



Australia ICOMOS Secretariat  
Cultural Heritage Centre for Asia & the Pacific  
Faculty of Arts, Deakin University  
221 Burwood Highway  
Burwood, Victoria 3125  
AUSTRALIA

Ph: +61 3 9251 7131  
Fax: +61 3 9251 7158  
austicomos@deakin.edu.au  
www.icomos.org/australia  
ABN: 85073285798

## **Submission on the Discussion paper titled ‘*Review of the Historic Shipwrecks Act 1976 and consideration of the requirements arising from the UNESCO 2001 Convention for the protection of Underwater Cultural Heritage*’.**

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### **Executive Summary**

Australia ICOMOS see the primary test for heritage legislation to be the question: Does the Historic Shipwrecks Act 1976 Act accord with best practice objectives for heritage legislation? The answer is clearly ‘No it does not’. The legislation is outdated. It should be amended in line with best practice documents such as the *UNESCO 2001 Convention for the Protection of Underwater Cultural Heritage*. The conservation of underwater cultural heritage should be consistent with the process outlined in the Burra Charter (Australia ICOMOS 1999).

There are many areas of agreement between AICOMOS approach to the questions posed in the review and those of other relevant heritage NGOs e.g AIMA. In general we consider the most important points are that:

- a) The UNESCO Convention should be ratified and
- b) That the Commonwealth legislation should be amended to ensure consistency with the Convention and
- c) That Underwater Cultural Heritage, including Shipwrecks should be afforded the same standard of protection as other types of heritage in m Australia
- d) Resources are committed to implement any new provisions including enforcement, public awareness, training and conservation.

We are also keen to be involved in further stages of consultation or collaboration in the review process and welcome any queries or requests for clarification of any points in this submission.

### **Introduction**

Australia ICOMOS welcomes this opportunity to participate in the review of the Historic Shipwrecks Act, 1976.

Australia ICOMOS, Australia’s leading non-government professional organisation for cultural heritage, is the Australian national committee of the International Council on

Monuments and Sites. This is a non-government professional/expert organisation primarily concerned with the philosophy, terminology, methodology and techniques of cultural heritage conservation. Internationally, ICOMOS works closely with UNESCO, and acts as UNESCO's principal adviser on cultural aspects of the operation of the World Heritage Convention. As members of an international NGO, we are part of a global professional network.

Australia ICOMOS has a key role in contributing to heritage conservation philosophy, methods and standards of practice in Australia. Our members are professionally qualified and experienced practitioners from a wide range of disciplines, working in all facets of the understanding and protection of Australia's cultural heritage places, at all levels of government and in the private sector. We regularly provide feedback and advice on heritage policy and philosophy to the Australian Government.

## The Review Questions

### **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?*

Response:

Yes. It is essential to maintain consistent coverage and therefore the Act should continue to apply from the Low Water Mark to the outer limits of the continental shelf.

*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?*

Response:

Yes. The model of shared responsibility through the delegation of some powers appears to work well. As with other types of cultural heritage, resourcing remains one of key barriers to improving effectiveness of this legislation.

### **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?*

Response:

Yes the 75 year blanket protection should be continued as it is well understood and well accepted by other governments and the community. The provision should be maintained to declare any younger significant wrecks owned by the Commonwealth including those which have diverted to the Commonwealth through abandonment, to be declared 'historic wrecks' based on significance assessment.

*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?*

Response:

The Act should be consistent with the UNESCO convention in terms of the range of Underwater Cultural Heritage that it applies to. The amendments to the Act should also be

made to ensure the protection of 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?*

Response:

Yes. Declarations through section 5 of the Act should be preserved. The Burra Charter (AICOMS 1991) provides the best practice guidance for cultural heritage management in Australia. It is a foundation premise of the Burra Charter that management be based on significance. Considerable work has been undertaken in establishing significance assessment criteria and this should be applied in the case of Underwater Cultural Heritage.

