegation system works well and the National Historic Shipwreck Program gives a national and consistent approach to managing UCH while providing for local knowledge and 'on the ground' management. This program has been running effectively, if under-resourced, since 1983, however, the current model of delegated powers while being the most effective and inclusive system of administration of the *Historic Shipwrecks Act* requires financial resources to remain functional. An agreement that allows for consistent funding for the employment of staff managing the program in the various states and territories which allows for the delivery of statutory outcomes such as the administration of the Act, field survey and site management activities. This funding should reflect the requirement for minimum three person occupational safety requirements for near-shore diving activities and staffing regulations for vessels operating a 2C survey. Collection management and conservation activities should also be funded through a service level agreement with major collecting institutions. State and Commonwealth funding on a dollar for dollar basis should be explored. The Commonwealth is currently getting very effective value for money in terms of the HSP, as many states fund a significant proportion of the burden of capital equipment, consumables, staff and overheads that contribute to the running of the HSP nationally.

### Scope of the Act

- Q.3 The Act protects by declaration all shipwrecks that are at least 75 years old and their associated articles, and articles (associated with a ship) that entered waters at least 75 years ago. Should this protection continue or be varied?

In terms of age then yes 75 years is an appropriate and well recognised age that is understood by the community. Following on principles from the

Navigation Act where any vessel abandoned for over 12 months becomes the property of the Commonwealth, all wrecks declared historic shipwrecks should become the legal property of the Commonwealth.

- Q.4 Should the Act continue to protect only shipwrecks and associated relics or should its protection include other underwater historical archaeological sites and relics such as sunken aircraft in line with the requirements of the Underwater Cultural Heritage Convention?

Yes the Act should be updated and amended to include all other types of UCH as per the definitions and scope of the UNESCO Convention. The Act should retain its 'no interference' legislation and not move to the concept of 'significant interference' as in the EPBC Act.

There should also be no specific reference to Dutch or PNG shipwrecks (it is noted that under the UNESCO Convention 2001 bilateral agreements between countries with flagged vessels wrecked in another country's waters should be encouraged.)

The Act should also follow the UNESCO Convention 2001 in protecting the environmental and archaeological context of the sites.

- Q.5 Should, as is currently the case, the Minister be able to declare underwater sites of historical significance if they are less than the prescribed date e.g. HMAS *Sydney II*? If so, what criteria, if any, should be used in making decisions or declarations?

Yes the Minister should have the ability to declare site younger than 75 years as protected sites. Updated legislation should include criteria for undertaking significance assessments. Current criteria for significance being used in Special Declarations are: technical, social, historic, scientific and aesthetic. These criteria are considered adequate to ensure that multiple values and categories of significance are considered when assessing a site for Special Declaration.

- Q.6 Should human remains be specifically protected to ensure the dignity of the remains and recognition and preservation of their resting place, and if so how should this protection be provided?

Yes. Human remains are not specifically mentioned in the current Act, and specific wording that protects human remains would remove some current confusion over their protection and management. They could be explicitly included in the definitions of site(s), along with such things as the archaeological and environmental context of UCH sites. See article 2.9 UNESCO Convention 2001. It is noted that in not all circumstances will it be the decision of family members, organisations (for example Department of Defence) or other nations to leave human remains on a UCH site or seabed. Recovery of human remains should be allowed through the normal controlled disturbance permit process.

## **Register of Historic Shipwrecks and Historic Shipwreck Relics**

- Q.7 Should there be a central national register of shipwrecks and shipwreck relics? If so, does the current Australian National Shipwreck Database meet this need?

Yes a Register should be maintained. The current ANSD is sufficient but has room for improvement. The new ANSDB undergoing testing offers improvements on the older list base database by providing linked relic and shipwreck files with increased search capacity based on drop down list selections. However the new simple GIS system is insufficient to meet LGA, State or Commonwealth planning requirements as it is not a fully compatible ArcGIS platform. For comparative research opportunities and development issues, consultation with other bodies that may wish to use this Register should be undertaken e.g. universities, archaeological associations (AIMA, ASHA, AAA), consultants, planners, developers.

