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Assessing the significance of twentieth century underwater cultural heritage

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Author Biography

Dr Mark Staniforth is Senior Lecturer in Maritime Archaeology in the Department of Archaeology at Flinders University. In his PhD, he examined issues of trade, capitalism and consumption through the study of material such as the Chinese export porcelain from the wreck of the Sydney Cove (1797). He spent six years as Curator of Maritime Archaeology at the Australian National Maritime Museum (ANMM) in Sydney (1987-1993) after serving as State Maritime Archaeologist at the Victoria Archaeological Survey (VAS) for five years (1982-1987). He has been involved in maritime archaeological work in every Australian State and on many of the well-known projects conducted in Australia in the past twenty-five years. Mark has published extensively in Australian and international journals including Historical Archaeology, Underwater Archaeology and the International Journal of Maritime History.

Mark is an elected member of the prestigious International Advisory Council on Underwater Archaeology (ACUA). He is a past President and Vice-President of the Australian Institute for Maritime Archaeology (AIMA), former Secretary of the South Australian chapter of the Australian Association of Consulting Archaeologists Inc. (AACA) and former Chair of the NSW Maritime Archaeology Advisory Panel (MAAP). He is currently President of the Australian Association for Maritime History (AAMH) and the Book Reviews Editor of the refereed journal The Great Circle.
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ABSTRACT

Significance assessment is frequently used to evaluate the importance of archaeological sites both on land and, more recently, underwater. The assessment of significance often determines suitability for legislative protection. Australia has a variable record with regard to the legislative protection of twentieth century underwater cultural heritage, with the current situation being particularly inconsistent. Recent proposed and actual changes to international conventions as well as to Australian national and state legislation and administrative arrangements have created at least five different legislative regimes.

This paper will focus on the significant differences that exist in the legislative protection afforded twentieth century underwater cultural heritage in Australia. These arise partly as a result of the case-by-case approach to significance assessment that still exists in South Australia under the SA Historic Shipwrecks Act 1982 compared to the various systems of blanket coverage such as those with a fixed date (of 1900 in Western Australia under the Maritime Archaeology Act) or a rolling date (of 75 years under the Commonwealth Historic Shipwrecks Act 1976). It will also address some of the problems that are becoming apparent with the current exclusive focus by both Commonwealth and State agencies on shipwrecks rather than the totality of underwater cultural heritage. Problems that can only increase with the ratification by Australia of the draft UNESCO Convention on the Protection of the Underwater Cultural Heritage expected to occur during 2002.

Keywords: shipwrecks, underwater cultural heritage, legislation, UNESCO Convention.
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**Introduction**

Australia has a very variable record with regard to the legislative protection of twentieth century underwater cultural heritage with the current situation being particularly inconsistent. The major cause of this variation has been in relation to the determination of significance. All too often the assessment of significance relies primarily on the age of the site, however the determination of when a site becomes significant has differed across state and between state and Commonwealth boundaries. Generally speaking nineteenth century shipwreck sites are protected by legislation and therefore can be seen as a significant, or important, component of Australia's heritage. It is twentieth century shipwreck sites, as well as underwater cultural heritage other than shipwrecks, that seem to be considered less significant and therefore are rarely protected by legislation.

Recent proposed and actual changes to international conventions as well as to Australian national and state legislation and administrative arrangements have created a situation where at least five distinctly different legislative and/or administrative approaches exist. This paper examines some of the significant differences that exist in the levels of legislative protection afforded twentieth century underwater cultural heritage in Australia. These arise from the different approaches of the various state governments and the Commonwealth government. It will also address some of the problems that are becoming increasingly apparent as a result of the almost exclusive focus by both Commonwealth and State governments on shipwrecks rather than the totality of underwater
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cultural heritage. Underwater cultural heritage has recently been defined by the UNESCO Convention on the Protection of the Underwater Cultural Heritage that was passed by the UNESCO General Assembly in Paris in November 2001. The Convention definition includes "all traces of human existence having a cultural, historical or archaeological character which have been partially or totally underwater, periodically or continuously, for at least 100 years" (UNESCO Convention, 2001:2). This is taken to include submerged buildings, aircraft, structures such as jetties, objects of a "prehistoric character" as well as shipwrecks.

Jurisdiction

The issue of jurisdiction is central to this discussion as different State or Commonwealth legislation or the UNESCO Convention will apply according to the particular location of an underwater cultural heritage site. The specific boundaries between Commonwealth and State jurisdiction with regard to shipwrecks vary from state to state and have been the subject of ongoing negotiation and occasional reinterpretation (Green, 1995). Nevertheless, there are three general areas of jurisdiction that exist around the Australian coastline. Firstly, there are state internal waters that principally consist of rivers, lakes and some enclosed or "historic" bays. In South Australia, for example, these include St Vincent's Gulf and Spencer Gulf and in Victoria these include Port Phillip Bay and Corner Inlet.