*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?*

Response: The protection of human remains and associated heritage values should be consistent with the protection of sites and relics and human remains in terrestrial contexts. We note that human remains are not specifically mentioned in the current Act and specific reference might reduce confusion over their management. Recovery of human remains should only be carried out under permit. Clearly other legislation may also apply depending on circumstances.

*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?*

Response: Yes. There should be a central national register of all cultural heritage protected under the Act.

The Australian National Shipwreck Database (ANSDB) provides a basis but its implementation has room for improvement. For example it could be better integrated with development and planning processes. We note concerns from some members that the GIS system used is not fully compatible with systems in use by state and local governments. Consultation with obvious end-users and stakeholders (e.g Australian Institute of Maritimes Archaeologists, Australasian Society for Historical Archaeology, Australian Archaeological Association, Museums, Local and State Governments) should be undertaken on this specific issue to avoid the need for a duplication of systems by other parties.

*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?*

Response: The details of reporting requirements and procedures under the UNECSO Convention are not yet fully known. Once known current reporting requirements should be reviewed for consistency.

Individuals must currently report the discovery of shipwrecks to State or Commonwealth Ministers depending on applicable jurisdictions. However, reporting requirements and procedures for individuals and master of vessels need to be defined as required under the UNESCO Convention.

*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?*

Response: Monetary rewards are not provided for reporting of other kinds of cultural heritage sites on land and should not be provided for shipwreck sites underwater.

Australia ICOMOS would prefer to see a focus on building an understanding and appreciation of the value of our cultural heritage places through increased publication education and awareness initiatives in relation to cultural heritage. Awards for best practice conservation efforts/initiatives would be preferred.

### **Management of Shipwrecks**

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

**Response:** Australia ICOMOS considers that the management of cultural heritage places should be based on an understanding of its significance. Access clearly relates to the potential for impact and the ability of the site to sustain that impact. Decisions about restricting access should be made based on a thorough conservation assessment as outlined in the conservation planning process. Open access to shipwrecks should be allowed and encouraged, except in cases where access may adversely impact the integrity of the site and associated values. Public access should be considered, defined and monitored through the Conservation Planning process.

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

**Response:** Permitting requirements should be consistent with those required for activities impacting areas of archaeological potential in the terrestrial context. Permit guidelines should reflect requirements for conservation management plans, pre-disturbance survey requirements, monitoring of development activity, minimum qualifications for persons reporting, structured reporting requirements and where excavation or archaeological salvage is involved the permits should include provisions for the analysis, treatment and long term storage of excavated material.

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

**Response:** From time to time with improvements in technology and methodology best practice in these matters will vary. It would be more useful therefore for the Act to refer to departmental guidelines in these matters. These could be more easily updated. Of course this presumes that the Department will periodically review the comprehensiveness of such guidelines against current best practice in archaeology and that they are resourced to do so in a timely way. Any guidelines should be consistent with the requirements of the Annex (Rules) of the UNESCO Convention.

**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?*

**Response:** Yes. Protected Zones are essential to protect sites assessed as significant and /or fragile or vulnerable or sites suspected of being so and not yet assessed. These are sites where uncontrolled access may adversely impact the integrity of the site and associated values. Declaration of protected zones should be based on an assessment of site integrity, vulnerability and significance. The use of Protected Zones should be precautionary in approach where no conservation planning has been undertaken. In some cases the Protected Zone may only be required for a limited time to allow for the development of an

appropriate management plan. Guidelines for conducting this assessment should be developed.

**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?*

Response: The size of the protected zone should be related to the need to conserve the significance of the site in its seascape and archaeological context. This means that the size of the protected zone may vary considerably from site to site. Therefore the reference in the current Act to a maximum size should be deleted. The protected zone should include the concept of a Buffer Zone.

**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?*

Response: Yes. There should be data sharing arrangements between all jurisdictions. Planning schemes that extend below the low water mark should consider Underwater Cultural Heritage. Specific consultation with State agencies and stakeholder should be undertaken on this point to ensure seamless integration.