- Q.8 Are the current reporting requirements for the discovery of shipwrecks and relics sufficient? If not, what information should be reported and how should it be reported?

No, the reporting requirements are insufficient with regard to developments and environmental processes (see Q.15 below). Generally speaking for normal purposes of wreck reports by members of the public the information required by the Commonwealth wreck reporting form to contact the finder, assess shipwreck reports and relocate them is sufficient. The definition of notification of shipwrecks and relics 'as soon as practicable' (S. 17 1)) could be better defined.

- Q.9 Should the capacity to provide monetary rewards for reporting of shipwrecks continue to be provided for in the Act? If not, how could those reporting the discovery of shipwrecks be acknowledged?

Modern heritage practice does not support financial rewards for reporting heritage sites, nor does AIMA. A range of non-monetary awards should be identified and adopted on a case-by-case basis as required such as framed certificates signed by the Minister, replicas of artefacts (e.g. bell) and public forms of presentation and acknowledgement (e.g. media releases, exhibition captions etc). This is some discrepancy in the fact that finders are required to report sites under S.17 'Discovery of shipwrecks and relics to be notified' yet may receive a reward for doing so under S.18 'Rewards'. Public acknowledgement of finders in the public record, media, exhibitions, publications and databases is critical to any consideration of awards and is not currently mentioned under S.18 (see Pandal, P., 1992, Report of the Select Committee on the Batavia Relics, WA Parliament, Perth).

## **Management of Historic Shipwrecks**

- Q.10 Should the Act continue to allow open access to most shipwrecks? If not, what should be required?

Yes open and free public access to most shipwrecks should continue to be allowed.

- Q.11 Do the current permit requirements of the Act meet best practice? If not, what should be required?

Yes current permit requirements are suitable. Further discussion between AIMA, Delegates and DEWHA on guidelines and conditions for permits such as for standard conditions, qualifications of persons undertaking disturbance and reporting requirements would be valuable.

- Q.12 Should the Act explicitly state how archaeological surveys and excavations should be conducted and reported on?

Yes subject to consultation and advice from the archaeological and heritage management community. It would suffice to refer to the UNESCO Convention 2001 Annex Rules and Guidelines, as these provide good guidelines for appropriate planning and reporting requirements. Another useful reference is English Heritage's *Management of Archaeological Projects* document.

- Q.13 Should the Act continue to provide for protected zones (that have the effect of restricting site access) to be declared? If protected zones are to be declared, what criteria should determine if a shipwreck site requires a protected zone?

Yes protected zones should be retained for protection of significant, fragile or other sensitive sites as assessed on a case-by-case basis. The declaration of protected zones should automatically be referred to in other complimentary Acts such as Customs, Marine /Division (Fisheries) and these Acts amended accordingly. Criteria for Protected Zones should be contingent upon vulnerability and significance of the site. Revised Management Guidelines could develop updated standard criteria for assessing Protected Zones and their management.

- Q.14 Should there be a maximum limit on the size of the protected zones or should the needs of the site define the area?

A Protected Zone should include the entire extent of a site including a buffer that adequately supports surveillance monitoring, and minimises impacts from accidental damage. It is recommended that the 200 hectare maximum limit referred to in S. 7 1) therefore be removed.

- Q.15 Currently, historic shipwrecks are not integrated into the planning regimes of the Commonwealth, States and Territories. Should they be, and what would be the preferred mechanism?

Yes historic shipwrecks and UCH generally should be integrated into planning mechanisms, through environmental assessment process for developments. Planning schemes that extend beyond the low water mark should also include underwater cultural heritage. It is noted that historic shipwrecks are included in the planning regimes of some states.

Also there are no agreed heritage policies or protocols in Australia for the management of sunken Commonwealth military ships and aircraft, and it is recommended DEWHA work with the Department of Defence to create a policy and guidelines to ensure that UCH issues are considered by the military – and that the military are considered by the heritage community - when dealing with historic sunken ships and aircraft including World War II sites.

Q.16 What approach should be taken towards dive tourism to ensure that it does not adversely impact on underwater archaeological sites?

