

## World Archaeological Congress 4

University of Cape Town

10th - 14th January 1999



### **Symposium: Maritime archaeology: challenges for the new millennium**

#### ***Underwater cultural heritage management in Australia: a model in need of repair***

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#### **Introduction**

One of the mechanisms by which archaeological sites and artefacts throughout the world are protected is cultural heritage legislation (Prott and O'Keefe, 1984; Pearson and Sullivan, 1995:34-36). In 1982 the United Nations Convention of the Law of the Sea provided that 'States have the duty to protect objects of an archaeological and historical nature found at sea and shall cooperate for this purpose' (quoted in O'Keefe and Nafzinger, 1994:393). Unfortunately the wording is very vague and it has been left up to individual states to define 'objects of an archaeological and historic nature' and what they consider their 'duty to protect' might be.

In recent years many countries have enacted cultural heritage legislation for the protection of shipwrecks and other items of underwater cultural heritage in their territorial waters including the USA (Runyan, 1990; Aubry, 1992; Larsen 1994; Pelkofer, 1994), the UK (Oxley, 1994; Andrian, 1995), Canada (Save Ontario Shipwrecks, 1993) and South Africa (Werz, 1990; Deacon, 1993; National Monuments Council, n.d.). In addition the deep ocean is littered with cultural material which lies beyond the territorial seas, and therefore the jurisdiction, of individual nation states. Consequently there have been moves through ICOMOS, UNESCO and the United Nations Convention of the Law of the Sea to establish international guidelines or a convention for the protection of underwater cultural heritage (O'Keefe, 1981; O'Keefe, 1993; O'Keefe & Nafzinger, 1994).

## Historic shipwreck legislation in Australia

Australia is the world's largest island and the only single nation to occupy a continent entirely surrounded by ocean. The sea and shipping have played an important part in Australian history in a variety of areas including exploration, settlement, immigration, trade, commercial industries, sport and recreation. In the past four centuries many thousands of ships have been wrecked in storms, on coastlines, in warfare and in collisions around the Australian coastline.

Legislation for the protection of shipwrecks has been enacted at both Federal and State level in Australia during the past three decades (Ryan, 1977; O'Keefe and Prott, 1978; Jeffery, 1987; Hosty, 1987; Cassidy, 1991; Gurney, 1994). Unfortunately Australian shipwrecks legislation makes no attempt to cover other items of underwater cultural heritage such as aircraft or Indigenous sites. It is not that such underwater cultural heritage items and sites cannot be protected through legislation it is simply that governments have chosen not to extend that protection beyond shipwrecks. This is unlike the situation in the Canadian province of Ontario where any wreck which is 50 or more years old from the date of sinking is considered a heritage wreck and the term 'wreck' includes 'boats, ships or other vessels and *airplanes*' (Save Ontario Shipwrecks, 1993:37). Similarly in South Africa where the *National Monuments Act 1969* states that 'no person shall disturb or remove any wreck which is 50 years old or older without a permit' and extends the definition of 'wreck' to include 'any portion of a ship or *aircraft*' (Deacon 1993:2).

The Australian Commonwealth and various State governments, however, expend considerable amounts of funding on the preservation of the shipwreck component of Australia's underwater cultural heritage. Shipwrecks and their associated artefacts have been effectively raised into the public domain where they are subjected to a different 'otherworldly' morality of 'public good' (Carman, 1995:23). Consequently it has become possible to claim that the Commonwealth *Historic Shipwrecks Act 1976* 'enshrines in legislation a national obligation to preserve the integrity of Australia's historic shipwrecks, for the benefit of present and future generations' (ACDO, n.d.:1)

Interestingly, Australia has been seen as a world leader in the legislative protection of shipwrecks largely as a result of the early enactment of protective legislation in the 1960s and 1970s (Green and Henderson, 1977; Finley, 1988). To see the origins of historic shipwrecks legislation we need to go back to the early 1960s when a number of Dutch East India Company (VOC) shipwrecks in Western Australia were located by divers. At that stage the only existing legislation which could be applied was the Commonwealth *Navigation Act 1912*, largely based on the British *Merchant Shipping Act 1896*, which focussed on the preservation of the property rights of the owners and the legal obligations relating to salvage. It is only in relatively recent times that legislation has been used to manage and protect archaeological heritage, particularly in the underwater environment.

