

RESPONSE TO THE 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

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Q. 1.

In our opinion the Act should continue to apply from the low water mark to the outer limit of the continental shelf. Any proposal for change has to satisfactorily answer the question: why change? In our view no change is required by either the United Nations Convention on the Law of the Sea 1982 or the UNESCO Convention on the Protection of the Underwater Cultural Heritage 2001 (hereafter "2001 Convention"). The current regime has been in place for more than 40 years and does not seem to have caused any problems. Other States are well aware of the extent of Australia's claimed jurisdiction. While some might not agree with this there was certainly no attack on it during the protracted negotiations for the 2001 Convention. Most significantly, any change at this stage would send a signal to those States opposed to the 2001 Convention and its rules on jurisdiction that Australia has changed its interpretation of the two Conventions..

Q. 2.

We consider that the Act should continue to allow delegation of powers by the Minister to State and Territory officials. This is a good example of Commonwealth/State co-operation and one that allows those in closest contact with the day-to-day administration of matters affecting those aspects of the underwater cultural heritage affected by the Act to make operational decisions.

Q. 3.

There are good reasons for reducing the period for blanket coverage to 50 years from 75. The arguments in favour of blanket coverage are well known and will not be repeated here. But the main argument, that it prevents activity on the wreck until a decision can be taken on its importance, is just as valid for 50 year wrecks as those of 75. For the immediate future, this would cover all World War II wrecks. As stated, they can be dealt with by specific declaration. However, until that is done, they are vulnerable. There would be no clash with the 2001 Convention but the benefits of the Convention would not apply to wrecks between 50 and 100 years, the period specified in the Convention.

Q. 4.

The Act should definitely be extended to protect other aspects of the underwater cultural heritage as set out in the 2001 Convention. Protection of shipwrecks and associated relics only is now considered a very limited form of cultural resource management. All forms of cultural heritage underwater are entitled to protection. Having said that, any definition given in revised legislation should specifically mention shipwrecks and associated relics in order to attract the attention of those affected by it.

Q. 5.

It may be useful for the Minister to have the power to declare a certain site to be of significance although the importance of this would diminish if the blanket period were reduced to 50 years. The criteria should relate to the importance of the site to Australian history.

Q. 6.

The 2001 Convention provides in Article 2(9): "States Parties shall ensure that proper respect is given to all human remains located in maritime waters". In view of this we consider that there should be specific provision in the legislation but that it should not go further than the Convention requires. It would be almost impossible to lay down very detailed rules as much will depend on the circumstances. For example, if, in the unlikely event that the remains could be specifically identified, then any family of the deceased would have the right to determine what should be done with. Apart from that, international practice seems to draw a distinction between remains in warships and those in other vessels. Those in warships that went down in battle within the past 200 years should be preserved *in situ*, unless the government of the flag vessel determines otherwise, and the site should be protected as a war grave. Other remains could be excavated as part of an authorised operation subject to the overwhelming need for respect.

Q. 7.

There should certainly be a central register of historic shipwrecks to enable ease of access by overseas researchers. This would also demonstrate to other States Australia's recognition of the importance of this aspect of cultural heritage. The need for a central register of associated relics is less obvious but, seeing that the ANSDB is being upgraded in this respect, it would seem desirable to complete the task. Once this is done, then the ANSDB would appear to meet the needs of a

central national register although this is a question best answered by those who need to use the database in their day-to-day activities.

Q. 8.

We have no immediate experience of the operation of the current reporting requirements and their effectiveness in practice. However, the information required would seem to enable the site to be located which is probably all that can be reasonably expected at that stage in the process. More important than imposing further detail in the reporting requirements is that all persons likely to find such a site know of those requirements and their obligations under them.

Q. 9.

Provision of monetary rewards is troubling. There is a legal obligation to report discoveries with attendant penalties for not doing so. This is the same as obligations cast on citizens in many other areas of society. Yet carrying out those obligations is not accompanied by a reward for having done so. Paying a reward seems to flow from the old notion of salvage where the reward came from saving property likely to be lost at sea. It played a valid and useful role at the time the legislation came into force in persuading finders to report their discoveries. However, management of underwater cultural heritage in Australia and the knowledge of the general public are now much more sophisticated so that we believe monetary rewards should be done away with. On the other hand, persons who discover and report underwater cultural heritage can be gratified by public recognition of what they have found. This can take many forms such as the provision of plaques acknowledging their work; notices near displayed objects telling of their discovery; mention in official and informal publications; perhaps even a gift of replicas to the discoverer.

Q. 10.

Public access to underwater cultural heritage is emphasized in the 2001 Convention. For example, Article 2(10) states: "Responsible non-intrusive access to observe or document *in situ* underwater cultural heritage shall be encouraged to create public awareness, appreciation, and protection of the heritage except where such access is incompatible with its protection and management". And further, Rule 7 of the Annex provides: "Public access to *in situ* underwater cultural heritage shall be promoted except where such access is incompatible with protection and management". With this international endorsement, we would propose that the Act continue to allow open access to most shipwrecks. The matter was discussed extensively during negotiation of the 2001

Convention and there was no opposition to this as a point of principle. It was strongly endorsed by the United States of America.

