



HERITAGE
COUNCIL
OF WESTERN AUSTRALIA

24 July 2009

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

Dear Sir/Madam,

Thankyou for the opportunity to provide comment on the Review of the *Historic Shipwrecks Act 1976* (the Act) and consideration of the requirements arising from the UNESCO 2001 *Convention for the Protection of the Underwater Cultural Heritage* Discussion Paper. We commend the Minister of the Environment, Heritage and the Arts in his efforts to amend the legislation to incorporate current heritage policy needs and to encourage best practice. Please find below responses from the Office of the Heritage Council of Western Australia.

Jurisdiction of the Act

The Office of the Heritage Council of Western Australia supports a review and amendment of the jurisdiction of the Act.

The Office supports the continuation of the application of the Act from all waters from the low water mark extending to the outer limit of the continental shelf, however clarification is required with regard to the following:

Jurisdiction in Coastal Waters - An important issue is for the Commonwealth to clarify its intent with respect to the relationship of the Act and corresponding state legislation. In particular, the Commonwealth should clarify the jurisdictional boundary between the Act and state legislation covering underwater cultural heritage (UCH) lying in state waters. Currently, ascertaining this boundary is an unnecessarily complex matter.

Jurisdiction in the Exclusive Economic Zone - A 1978 paper by Patrick O'Keefe and Lyndel Prott¹ analysed the Act in some detail. They noted that the Act's reach to the limit of the exclusive economic zone (EEZ) would probably not be recognised by other nations because this is in direct conflict with the principles of the 1958 Convention on the Continental Shelf (the Geneva Convention), which was later incorporated into 1982 UN Law of the Sea Convention (UNCLOS).

UNCLOS limits a coastal nation's exclusive rights in the EEZ to the exploration for and exploitation of natural resources, including fish, minerals, and petroleum products. The underlying rationale is that ships of other nations should enjoy the right of free passage in the EEZ, without fear of being taxed or otherwise interfered with by a coastal nation. In particular, ownership of shipwrecks in the EEZ is denied to coastal nations under UNCLOS.

¹ O'Keefe, PJ and Prott, LV. 1978 'Australian Protection of Historic Shipwrecks'. *Australian Yearbook of International Law*. Vol 6, p 119.

The courts of a coastal state have non-exclusive jurisdiction to adjudicate claims involving shipwrecks lying in the EEZ, but this does not confer a general regulatory jurisdiction over shipwrecks in the EEZ.

While there is no compelling reason to remove protection of UCH lying in the EEZ from the Act, it must be recognised that courts of other nations that are not parties to the UCH Convention, when hearing salvage claims to shipwrecks lying in Australia's EEZ, might not recognise the reach of the Act to such shipwrecks and thereby leave them completely unprotected. Accordingly, it is essential that Australia enact legislation to prohibit Australian nationals and residents from engaging in unauthorised activity directed at shipwrecks lying in the EEZ, pursuant to Articles 9 and 10 of the UCH Convention as discussed in Question 26, as well as prohibiting Australian-flagged vessels from being employed in such activity. Such prohibitions should extend not only to Australian citizens and permanent residents, but should make participation in such activity grounds for denial or revocation of any type of entry visa. Further, Australian port facilities and chandlery should also be prohibited from servicing vessels engaged in unauthorised activity directed at UCH in the EEZ.

Additionally, the Office of the Heritage Council of Western Australia supports the continued delegation of some powers by the Minister to State and Territory officials, but would suggest that responsibilities are clearly stated regarding who is responsible for what and in what capacity. This should be defined and negotiated in consultation with the agencies in question.

Scope of the Act

The Office of the Heritage Council of Western Australia supports a variation in the scope of the Act to cover all types of underwater cultural heritage, including submerged military wreckage, and particularly World War II aircraft. This improved coverage could be achieved by reducing the period of protection to older than 50 years, or by making an exception to include submerged wrecked military property of any age.

The Office of the Heritage Council of Western Australia supports the amendment of the Act to protect anything covered by the UCH Convention (i.e. other underwater historical sites including aircraft, Indigenous sites and human remains) but relevant language in the Act should be drafted so as to take into account the 2007 UN *Declaration on the Rights of Indigenous Peoples*, endorsed by Australia 3 April 2008, which recognises the right of Indigenous peoples to participate in the management of Indigenous archaeological sites.

The Office of the Heritage Council of Western Australia also supports the continuation of Ministerial powers to declare underwater sites of historical significance if they are less than the prescribed date. However, if the above amendments are made i.e. an expansion of the time period covered and more expansive site types included, the frequency this declaration is required would be substantially reduced. Additionally, the Act should expressly require other Federal agencies, e.g. the Australian Defence Forces (ADF), to co-operate with state and Commonwealth heritage agencies to protect the heritage values, significant heritage fabric, and archaeological material of submerged military ships and aircraft, where the ADF no longer has an operational interest or security concerns.

Provisions in other legislation (e.g., ss. 20 & 21 of the *Aboriginal and Torres Strait Islander Heritage Protection Act 1984*), and international agreements (e.g., Art. 12 of the 2007 UN *Declaration on the Rights of Indigenous Peoples*), address the handling, and in some cases repatriation, of Indigenous human remains. Language in the Act that specifically relates to human remains should be drafted with a view to ensuring compatibility with these provisions. The Office of the Heritage Council of Western Australia supports the respectful treatment of any submerged human remains and, wherever possible, the next of kin and/or relevant community should be consulted on their treatment and preservation as soon as possible following discovery and identification.