In 1976 Alan Robinson, a diver, mounted a case in the High Court of Australia attempting to claim possession of the *Vergulde Draeck* wrecksite (*Robinson v. The Western Australian Museum* (1977) 51 A.L.J.R.806). As part of its judgement the High Court found that the WA *Maritime Archaeology Act* (1973) had over-reached the jurisdictional powers of the Western Australian State government. The flaw lay in

the attempt to legislate to control waters from the low water mark out the three mile limit. The judgement was that the Commonwealth government was, in fact, responsible for this part of the territorial sea based largely on the *Seas and Submerged Lands Act 1973*. Fortunately the Commonwealth government had drafted and subsequently enacted the *Historic Shipwrecks Act 1976* (The Act).

The Act allows access to declared historic shipwrecks for non-disturbance purposes i.e. SCUBA diving, underwater photography and fishing are all allowed on declared historic shipwrecks while the removal of cultural material or archaeological excavation requires a permit (ACDO, n.d.). A small number of shipwrecks lie within 'protected zones' or no-entry zones up to 800 metres in radius which require a permit just to enter. A protected zone is declared when it is considered necessary to limit activities such as SCUBA diving which may adversely affect particularly sensitive archaeological sites. At October 1998 Commonwealth declared historic shipwrecks with prohibited zones were: *Pandora*, *Yongala*, *Aarhus* and *Foam* (Qld), *Zuytdorp* (WA), *Emden* (Cocos Island), *Duckenfield* (NSW), Japanese submarine *I-124* (NT), *Cato* and *Porpoise* (Coral Sea Territory).

Until 1993 the Act required the Minister to individually declare each shipwreck site that was considered to be of significance to be 'historic'. Amendments to the Act now give automatic protection to all shipwrecks 75 years after the date of sinking - so called 'blanket declaration' (Cassidy, 1991). This was the single most significant change to the legislation in the past two decades as it increased the number of declared historic shipwrecks from just over 150 to more than 5 000 literally overnight (MacIntyre, 1992:1-3). The implementation of 'blanket declaration' required an amnesty period, eventually of twelve months duration, to be granted to allow members of the public who held shipwreck material to declare this to the authorities.

Australian federal government legislation for the protection of historic shipwrecks has now been in existence for more than two decades. Twenty years or so down the track, however, the legislation can be viewed as less than cutting edge. Even the Commonwealth bureaucrats responsible for administering the Act have acknowledged that the Act 'may not adequately reflect developments since 1976 and current circumstances' (Cassidy, 1991:6).

One of the problems which has become increasingly evident in recent years arises as the result of the Commonwealth's attempt to skirt around the issue of ownership. In framing the legislation the Commonwealth did not claim ownership or assert title to the shipwrecks or associated artefacts covered by the Act unlike the more recent US legislation (*Abandoned Shipwreck Act 1987*). Some nations like the USA are prepared to interfere with ownership rights after a specified length of time; for example, in Spain the state becomes the legal owner of a wreck after three years if the owner makes no attempt to exercise rights to it, in Portugal the period is five years and in Finland the remains are vested in the state 100 years after sinking. It could be suggested that it is this period of time, however long or short it may be, that separates commercial salvage from archaeological investigations. Instead the Australian legislation deals with the issue by allowing the Minister (currently the Minister for Communications and the Arts) to make written directions about the possession, custody and control of artefacts (Commonwealth *Historic Shipwrecks Act 1976*:9) without the state making any claim to ownership.

One result is that it has proved impossible to prevent the sale of artefacts from historic shipwrecks on the open market as long as the artefacts were raised prior to the declaration of the historic shipwreck, the artefacts were declared to the authorities during the 1993 amnesty and the authorities are notified about the transaction. In fact it is likely that the monetary value of the existing pool of historic shipwreck artefacts has been substantially enhanced through this process as the amnesty has provided these artefacts with 'provenance' as well as largely preventing any more artefacts from being legally raised from the vast majority of Australia's shipwrecks (ACDO, n.d.:8).