Q. 11.

A permit is invariably required by national administrations before any activity directed at underwater cultural heritage may take place. The current Australian legislation is in alignment with this. However, we believe that there should be subsidiary regulations setting out many of the conditions that the permit holder will be required to observe. In drafting these attention should be paid to the Rules in the Annex to the 2001 Convention as representing international best practice (see response to Question 9). Further, various provisions of the Convention itself, such as Articles 9 and 10, require actions to be taken that could well be dealt with in a permit issuing process.

Q. 12.

Rules for the actual conduct of archaeological surveys and excavations and the reporting process should not be included in the Act itself. These should be a matter for subsidiary regulations which provide greater flexibility in administration.

Q. 13.

There should definitely be provision in the Act for the declaration of protected zones. These are but one element in the range of options available for management of the underwater cultural heritage. They should be seen as a step to be taken only if a site is under threat from divers or treasure hunters. Restricting access should be seen as a serious step and one to be taken only after consideration at the highest level. The degree of risk to the site and its importance should be primary considerations.

Q. 14.

In principle the needs of the site should define the area. However, the criteria by which the area is set in any particular situation should be publicly available in order that a challenge may be mounted by those affected.

Q. 15.

We do see a desirability for underwater cultural heritage to be integrated into the planning regimes. By way of comparison, the *European Convention on the Protection of the Archaeological Heritage* 1992 requires States Parties to ensure that archaeologists participate in planning policy making and to see that archaeologists and planners

systematically consult one another. That Convention applies to sites both on land and underwater. We do not know enough about the existing mechanisms in use in the States and Commonwealth to be able to comment on what mechanism should be preferred.

Q. 16.

Dive tourism should be encouraged provided there is adequate supervision and all those participating are educated in the values of the underwater cultural heritage. For example, in 2003, the then Vice President for Training, Education and Memberships of the PADI Asia Pacific Office said: "Divers are privileged to have access to underwater sites that are part of our cultural heritage or maritime history. To preserve the sites for future generations, it is important to be informed, dive responsibly and treat shipwrecks with honour and respect". This ethos needs to be expanded beyond PADI membership to all those engaged in dive tourism. Commercial enterprises that organize such tourism should be registered or licensed and required to abide by specified conditions. Staff must be knowledgeable in the requirements of the Act and its subsidiary regulations. Failure to observe conditions should lead to withdrawal of the licence.

Q. 17.

The system of protection needs to be seamless. All underwater cultural heritage should be protected and its removal or excavation subject to permit. The permit should specify what happens to any relics that are taken. As for relics already out of the water, the current situation should continue.

Q. 18.

Much will depend on the circumstances. A small isolated relic such as a pistol is likely to be lost if it is not removed. Even larger items may be subject to the vagaries of storm and ocean currents. Such objects may need to be removed before a permit can be obtained. In these circumstances, a scheme of protection needs to be put in place to cover these objects from the time they are discovered until they come into the possession of the responsible authority. In particular, there should be a requirement that the find spot be accurately recorded at the time of removal.

Q. 19.

The Act is not the place for principles guiding conservation and curation. The most basic of these should be in subsidiary legislation with the more detailed provisions in administrative guidance documents. There has to

be room for flexibility. Care has to be taken not to stifle innovation and advances in the methods used for conservation and curation.

Q. 20.

Subject to one exception, future trade in underwater cultural heritage should be banned. This is required by the 2001 Convention. However, trade in relics that have been previously traded can only be halted in accordance with the provisions of the Constitution. In our opinion, halting trade in such objects could only be done by acquisition on just terms and thus would require compensation to the current holders: this appears to require an exception to the general rule. Keeping track of objects being traded should not be particularly onerous once detailed computer records have been put in place.

Q. 21.

The Act could describe in general terms where excavated underwater cultural heritage should be stored and who should manage it, but it would be counterproductive to specifically name institutions and organizations. There needs to be flexibility to meet particular situations.

Q. 22.

We are not sufficiently acquainted with this aspect of administering the Act to comment except to emphasize the point that inspectors should be acquainted with the provisions of the Act and, more importantly, be very aware of its objectives.

Q. 23.

Appropriate framing of offence and penalty provisions of the Act will depend on how the obligations of the Act are changed as a result of this review. If the administration is altered in ways foreseen in the previous questions then new provisions will certainly be needed. Nevertheless, the current offence and penalty provisions of the Act are definitely in need of amendment. Firstly, they are a strange mixture of monetary penalties expressed in dollar terms and Penalty Units (ss. 17 and 28). All should be in Penalty Units to comply with current concepts and allow for automatic adjustments in value. The relationship between the monetary penalty and terms of imprisonment have also become skewed. For example, s. 11(3) refers to a penalty of \$5000 or two years imprisonment. In 1976, \$5000 was a very substantial sum of money. Today it is much less so while two years imprisonment is still the same deterrent.