Dive tourism that promotes public access and enjoyment of UCH is desirable and of social and economic benefit. Dive tourism on UCH should be encouraged and facilitated by onsite interpretation, brochures and web based information. There are opportunities to improve links with the recreational diving industry and community through the HSP and DEWHA/ State agency programs. Educational programs such as the AIMA/NAS training course are valuable in educating people including dive charter operators, instructors etc.

### **Management of Historic Shipwreck Relics**

Q.17 Does the current permit system assist in the protection of historic shipwreck relics? If not, what would be a preferred model to manage and conserve Australia's historic shipwreck relics?

The current permit system is adequate however there is room for improvement. It is understood that on-line access is being developed as part of the new national database. Ideally it should be necessary for people to have a permit prior to the sale or transfer of a relic. This would reduce staff workloads and make enforcing transfers more achievable. It would enable automated monitoring of Ebay and other on-line auction site sales more effective (i.e. gun sales or alcohol sales on Ebay require permits prior to lodgement of the item for sale – see below).

An ongoing issue is with historic shipwreck relics that appear in the market place but have not been declared under the 1993 Amnesty. A policy position needs to be agreed to by DEWHA and Delegates regarding the issue of Post-Amnesty material. If the object is from an historic shipwreck and has not been registered then the object should be compulsorily acquired and registered by the Commonwealth, and further enforcement proceedings considered.

There is room for improvement on issues relating to Ebay and other on-line auction sites especially with new functionality of the ANSD and permit forms. DEWHA could request that sellers are required to list their permit in the listing or catalogue as a live link, which when 'clicked' by potential buyers advises them of the consequences of buying a protected item. Both buyers and sellers (buyers are currently unaware of their obligations when buying items from on-line auction sites) could be made aware of the permit requirements via pop-up messages. Alternatively the permit could be recorded in the item listing process, and when a bid is attempted a pop-up message requires the

bidder to acknowledge they have read and agree to the transfer and possession regulations.

Another way to ensure buyers are made aware of their obligations is to introduce a permit system to buy an historic shipwreck relic. This would ensure items are not exported without an export permit. It would decrease the amount of illegal sales and would be a measure consistent with the UNESCO Convention 2001.

With regard to keyword triggered notifications to DEWHA a wider database of keywords and searches in specific categories (e.g. Coins/ Antiques/ Collectibles) would pick up more illegal sales, but would require someone to assess and monitor the site(s).

Overall any cooperation between DEWHA and Ebay that results in a real decrease in on-line sales through automated on-line education and regulation of both buyers and sellers will be valuable.

- Q.18 Should isolated archaeological artefacts found in the sea (such as Cook's cannon and anchor from the HMB *Endeavour* and the recent discovery of a pistol from HSK *Kormoran*) whether associated with a known shipwreck site or not, be protected?

Yes as per UNESCO Convention 1. a) i).

It should also be noted that transformed or amorphous historic shipwreck relics (for example worked into furniture, jewellery, ashtrays etc) should be still identified as relics belonging to or having been associated with a ship.

- Q.19 Should the Act state principles guiding how historic shipwreck relics should be conserved and curated?

Yes within the context of stating that best practice is required. A more detailed framework developed in consultation and advice from the archaeological conservation and heritage management community should be developed as guidelines for all ongoing decision making, similar to the UNESCO Convention 2001 Annex and English Heritage's Management of Archaeological Project document.

- Q.20 Should Australia ban all future trade in historic shipwreck relics or continue to allow trade in relics with proven provenance that have previously been traded?

Yes all future trade should be banned in historic shipwreck relics as per UNESCO Convention Article 2. 6) and 7). And Annex Rule 2.

With regards to relics currently in circulation and being traded with permits under the current Act, a compulsory buyback scheme has been suggested where:

- a) Custodians holding currently registered relics are offered appropriate recognition and/or compensation for surrendering or gifting relics to the Commonwealth;

- b) No further transfers permitted during or beyond the life of a current custodian choosing to retain the item, after which the deceased estate shall forfeit the item without compensation;
- c) No company or business to retain custody of a currently registered relic. These items to be acquired with compensation;
- d) Any registered relic illegally held or transferred in breach of the Act (including Moveable Cultural Heritage Act) to be forfeited without compensation.