Some shipwreck artefacts in Australia, particularly valuable items like coins, are quite clearly still not a part of the public domain and will continue to circulate through commercial transactions. The interesting legal point is that the individual does not 'own' the artefact but effectively the Commonwealth government has established a system whereby the individual can transfer 'custody and control' of an artefact (usually in exchange for a sum of money) to another person. In addition failure to adequately enforce the provisions of the shipwrecks legislation, and the *Protection of Moveable Cultural Heritage Act 1986*, is almost certainly allowing the illegal sale of coins from historic shipwrecks to overseas buyers through regular postal auctions and sales. The problems associated with the enforcement of the *Protection of Moveable Cultural Heritage Act 1986* including the lack of powers given to Customs officers to enforce the Act which has been previously discussed by Wiltshire (1993:3).

The Commonwealth government has delegated responsibility for the day to day administration of the *Historic Shipwrecks Act 1976* to a delegated authority in each state. The Commonwealth provides direct grants to the State and Northern Territory delegated authorities to investigate and document wreck sites, conserve artefacts, and develop management and public programs. The delegated authority has day to day responsibility to:

- \* survey, identify and assess shipwrecks
- \* recommend protection under the Act
- \* issue permits to applicants wishing to dive on shipwrecks protected by prohibited entry zones
- \* arrange protection for declared historic shipwrecks
- \* devise management plans for declared historic shipwrecks
- \* oversee the recovery, conservation and exhibition of relics from declared historic shipwrecks
- \* provide publicity and public education for historic shipwrecks and maritime archaeology generally

In addition to the federal legislation some Australian States (Victoria, Western Australia and South Australia) have also enacted specific legislation which covers shipwrecks in State internal waters including rivers and lakes, though it should be noted that Victoria recently moved from specific shipwreck legislation to more generic heritage legislation. Other States (Queensland, New South Wales, Tasmania and the Northern Territory) have opted for covering shipwrecks under more general

heritage legislation. Generally this sort of legislative and administrative ‘balkanisation’ results in some spectacular anomalies where some shipwrecks are protected while others are not. This results in an understandable level of confusion among the public, and occasionally among the administrators, about the necessity, utility and effectiveness of legislative protection. Shipwrecks in the Murray River region are a classic example of this phenomenon. Within New South Wales internal waters shipwrecks of 50 years or older are protected from disturbance under section 139 of the *Heritage Act 1977*, shipwrecks in the Victorian tributaries are protected only if they are older than 75 years while in the South Australian section of the River Murray only one shipwreck is protected by legislation - the *Waterwitch* (Kenderdine, 1993:7 and 1994:5-6). This is because South Australia still operates on a case by case basis for the declaration of historic shipwrecks rather than a ‘blanket declaration’ approach.

Each of the States and the Northern Territory has established programs for the protection of historic shipwrecks, the administration of the *Historic Shipwrecks Act 1976* and their own legislation. The States have some very different ideas about how to go about implementing these responsibilities and have opted for a variety of different kinds of organisations to administer the Act. Western Australia, Queensland and the Northern Territory have programs based in State run museums. On the other hand, South Australia, Tasmania, New South Wales and Victoria have developed public archaeology programs based in state government planning departments or similar agencies. In some states such as Queensland and the Northern Territory there is an administrative split with responsibility for State shipwrecks resting with one organisation and Commonwealth shipwrecks with another. In the Northern Territory, for example, the *Commonwealth Historic Shipwrecks Act 1976* is administered by the Northern Territory Museum and Art Gallery while the *Heritage Conservation Act 1991* is administered by the Conservation Commission of the Northern Territory (Dennis, 1993:3-6).