Q. 24

The Act relies mainly on penalties – both monetary and imprisonment – to encourage compliance. Guidance as to other possibilities could be obtained by examination of foreign legislation – not necessarily restricted to underwater cultural heritage. For example, the *Archaeological Resources Protection Act* in the United States of America includes civil penalties based in part on the cost of repairing a site which has been unlawfully excavated. A significant jurisprudence has developed for this kind of calculation. Other matters could also be considered; such as a second offence carrying a higher penalty than a first and mitigating circumstances. These issues are extensively discussed in our joint book *Law and the Cultural Heritage: Volume I: Discovery and Excavation* at pp. 346-355.

Q. 25.

The seizure and forfeiture provisions would seem to be adequate. The range of objects covered may possibly need reconsideration. For example, are aircraft ever used in unlawful operations under the Act? Would the current scope of Section 25 extend to means of transport used by a person in travelling to and from the site?

Q. 26.

We would definitely support amendment of the Act to allow Australian nationals, companies and vessels being prohibited from participating in activities in the waters of other States Parties to the 2001 Convention contrary to the provisions of that Convention. This is an internationally agreed standard with more and more States adopting its provisions as time goes by. It would be counterproductive to consider other mechanisms. The 2001 Convention now has 26 States Parties which is a more than respectable number considering that it has only been in existence for eight years and is a Convention which requires serious consideration by States before becoming party.

Q. 27.

We are not sure what is intended by this question. Does it imply that the 2001 Convention is not international best practice? If so, how is such practice to be established and by whom? If there are areas that the Convention does not deal with the question is once again who decides what is the desirable practice?

Q. 28.

Australia should definitely ratify the 2001 Convention. The Convention would not require major alteration of Australia's current practice and

would bring Australia into line with international best practice. It would also send a powerful signal to other States prepared to follow Australia's lead particularly as Australia played a major role in bringing it into being. From the political point of view, major Pacific States including China, Japan and close allies such as Canada as well as other States relevant to Australian interests such as South Africa are in favour of the Convention. The Convention endorses Australia's existing assertion of authority over the Continental Shelf. Although a group of "like-minded" States led by the United States of America and Norway and including France, Germany, Netherlands, Sweden and the United Kingdom were not in favour of the Convention, this relates to a minority interpretation of the United Nations Law of the Sea Convention 1982 not accepted by the majority of States. Australia, Canada, Italy and Japan were a powerful moderating group in the negotiations between the two positions ("like-minded" and the rest of the world) and their proposals were responsible for the realization of the Convention.

Ratification of the Convention automatically ensures acceptance of the Rules in the Annex for the Annex is an integral part of the Convention (Article 33). Ratification of the Convention without the Annex could only be made by entering a reservation excluding the Annex at the time of ratification – this is prohibited by Article 30 which excludes, with one exception which is not relevant, all reservations to the Convention.

Q. 29.

The Rules in the Annex have possibly universal acceptance. In 1991, Patrick O'Keefe, Chairman of the Cultural Heritage Law Committee of the International Law Association, wrote to Graeme Henderson, Chairman of the newly formed ICOMOS International Committee on the Underwater Cultural Heritage. He asked if the ICOMOS Committee could assist in the preparation of a set of principles which could be attached as a "Charter" to the Draft Convention the ILA was preparing. The relevant principles were prepared at meetings in Paris, 1994, and London, 1995, and forwarded to UNESCO. The ICOMOS Committee then went further and, from this set of principles, developed its International Charter on the Protection and Management of Underwater Cultural Heritage ratified by the 11<sup>th</sup> ICOMOS General Assembly, Sofia, Bulgaria, October, 1966. In 1999 in Paris at the Second Meeting of Governmental Experts to negotiate the Convention, Canada stated that the standards set out in the Charter formed a good basis for the principles that should guide any authorized activity directed at underwater cultural heritage but they needed adjustment to fit the context of a Convention. Following on this, Canada circulated a working paper incorporating such

adjustments. This became the basis for work in a special group of archaeologists and administrators during that and the Third Meeting of Governmental Experts. Work in the group was the most homogenous of the entire series of conferences. At the Fourth Meeting the Rules were discussed in Plenary Session and adopted unanimously. During the debate in Commission IV of the UNESCO General Conference, some States that found problems with the 2001 Convention said that they supported the Rules and would apply them unilaterally.

We have set out the history of these Rules in some detail to show that they have been drafted by archaeologists and administrators specialized in underwater cultural heritage over a long period of time and given close consideration in technical fora. We would ask the question : are Australian conditions somehow different to the rest of the world so as to make their application inappropriate ?