Secondly, there are Commonwealth waters that generally include waters from the high water mark out to sea including coastal waters, the territorial seas, contiguous zone and Exclusive
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Economic Zone (or EEZ). Commonwealth waters are measured from what is known as the territorial sea baseline (TSB), generally the level of lowest astronomical tide. They are consist of:

• 3 nautical miles of coastal waters – a belt of water in which the seabed is vested in the adjacent state or territory as if that belt formed part of that state or territory - in the case of shipwrecks this has been transferred by the states and territories to the Commonwealth;

• 12 nautical miles of territorial sea – a belt of water in which Australia has sovereignty over the sea, its seabed and sub-soil, and the airspace above it;

• 24 nautical miles of contiguous zone – a belt of water contiguous to the territorial sea where Australia may exercise the necessary control to prevent infringement of its customs and immigration laws and regulations; and

• 200 nautical miles of the Exclusive Economic Zone (EEZ) – a belt of water where Australia has sovereign rights for the purpose of exploring and exploiting, conserving and managing the natural resources of the sea and seabed, and other activities such as production of energy from the sea, currents and wind.

Finally, there are International waters that lie outside the direct jurisdiction of either State or Commonwealth governments but which Australia will have certain responsibilities when, and if, it ratifies the UNESCO *Convention*.

Thus responsibility for the legislative protection of underwater cultural heritage is spread, and sometimes shared, between Commonwealth government and State governments. The legislation is implemented on a day-to-day basis primarily by Environment Australia at a national level and
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within each state by state government agencies such as Heritage SA, NSW Heritage Office, Tasmanian Parks and Wildlife Service and the WA Maritime Museum.

**Shipwrecks only or underwater cultural heritage in general?**

One of the greatest problems with the current situation is that most of the existing State and Commonwealth legislation in Australia only provides legislative protection for shipwreck sites and their associated artefacts. Thus legislative protection often does not extend to other types of underwater cultural heritage including aircraft or other twentieth century "historic" underwater sites (Jung, 1996). It is not that underwater cultural heritage items and sites cannot be protected through "shipwreck" legislation; it is simply that some Australian governments have chosen not to extend that protection beyond a narrow definition of "shipwreck". 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). Generally speaking, very little of Australia's twentieth century underwater cultural heritage, apart from some shipwrecks that sank in the first quarter of the twentieth century, has any form of legislative protection except in certain states like NSW.

**Significance assessment and legislative protection**

Significance assessment has frequently been used in Australia to evaluate the importance of heritage, in general, and archaeological sites, in particular, both on land and underwater (Pearson
and Sullivan 1995:16-22 and 126-186). Understanding and evaluating the relative importance of a heritage site is then often used in making decisions about the future of the particular site (NSW Heritage Office 2001:2-4). In the case of historical archaeological sites, the assessment of significance is commonly used to determine the suitability of the site for legislative protection. This results in the legislative protection of sites on what is known as a "case-by-case" basis whereby the particular site has to be individually identified and listed on a "Register" such as the Commonwealth government's Register of the National Estate (Pearson and Sullivan 1995:37). The Commonwealth Historic Shipwrecks Act (1976), for example, operated on a case-by-case basis between 1976 and 1993 where an individual shipwreck site had to be nominated and "assessed as being significant according to particular criteria" in order to qualify for "selective declaration" as a "historic shipwreck" (Cassidy 1991:4). The seven criteria used for significance assessment were:

* a wreck significant in the discovery, early exploration, settlement or early development of Australia
* relevance of a wreck to the opening up or development of parts of Australia
* relevance of a wreck to a particular person or event of historical importance
* the wreck as a possible source of relics of historical or cultural significance
* the wreck as representative of a particular maritime design or development
* Naval wrecks, other than those deliberately scrapped or sunk and having no particular historical or emotional interest
* wrecks of outstanding recreational or educational interest (Nutley, 1991).

As a result of this method of significance assessment there were relatively few "declared historic shipwrecks" (just over 100 by the early 1990s) compared to a very much larger number of
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shipwrecks (many thousands) that were not protected by the Commonwealth *Historic Shipwrecks Act* (1976).

The main alternative to the formal assessment of significance and subsequent registration is some form of legislative protection that is extended to archaeological sites as a "class". Aboriginal sites in Australia are frequently protected in this way (Pearson and Sullivan 1995:37). In 1993 the Commonwealth government enacted amendments (that had been first proposed in 1985) to the Commonwealth *Historic Shipwrecks Act* (1976) to provide shipwreck sites as a class with what was referred to as "blanket declaration" (Cassidy, 1991). The implementation of blanket declaration required an amnesty period, eventually of twelve months duration, to be granted which allowed members of the public who held shipwreck material to declare this material to the authorities. 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 100 to more than 6 000 literally overnight (MacIntyre, 1992:1-3).