Needless to say each of these organisations has a different way of going about the protection and preservation of historic shipwrecks and their associated artefacts. One of the resulting problems is the potential for conflict of interest which exists where permits for the excavation of shipwrecks are under the control of organisations, such as museums, which have a vested interest in conducting the excavation of shipwrecks (Staniforth 1993:215-228). Excavation and *in situ* preservation can, in fact, be seen as being in opposition to one another and the excavation activities of maritime archaeologists are not necessarily in the best long term conservation interests of shipwreck sites. In most other areas of public archaeology there is a deliberate separation between the assessment and control of archaeological excavation and the actual conduct of archaeological excavation. This potential for conflict between archaeological or scientific values and preservation *in situ* or conservation values has also been recognised in the UK (Firth, 1995:60-66).

Interestingly the vast majority of those administrators and bureaucrats involved in the day-to-day operation of the legislation and historic shipwrecks programs in all the State and the Northern Territory governments are qualified maritime archaeologists with the important exception of the Commonwealth government. In Australia the practice of underwater cultural resource management and public maritime archaeology has been, in part, derived from American, and more recently, worldwide

models (McGimsey, 1972; Schiffer and Gummerman, 1977; Cleere, 1989). In a somewhat wider context John Carman has argued that there is an intimate link between 'the development of laws to govern the treatment of archaeological remains and the development of the discipline of archaeology itself' (Carman, 1995:20). Apparently the Australian states can see a direct link between historic shipwrecks legislation and the practice of maritime archaeology - a link which seems less apparent to the Commonwealth government.

Generally federal and state authorities involved in the administration of historic shipwrecks legislation have shown a marked reluctance to become involved in the active enforcement of this legislation. There have been a number of difficulties encountered in attempting to enforce the legislation particularly with respect to offences against section 13 of the Act involving illegal interference with, or damage to, a historic shipwreck or relic. There are inherent difficulties in proving an offence which occurs at some depth beneath the sea in the absence of direct observations of the fact by an investigating officer. As a result there have been relatively few attempted prosecutions under historic shipwrecks legislation and of these even fewer have been successful. This is despite a clear recognition that shipwrecks legislation needs to be enforced in order to be effective (Jeffery, 1987:17). One of the interesting consequences of the lack of enforcement is a serious deficiency of case law in this area, a remarkable degree of secretiveness by the bureaucrats and a sense that prosecutions mounted under shipwrecks legislation would have a very good chance of failing in court.

In South Australia, for example, under the provisions of the South Australia *Historic Shipwrecks Act 1981* and the associated *Historic Shipwrecks Regulations 1982* a total of eight individuals have been convicted in four different court cases during the past thirteen years (1985-98). All were charged with fishing without a permit within the protected zone established around the wrecksite of the *Zanoni* in Spencer Gulf. All pleaded guilty, were convicted and fined \$75 or \$80 with costs. In addition several cases were abandoned before they came to court for various reasons including on technical grounds or on the advice of the Crown Solicitor. It is interesting to note that all of the successful prosecutions have been for offences under the provisions of regulation 4(v) of the *Historic Shipwrecks Regulations* on one particular site (*Zanoni*) and that there has never been a case attempted under the provisions of the main Act.

These cases have established that a successful prosecution can only be mounted if it can be proved that the person knew of the regulation which prohibits access to the protected zone without a permit and that the person was knowingly within the protected zone. Consequently the State Heritage Branch of the Department of Environment and Planning found it necessary to widely publicise the existence of the regulation, establish warning signs at the boat ramps in the area and place a buoy with a warning sign on the wrecksite.

Four successful cases in more than a decade using legislation for the protection of the underwater cultural heritage compares poorly with an area where extensive and effective enforcement of legislation is carried out such as the economically important area of Fisheries. There was a record figure of 104 convictions for fisheries offences in 1995 in South Australia with fines ranging from \$152 to \$26,253 and one 12 month jail term being handed down (*Advertiser* 3 Feb 1996:14). In an economically rational

world the removal of artefacts from shipwrecks may be considered less important than abalone poaching but protection of cultural heritage still requires something more than lip service.

