

**Submission
No 105**

INQUIRY INTO REVIEW OF THE HERITAGE ACT 1977

Organisation: Australasian Institute of Maritime Archaeology

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Submission to the ‘Review of the *Heritage Act 1977*’

The Australasian Institute for Maritime Archaeology (AIMA) is Australia’s peak organisation representing professional maritime archaeologists, SCUBA divers, historians, photographers, students, academics, historical archaeologists, and conservation scientists. AIMA works for the protection, documentation interpretation and promotion of underwater cultural heritage (UCH) in Australasia.

AIMA also plays an active role in international maritime archaeology. AIMA participated in the drafting of, and strongly supports the UNESCO *Convention on the Protection of the Underwater Cultural Heritage 2001*. AIMA is formally accredited by UNESCO as a ‘Non-Government Organisation’ member of the Scientific and Technical Advisory Body (STAB) to the State Parties of the aforementioned Convention. This puts AIMA in a unique and credible position as being recognised to provide the highest level of advice on the management of UCH to governments all around the world. Accordingly, AIMA sends representatives to the annual meetings of the STAB at UNESCO headquarters in Paris each year. AIMA also supports UNESCO training field schools, seminars and conferences through sponsorship, and provides technical support.

AIMA also supports the work of the International Committee for Underwater Cultural Heritage (ICUCH) with several of our members represented on the committee and holds an associate membership to the Advisory Council for Underwater Archaeology (ACUA).

AIMA welcomes the review of the NSW *Heritage Act 1977* and such review must continue to demonstrate Australia’s leadership in UCH by committing to ratification of the UNESCO *Convention on the Protection of the Underwater Cultural Heritage 2001*.

Automatic protection of underwater cultural heritage

AIMA strongly supports the continued blanket protection of NSW’s historic shipwrecks and the inclusion of other underwater cultural heritage in the state through the archaeological provisions of its *Heritage Act*.

Reason: As an island country, Australia’s cultural heritage is inextricably linked with the sea. Australia’s Exclusive Economic Zone (EEZ) covers 8,148,250 square kilometres, which exceeds its land territory, and its coastline extends some 34,000 kilometres (excluding small offshore islands). Initial settlement by Indigenous Australians, and later by Europeans and other cultures was by watercraft or ocean-going vessels. Australia has over 8,000 shipwrecks, of which only a quarter have been found. Much of NSW’s nineteenth century transport and defence infrastructure was focused on the maritime

environment. Archaeological sites, be they on land or under water, contain important information that informs our understanding of past activity and the development of Australia as a country. It is therefore important that this information is protected in-situ for future generations while allowing a process for responsible scientific investigation to be carried out by appropriately qualified archaeologists. If damage cannot be avoided, then it is imperative that the archaeological information contained in these sites is recorded in accordance with international best practice.

Alignment with the *Underwater Cultural Heritage Act 2018*

AIMA submits that the definition of an archaeological site is made consistent with the definition contained in the Commonwealth *Underwater Cultural Heritage Act 2018*. Both Acts used to be aligned when the Commonwealth act was still the *Historic Shipwrecks Act 1976*. The latter was reviewed and updated so Australian legislation is in keeping with the UNESCO *Convention on the Protection of Underwater Cultural Heritage 2001*. The latter was adopted by the UNESCO general assembly in 2001, and passed into international law following its adoption by 20 state parties in 2009. It has currently been ratified by 69 countries.

Reason: The *Underwater Cultural Heritage Act 2018* sets out basic principles for the protection of underwater cultural heritage and provides widely recognized practical rules for the treatment and research of underwater cultural heritage.

As drafted, the definition of an underwater archaeological site is currently limited to historic shipwrecks. Part 3C, Division 1, Article 47 of NSW *Heritage Act 1977* reads:

“**historic shipwreck**” means the remains of any ship (including any articles associated with the ship)—

- (a) that have been situated in State waters, or otherwise within the limits of the State, for 75 years or more, or
- (b) that are the subject of a historic shipwrecks protection order.

The *Underwater Cultural Heritage Act 2018* (Part 1, Division 2, article 15) defines underwater cultural heritage as:

- (1) ***Underwater cultural heritage*** means any trace of human existence that:
 - (a) has a cultural, historical or archaeological character; and
 - (b) is located under water.
- (2) For the purposes of subsection (1), a trace of human existence includes:
 - (a) sites, structures, buildings, artefacts and human and animal remains, together with their archaeological and natural context; and
 - (b) vessels, aircraft and other vehicles or any part thereof, together with their archaeological and natural context; and
 - (c) articles associated with vessels, aircraft or other vehicles, together with their archaeological and natural context.

