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Cosmos Archaeology Pty Ltd

Secretariat to the Review of the Historic Shipwrecks Act  
GPO Box 787  
Canberra ACT 2601

To whom it may concern,

**Re : Review of the Historic Shipwrecks Act 1976 and consideration of the requirements arising from the UNESCO 2001 Convention for the Protection of the Underwater Cultural Heritage.**

I am the Director of a heritage consultancy, which specialises in maritime heritage. Prior to the formation of the firm in 1996 I was engaged as a Project Officer in Victoria, South Australia and Northern Territory working on projects funded by the Historic Shipwrecks Programme. I am a past Secretary, Treasurer, Training Officer and President of the Australasian Institute of Maritime Archaeology and am currently its Senior Vice President.

In my capacity as a consultant I regularly advise clients on legal compliance issues with maritime heritage and my main interest with this review is that the *HSA 76* becomes updated and better integrated with comparable State Acts. My other interest in this review is in adding another voice to the ratification of the *UNESCO 2001 Convention for the Protection of the Underwater Cultural Heritage*. It is hypocritical and obscene that we allow individuals and businesses to profit financially from activities (treasure hunting) conducted overseas, activities which are not permitted within this country.

My submission takes the form of responding to the questions presented in the Discussion Paper.

**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, but only if it does not reduce the levels of existing protection for shipwrecks and other forms of underwater cultural heritage provided by State based legislation. This review and subsequent possible changes to the Act should take the opportunity to make clear the relationship between the Federal and State Acts with respect to shipwrecks – do the provisions of the *HSA 76* extinguish the provisions of comparable State Acts or can the provisions of each co-exist? This opinion varies according to the views of individuals tasked with administering their respective Acts on both a State and Federal level. This often can make the provision of advice to clients on legislative compliance difficult.

As it stands at the time of writing, if the primacy and exclusivity of the *HSA 76* holds true, NSW shipwrecks from the low water mark to the 3 nm from the coast are afforded less protection than would be the case under the *Heritage Act 1977*. This is

because the HA 77 considers a relic any object 'made' over 50 years ago. The situation is summarised in the table below. The table also highlights the incongruity of the HSA 76 in protecting only shipwrecks:

Land and enclosed waters	Shipwrecks	Aircraft	Other
(NSW) HA 1977	Protected if ship built over 50 years ago	Protected if made over 50 years ago	Protected if made over 50 years ago
<b>Commonwealth Territory</b>			
(Cwth) HSA 1976	Protected if wrecked over 75 years ago	Not protected	Not protected
<b>Up to 3 nm from coast</b>			
(NSW) HA 1977	Not protected*	Protected if made over 50 years ago	Protected if made over 50 years ago
(Cwth) HSA 1976	Protected if wrecked over 75 years ago	Not protected	Not protected
<b>Beyond 3 nm from coast</b>			
(Cwth) HSA 1976	Protected if wrecked over 75 years ago	Not protected	Not protected

\* Some public servants who administer these and similar Acts believe that the provisions of the comparable State Acts can co-exist with the HSA 76.

**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. However the agencies to which the powers are delegated should be reviewed. I believe that cultural resource management agencies are generally better suited to administer the Act as its provisions are comparable with other heritage related Acts which these agencies are also charged to administer. Such agencies are also better placed to proactively and reactively deal with increasing seabed development. Their public awareness campaigns for cultural heritage are also more extensive and far reaching.

### **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?*

The automatic protection provision should be changed to when the object (vessel) was built. At present a vessel built in 1933 and wrecked in 1934 is protected in the Act but a vessel built in 1889 but wrecked in 1935 is not. The age based protection provisions in heritage acts are meant to reflect a major criterion for the assessment of the significance for objects/sites in whether they represent a technology or activity that is rare or extinct. The NSW and Victoria Heritage Acts recognise this by determining relic status from when the object was created rather than when it passes from a systemic context into an archaeological context as the HSA 76 does. In a time of rapid technology change and changing community attitudes the 75 year provision seems too long and 50 years more apt. The 75 year provision also has proven inadequate when dealing with World War II maritime heritage which resonates with the community at large not because of technological rarity but because of a seminal event in Australian history.