Register of Historic Shipwrecks and Historic Shipwreck Relics

The Office of the Heritage Council of Western Australia supports the establishment of a central national register, or an expansion of the current Australian National Shipwreck Database, to include other sites/material such as aircraft. The format of such a database

should be consistent with international standards to allow for comparative research. Current reporting requirements for the discovery of shipwrecks and relics should also be reviewed and updated to come in line with international best practice.

The Office of the Heritage Council of Western Australia would potentially support the continuation of monetary rewards for the discovery and reporting of shipwrecks and other underwater sites, to reduce the onus on the Commonwealth to undertake such projects. However, this should be closely regulated and not overly onerous to the agency and strict requirements for what is done once the discovery has been made e.g. notification of next of kin, fines for destruction and removal of any fabric, should be provided. The Act should expressly abrogate any rights arising in the finder under common-law doctrines relating to abandoned property, treasure trove, and salvage, with respect to UCH protected under the Act. However, Section 21 should be retained in the event that other property interests are found to be 'acquired' by operation of the Act.

Management of Historic Shipwrecks

The Office of the Heritage Council of Western Australia would suggest open access to most shipwrecks be discontinued and a permit system established. This would aid in monitoring visitation to these wrecks and allow some regulation of potentially destructive activities.

The Office of the Heritage Council of Western Australia supports amendments to the Act that explicitly state how archaeological surveys and excavations should be conducted and reported on. Any amendments should be decided by a committee of professional practitioners to establish best practice. These provisions should also be continuously reviewed to ensure they are in keeping with international standards and current best practice.

The Office of the Heritage Council of Western Australia supports the continued provision of protected zones and, if declared, these zones should be based on criteria such as level of significance, condition/fragility of the fabric, potential risks to this fabric, and the presence of human remains. There should be no maximum limit on the size of the protected zones; the site should define the area.

The Office of the Heritage Council of Western Australia supports the integration of historic shipwrecks into the planning regimes of the Commonwealth, States and Territories. However, these planning provisions should be enacted under State law, not under the Act.

The Office of the Heritage Council of Western Australia supports the continuation of dive tourism as this is an excellent means of communicating and showcasing our important heritage places to the international community. However, these activities should be regulated, perhaps with the permit system discussed above, with clear guidelines for allowable activities and periodic monitoring of sites to track impacts.

Management of Historic Shipwreck Relics

Although the current permit system does assist in the protection of historic shipwreck relics the Office of the Heritage Council of Western Australia would support an expansion of this system to better manage and conserve Australia's historic shipwreck relics. Isolated archaeological artefacts found in the sea, whether associated with a known shipwreck site or not, should also be protected. The Act should clearly state principles guiding how historic shipwreck relics should be conserved and curated. These principles should use current best practice and be periodically reviewed and updated.

Australia should only allow trade in relics with proven provenance that have been previously traded to continue, but only to the extent that doing so is consistent with the express provisions of the UCH Convention. The Act should clearly prescribe where all underwater relics that have been excavated should be stored and who should manage them.

Compliance and Enforcement

The Office of the Heritage Council of Western Australia supports a review of the current provisions for appointing inspectors under the Act and Regulations to ensure any individual appointed holds appropriate qualifications for the task assigned and has a proven track record in the industry.

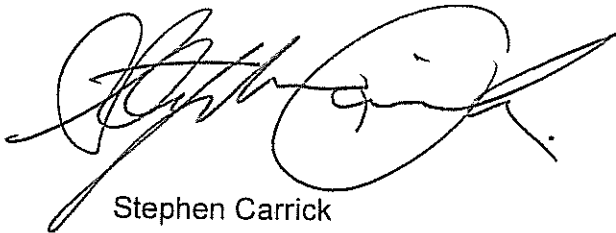
The current offence and penalty provisions are no longer appropriately framed to encourage compliance with the Act. In order to provide a satisfactory level of deterrence and the adequate protection of matters covered in the Act these should be reviewed and updated. Fines, for example, should be expressed in terms of penalty units, rather than a fixed dollar amount and the potential for gaol terms should be explored. The Act does not contain a sufficient, comprehensive and appropriate range of enforcement mechanisms capable of deterring and responding to contraventions of the Act. An example of additional mechanisms may be the evocation of crew licenses for vessels used in illegal activities and the confiscation of such vessels. The seizure and forfeiture provisions within the Act should also be improved to provide a better level of protection and repatriation of items illegally taken from historic shipwrecks.

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

The Office of the Heritage Council of Western Australia supports the ratification of the Underwater Cultural Heritage Convention, and the Annex, which defines the Rules of the Convention, as these are appropriate for the conservation of Australia's underwater heritage. The Office of the Heritage Council of Western Australia also supports the amendment of the Act to prohibit Australian nationals, Australian companies and Australian vessels from participating in illegal excavations or salvage in another country (also see comments related to 'Jurisdiction in the Exclusive Economic Zone'). The Act should be amended to comply with international best practice for the protection of underwater archaeological sites and artefacts.

Thankyou again for the opportunity to provide comment on the Review of the *Historic Shipwrecks Act 1976* (the Act) and consideration of the requirements arising from the UNESCO 2001 *Convention for the Protection of the Underwater Cultural Heritage* Discussion Paper. Should you have any further queries concerning the above please contact the Heritage Council of Western Australia on (08) 9221 4177.

Yours sincerely

A handwritten signature in black ink, appearing to read 'Stephen Carrick', written in a cursive style.

Stephen Carrick
A/DIRECTOR