In fact, South Australia has a better record in the enforcement of shipwrecks legislation than a number of the other states where no successful prosecutions have ever been mounted. Bureaucratic inaction at Commonwealth and State level over many years including failures and delays in the appointment of inspectors under shipwrecks legislation and a marked reluctance among maritime archaeologists to be seen as 'police' are at the heart of the problem.

In the absence of effective efforts at enforcement of the legislation it is suggested that a significant part of the effect of Australian historic shipwrecks legislation is actually bluff and illusion - smoke and mirrors. The mere existence of the legislation is usually sufficient to keep many divers on the 'path of righteousness'. As a result it can be argued that legislation still plays a role in changing public attitudes even when it is not actively enforced and where few successful prosecutions are mounted. It can also be argued, however, that a small minority of the diving public see historic shipwrecks legislation as a 'paper tiger' and almost certainly continue to remove material from historic shipwrecks resulting in serious damage to the archaeological integrity of these sites. Sullivan, for example, has suggested that 'it is not unacceptable to assume that illegal abalone divers are also associated with the plundering of our valuable shipwreck resource' (Sullivan, 1994:52).

Legislation is simply one step towards the effective protection of shipwrecks and it is by no means the only answer to the problem. Generally effective protection of cultural heritage is about changing perceptions and public attitudes. The most effective method is to change community perceptions of underwater heritage away from 'treasure' and the idea that shipwrecks are a source of 'souvenirs' towards a conservation ethic. Both the Commonwealth government and the State delegated authorities have produced education programs in the form of pamphlets, brochures, posters, lecture series, videos and small text/image exhibitions (Nutley, 1987; Gesner, 1990; Nutley, 1994; Staniforth, 1994). The education programs mounted by various States are aimed at the majority of SCUBA divers and aim to encourage the idea that it is now socially unacceptable for divers to have or collect shipwreck artefacts. Of course, there are always some people who will disturb shipwrecks for profit or for souvenirs consequently an education program cannot succeed without effective enforcement. One important point to note here is that no two states have the quite the same approach to education programs. As a result useful and popular diver education programs are often mounted only in one state while other states put far less effort into diver education.

Despite the problems the majority of SCUBA divers have probably come to appreciate that the 'state' has an interest in shipwrecks and many have developed the very conservation ethic which historic shipwrecks legislation seeks to instil. For the rest, who may not understand why it is important to protect and preserve shipwreck sites, the education programs (largely) and enforcement (very occasionally) has persuaded them that it is not worth removing material from the declared historic shipwrecks. Even among those SCUBA divers who have gathered (albeit illegally)

collections of shipwreck material there has been a change in attitude towards a more conservation minded approach.

## **Conclusion**

There is no doubt about the need for legislative protection of Australia's underwater cultural heritage. Some of the problems with the existing situation stem from the unsuitability and outdated approach of the *Historic Shipwrecks Act 1976*. This legislation desperately needs to be completely rewritten and in the process needs to assert ownership of shipwreck material on behalf of the 'state'. New legislation should address a much wider definition of underwater cultural heritage including, at least, aircraft and needs to change the date of application from 75 years to 50 years in line with the *NSW Heritage Act 1977* and recent overseas trends.

The Commonwealth and State governments also need to seriously address the issue of the potential conflict of interest faced by some of the organisations which currently administer the historic shipwrecks legislation. A sharper dividing line between underwater cultural resource management or 'public' maritime archaeology and research or excavation oriented maritime archaeology needs to be established.

Finally far more emphasis need to be placed on the effective enforcement of the legislation including the appointment of inspectors under the legislation and building a case law base for the legislation. The education programs which have been largely state based need to be more standardised at a national level to allow a truly 'National Historic Shipwrecks Program' to be established.

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*Historic Shipwrecks Regulations* (South Australia)

*Merchant Shipping Act 1896* (Great Britain)

*National Monuments Act 1969* (South Africa)

*Navigation Act 1912* (Commonwealth)

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*Protection of Moveable Cultural Heritage Act 1986* (Commonwealth)

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**Mark Staniforth - autobiographical note**

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