Q.21 Should the Act prescribe where underwater relics that have been excavated should be stored and who should manage them?

Yes this may be useful. However such prescriptive detail may be limiting and date very quickly, perhaps this would be better stated in Regulations or Guidelines that can be relatively more easily updated than in the Act. There may be issues with regard to funding and jurisdiction if the Commonwealth prescribes this but does not or is unable to provide funding to conserve and curate objects on an ongoing basis. Australia's historic shipwreck relics should be considered as a distributed Commonwealth national collection, and conservation and collection management activities should be funded through a similar mechanism to other Commonwealth collections.

#### **Compliance and Enforcement**

Q.22 Are the current provisions for appointing inspectors under the Act and Regulations sufficient? If not, what additional requirements would be appropriate?

Yes they appear to be sufficient however the wording within the Act and an ability to have tiered authorised officer powers may need to be modernised.

Q.23 Are the offence and penalty provisions appropriately framed to encourage compliance with the Act? Do they provide a satisfactory level of deterrence to provide for the adequate protection of matters covered in the Act? Are there other measures that should be incorporated into this Act to support the objectives of the Act?

No. The Act is 33 years old and is very much out of date. The penalty provisions in 1976 were significant but they need to be indexed or regularly updated to ensure that fines and sentences are on par with similar Acts. Penalty Infringement Notices (PINS) are useful for some offences and would assist Inspectors in their work. Other aspects need to be addressed including reversing the onus of proof onto the person who has an object. Improvements in search and seizure provisions and the length of time to bring a matter before the courts is required. Civil penalty provisions need to be included as well enforceable undertakings and evidentiary certificates to be included as options.

Q.24 Does the Act contain a sufficient, comprehensive and appropriate range of enforcement mechanisms? Are those mechanisms capable of deterring and responding to contraventions of the Act? Are there any other measures which would assist to ensure compliance with the Act?

See above discussion on PINS. There are some discrepancies in the HS Act which could be amended to provide better protection. For example the onus of proof could be on a person with a relic, rather than an Inspector, to provide evidence that the relic did NOT come from an historic shipwreck site. The Victorian Heritage Act is a good model for future drafting. Successful prosecutions should require offenders to pay fines into shipwreck heritage programs or site rehabilitation.

- Q.25 Are the seizure and forfeiture provisions within the Act adequate? Can they be improved to provide a better level of protection and repatriation of items illegally taken from historic shipwrecks? If so, in what way can they be strengthened?

No, these provisions are inadequate and they are very dated. It is important to tie the seizure of objects with the onus of responsibility being placed on the person with the relic to prove they are not from a historic shipwreck site, rather than the Commonwealth proving they are from an historic shipwreck site.

**UNESCO 2001 *Convention for the Protection of the Underwater Cultural Heritage***

- Q.26 If Australia decided to ratify the Underwater Cultural Heritage Convention, the Act would need to be amended to prohibit Australian nationals, Australian companies and Australian vessels from participating in illegal excavations or salvage in another country. Would you support such a proposal? If not, what other mechanisms would you support to ensure that other countries' underwater cultural heritage is protected?

Yes AIMA supports the prohibition of Australian nationals and companies participating in illegal activities in other countries.

- Q.27 Should the Act be amended to comply with international best practice for protection of underwater archaeological sites and artefacts?

Yes in terms of this the UNESCO Convention on the Protection of the Underwater Cultural Heritage 2001 is international best practice.

- Q.28 Should Australia ratify the Underwater Cultural Heritage Convention and the Annex which defines the Rules of the Convention?

Yes AIMA fully supports the Australian Government ratifying the UNESCO Convention 2001. Any new legislation should also include the ability for Australia to form Bilateral arrangements with other States who have shipwreck heritage in Australian waters.

- Q.29 Are these Rules appropriate for conservation of Australia's underwater heritage?

Yes the UNESCO Convention Rules are appropriate for the protection and long-term conservation of Australia's UCH.