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?*

The Act should be updated and amended to include **all forms** of underwater cultural heritage as defined in the UNESCO 2001 *Convention for the Protection of the Underwater Cultural Heritage*. This would conform with some existing State legislation, such as the *Heritage Act 1977* (NSW) and *1995* (VIC), however the discrepancies of automatic protection provisions may need to be reconciled if the Commonwealth Act overrides the State Acts (See Q.1 and 3).

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 criteria used for nominating sites to the National Heritage List would be the most appropriate ([www.environment.gov.au/heritage/about/national/criteria.html](http://www.environment.gov.au/heritage/about/national/criteria.html)).

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?*

Human remains should be included within the definitions of sites/relics that are protected under the Act.

#### **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 for both. They should be updated regularly and have advanced search options.

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?*

Yes. It could be tightened up in terms of reporting timeframes. Some clients have thought that "...as soon as practicable..." gives them scope to delay notification until they have finished their development.

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?*

No. People should not be financially rewarded for reporting shipwrecks. They should however be suitably acknowledged and publicly commended. A well made replica of a key artefact – such as a ship's bell – with accompanying public recognition can mean more to the recipient than a plain monetary reward of the same value.

#### **Management of Historic Shipwrecks**

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

Yes, absolutely.

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

No. It is my understanding that at present a permit can be issued to disturb a historic shipwreck that would not take its heritage values into consideration – that is, there appears to be nothing in the legislation to prevent a wreck from being subjected commercial salvage or treasure hunting. This can be remedied by ratifying the UNESCO 2001 *Convention for the Protection of the Underwater Cultural Heritage*. See responses also to Q.12 and Q19.

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

Yes. They should be in the form of Regulations or Technical Memorandums so they can be updated and changed without amending the Act. The *Guidelines for the management of Australia's shipwrecks* (AIMA & ACDO, 1994) and the UNESCO 2001 *Convention for the Protection of the Underwater Cultural Heritage* could be used as a basis for such a set of Regulations.

*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 are a very important for protecting fragile and archaeologically rich sites.

*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 be large enough to reasonably protect the site and its outlying elements.

*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?*

These sites can be better protected by being integrated into planning regimes by :

- Ensuring that provisions to protect historic shipwrecks and underwater cultural heritage are written into relevant planning and environmental protection Acts on at State and Commonwealth levels. This is already the case I believe for example with the *EPBC Act 2003* (CWLTH) and the *Environmental Planning and Assessment Act 1977* (NSW);
- Training of planners/project managers in relevant departments at both State and Commonwealth levels which carry out/issue approvals for seabed development to take into consideration underwater cultural heritage.
- Have the delegated authority for the *HSA 76* placed in cultural resource management agencies, which are more attuned to planning issues and are more responsive to cultural heritage impacts arising from development.

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

The support of avocational training programmes such as AIMA/NAS Introduction to Maritime Archaeology as well as incorporating sections on maritime heritage protection in diving course curriculums.

### **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?*

Not enough knowledge to comment.

*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.

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

Yes. See Q.12.

*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?*

Trade could continue if it can be ensured that relics will not leave the country, can be accessed for people doing research, can be made available for displays and are well conserved.

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

Yes. In NSW, for example, the absence of a dedicated repository for artefacts recovered by excavation is a critical failing in the management of the State's cultural heritage. IN NSW there is no place legislated to 'take' artefacts recovered from a shipwreck excavated under a permit issued through the HSA 76.

### **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?*

Not enough knowledge to comment.

*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 monetary penalties are laughable today. With respect to impacts arising from seabed development some proponents would consider paying the fines as a cheap way of overcoming the hindrances posed by the presence of a historic shipwreck within the development envelope.

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?*

Not enough knowledge to comment.

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?*

Not enough knowledge to comment.

**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 I wholeheartedly support the proposal to prohibit Australian nationals, Australian companies and Australian vessels from participating in illegal excavations or salvage in another country.

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

Yes. See Q.11.

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

Yes; unreservedly.

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

Yes.

Thankyou for allowing me the opportunity to comment.

Sincerely

  
Friday, July 17, 2009

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