- (3) For the purposes of paragraph (1)(b), a trace of human existence is located under water:
 - (a) whether partially or totally under water; and
 - (b) whether under water periodically or continuously.
- (4) However, the following are not ***underwater cultural heritage***:
 - (a) pipelines or cables on the seabed;
 - (b) installations (other than pipelines or cables) that are:
 - (i) placed on the seabed; and
 - (ii) still in use.

The *Underwater Cultural Heritage Act* 2018 (Part 2, Division 1, article 16) also states:

Underwater cultural heritage that is automatically protected

- (1) The following articles are protected underwater cultural heritage:
 - (a) all remains of vessels that have been in Australian waters for at least 75 years;
 - (b) every article that is associated with a vessel, or the remains of a vessel, and that has been in Australian waters for at least 75 years;
 - (c) all remains of aircraft that have been in Commonwealth waters for at least 75 years;
 - (d) every article that is associated with an aircraft, or the remains of an aircraft, and that has been in Commonwealth waters for at least 75 years.
- (2) An article is covered by subsection (1) whether or not the existence or location of the article is known.
- (3) An article is covered by subsection (1) even if the article is, or has been, removed from Australian waters or Commonwealth waters (as the case may be).
- (4) The Underwater Cultural Heritage Rules may provide that subsection (1) or (3) does not cover a specified article.

AIMA therefore submits that the Review of the NSW *Heritage Act* includes this definition and the automatic protection of UCH sites as outlined above. The effect of this change would bring NSW's state heritage protection in line with Commonwealth legislation and international best practice.

Aboriginal archaeological sites under water

Furthermore, AIMA Members recently led the project which found the first known submerged Aboriginal archaeological sites at Murujuga in Western Australia¹ and they demonstrated that ancient archaeological sites can survive

¹ Benjamin, J., O'Leary, M., McDonald, J., Wiseman, C., McCarthy, J., Beckett, E., Morrison, P., Stankiewicz, F., Leach, J., Hacker, J., Baggaley, P., Jerbić, K., Fowler, M., Fairweather, J., Jeffries, P., Ulm, S. and Bailey, G. (2020). Aboriginal artefacts on the continental shelf reveal ancient drowned cultural landscapes in northwest Australia, *PLOS One*, 15(7): e0233912, pp.1–31. <https://doi.org/10.1371/journal.pone.0233912>

the rise of sea-level and suggest there may be many more sites to record, manage and protect around Australia's coast. The continental shelf down to 130m depth was previously dry land (as recent as 18,000 years ago), and was inhabited by Indigenous Australians—therefore any seabed at that depth (or less) has the potential to have preserved Indigenous cultural sites, artefacts and other forms of tangible and intangible heritage and archaeological material.

There are two distinct legal frameworks for cultural heritage in the sea off NSW, with state heritage legislation applying from the shore to the limit of Coastal Waters, and federal heritage legislation applying from Coastal Waters to the limits of Australian Waters and Commonwealth waters. Coastal Waters is defined as the 'Territorial Sea baseline' plus three nautical miles.

Federal and state legislation differ in their protection for submerged archaeological landscapes. The federal act provides automatic legal protection for shipwrecks and aircraft lost at least 75 years ago, protecting in theory even to those shipwrecks and aircraft with unknown locations. The act explicitly includes a mechanism for the protection of submerged Aboriginal archaeology, but for each site requires a ministerial declaration.

Within NSW, Indigenous cultural heritage and significant places are protected under the *National Parks and Wildlife Act 1974* but only when declared an Aboriginal Place. This act makes it an offence to 'harm or desecrate an Aboriginal place' (86(4)). The act covers the land of NSW including "those parts of the seabed and of the waters beneath which it is submerged that are within the territorial jurisdiction of New South Wales (*National Parks and Wildlife Act 1974*, p. 29; *Crown Lands Consolidation Act 1913*). Submerged archaeological landscapes are not explicitly mentioned but in this way the act protects them seamlessly alongside terrestrial archaeological landscapes.

It is fortunate that the existing NSW state heritage legislation extends offshore in this way, as the submerged archaeological landscape predates the location of the current shoreline and forms a seamless extension of NSW's archaeological landscape. Indeed, this seamless nature of this landscape is central to the traditions of many of NSW's Indigenous cultures.

Unfortunately, the existence of this finite and fragile archaeological resource has often been overlooked in Australian offshore planning and development mitigation. To minimise this problem in the future, we recommend that explicit recognition of the existence of this submerged landscape alongside aircraft and shipwrecks should be made in legislation.

AIMA welcomes the opportunity to further engage with the review of the NSW Heritage Act and assist with the development of appropriate, sustainable actions to achieve best practise standards for the protection and management of maritime cultural heritage.

Yours sincerely,

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