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

Response: Active engagement with the dive tourism industry as with all tourism activities that affect cultural heritage sites is essential. Tourism is clearly an industry that impacts on cultural heritage places. At the same time it relies on the continued existence of such places to ensure the sustainability of the industry.

Tour operators can provide an important channel for communicating with the diving public for the purposes of heritage promotion, education, and responsible public access to shipwrecks. Therefore a strong relationship between the tourism industry and the government should be developed.

### **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?*

Response: The current permit system does not adequately protect and track these cultural heritage items. There is no database to track the private custodianship of declared shipwreck relics. The permit system should not be applied to any newly recovered shipwreck relics. It is understood that AIMA has suggestions for modifying the permit system to more effectively regulate the sale and transfer of items already in circulation. In general historic shipwreck relics found in the future should be protected and custodianship restricted to museums and government agencies.

**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?*

Response: Yes, the UNESCO Convention applies equally to shipwrecks and isolated artefacts and the Commonwealth Act should be consistent with the Convention.

The management of isolated archaeological artefacts should be treated in accordance with the process established in the Burra Charter (AICOMOS 1999). They should be considered in much the same way as significant artefacts encountered on and finds reported, significance assessed and artefacts managed in accordance with that significance.

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

**Response:** Yes. A statement of principles would assist in providing direction for more detailed procedures/and guidelines which can be developed to reflect the requirements of the Annex (Rules) of the UNESCO Convention.

As is the case with other types of cultural heritage detailed guidelines which follow the process outlined in the Burra Charter should be developed outside the Act to implement the objectives of the Act. Such guidelines should be reviewed periodically to ensure that they are consistent with best practice.

**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?*

**Response:** Yes all future trade in historic shipwreck relics should be banned in line with the UNESCO Convention of 2001. We note that AIMA has suggested a number of steps relating to heritage items already in circulation. AICOMOS considers that such a multi faceted approach warrants government consideration. The approach should be determined in consultation with State and Commonwealth and public stakeholders.

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

**Response:** The Act should at least give the Minister the power to do this with the expectation that he/she would do this in accordance with agreed regulations or procedures. This would allow this provision to be updated as required and circumstances change. This could be implemented via permit conditions in the case of archaeological excavations and 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?*

**Response:** It is understood that generally Inspectors are appointed from relevant government agencies and it is understood that from time to time restructures and changes in roles, responsibilities within state agencies have not always maintained the effectiveness of such positions. It is likely that such agencies will be in a better position to provide input into this question. However, generally AICOMOS considers that inspector appointments require an induction and ongoing training program with regular review. If this is to be devolved to the state agencies then there should be a requirement for ongoing appointments for new staff to sustain this role in the face of staff turnover and attrition.

**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?*

Response: No. The Act is outdated. The offence and penalty provisions are difficult to prosecute due to the onus of proof requirements for the Inspector. It is recommended that the onus of proof be reversed. See AIMA submission for detailed suggestions in relation to this question.

**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?*

Response: No see response to Q23. In addition it is recommended that the Act enable Inspectors to issue spot fines and penalty infringement notices. Existing State heritage legislation (see Victorian Heritage Act for example) may provide useful tested models.

**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?*

Response: No. These provisions are out of date and largely ineffective. The onus of proof of legal possession of a historic shipwreck relic should lie with the person holding the item.

### **UNESCO 2001 Convention for the Protection of 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?*

Response: Yes. Such illegal activities should be prosecuted under Australian law.

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

Response: Yes. Specifically the Act should be amended to comply with the UNESCO 2001 Convention for the Protection of Underwater Cultural Heritage.

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

Response: Yes.

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

Response: Yes. The principles of the Rules are already well represented in many state and commonwealth heritage legislations. They are consistent with the Burra Charter which is the

Dr Susan McIntyre Tamwoy  
President