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 *Historic Shipwreck Act* acknowledged a decade ago that the Act "may not adequately reflect developments since 1976 and current circumstances" (Cassidy, 1991:6).
Generally, any form of blanket (or class) protection for historic period archaeological sites is extended to sites, and associated artefacts, on the basis of either a set "cut-off date" (i.e. 1900) or what is referred to as a "rolling date" (i.e. 75 years). In the case of a cut-off date, all sites and artefacts that were abandoned, wrecked or otherwise deposited in the environment before a certain date are protected by the legislation. A set cut-off date of 1900 is the basis for protection of the remains of "any ship lost, wrecked, abandoned or stranded before 1900" that falls within the jurisdiction of the West Australian Maritime Archaeology Act (1973) (Henderson 1986:73). On the other hand, a rolling date means that only on the particular "birthday" of the shipwreck event does the site become protected. It is this 75-year "rolling date" system that has applied in the case of the Commonwealth Historic Shipwrecks Act (1976) since 1993. As a result, on the 75th birthday of a particular shipwreck event (currently a date in 1926) the remains of that shipwreck will become protected by the existing Commonwealth legislation. Even this is currently ambiguous with Environment Australia suggesting that the 75 year date may apply to the date of building of the vessel not the sinking of the vessel. If this interpretation is correct then the legislation applies to an even greater number of shipwrecks than previously thought.

**Legislative protection for twentieth century shipwrecks**

There are dramatic differences that exist in the legislative protection afforded twentieth century shipwrecks in Australia. Some of these differences arise as a result of the case-by-case approach to significance assessment, and subsequent legislative protection, that continues to exist in South Australia. This can be compared to the various systems of blanket coverage such as those with a fixed date or a rolling date. The imposition of a fixed date of 1900 in Western Australia is a
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major impediment to the legislative protection of twentieth century underwater cultural heritage. Depending on the rolling date (50, 75 or 100 years) means that a greater or lesser proportion of twentieth century shipwrecks are protected by legislation.

Let us examine the case studies of four shipwrecks at 25 year intervals starting in the late nineteenth century to see if these sites would be protected under the provisions of existing or proposed International Conventions, Commonwealth and/or State legislation.

<table>
<thead>
<tr>
<th>* International waters</th>
<th>UNESCO Convention</th>
<th>not at present but will be once the Convention is ratified</th>
</tr>
</thead>
<tbody>
<tr>
<td>* Commonwealth waters</td>
<td>Historic Shipwrecks Act</td>
<td>Yes</td>
</tr>
<tr>
<td>* NSW land and waters</td>
<td>Heritage Act</td>
<td>Yes</td>
</tr>
<tr>
<td>* WA waters</td>
<td>Maritime Archaeology Act</td>
<td>Yes</td>
</tr>
<tr>
<td>* SA waters</td>
<td>Historic Shipwrecks Act</td>
<td>Only on a case by case basis</td>
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</tbody>
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Table 2. A vessel lost in 1901 is protected by legislation/convention in

<table>
<thead>
<tr>
<th>Area</th>
<th>Legislation/Convention</th>
<th>Protection Status</th>
</tr>
</thead>
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<tr>
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<tr>
<td>* SA waters</td>
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</tr>
</tbody>
</table>

Table 3. A vessel lost in 1926 is protected by legislation/convention in

<table>
<thead>
<tr>
<th>Area</th>
<th>Legislation/Convention</th>
<th>Protection Status</th>
</tr>
</thead>
<tbody>
<tr>
<td>* International waters</td>
<td>UNESCO Convention</td>
<td>No</td>
</tr>
<tr>
<td>* Commonwealth waters</td>
<td>Historic Shipwrecks Act</td>
<td>Yes</td>
</tr>
<tr>
<td>* NSW land and waters</td>
<td>Heritage Act</td>
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</tbody>
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<table>
<thead>
<tr>
<th>Table 4. A vessel lost in 1952 is protected by legislation/convention in</th>
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</thead>
<tbody>
<tr>
<td>* International waters</td>
</tr>
<tr>
<td>* Commonwealth waters</td>
</tr>
<tr>
<td>* NSW land and waters</td>
</tr>
<tr>
<td>* WA waters</td>
</tr>
<tr>
<td>* SA waters</td>
</tr>
</tbody>
</table>

It should be clear from these tables that the automatic legislative protection extends to virtually all nineteenth-century shipwreck sites in Australia. The exception is South Australia where a case-by-case system of protection for shipwreck sites still exists. As a result only a relatively small number of nineteenth century shipwreck sites and an even smaller number of twentieth century shipwreck sites are protected by legislation in South Australia.

It should also be clear that there is one set date and, at least, three cut-off dates for the protection of Australia's shipwreck heritage. These are 1900 (in WA), 100 years ago under the draft UNESCO Convention, 75 years ago (in Commonwealth waters) and 50 years ago (in NSW). 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 even among the administrators, about the necessity, utility and effectiveness of legislative protection for individual sites. Overall the level of inconsistency is quite remarkable.
Riverine underwater cultural heritage

The River Murray is Australia's largest and most important riverine environment. The River Murray contains a range of underwater cultural heritage material submerged in the river including paddle-steamers, barges and terrestrial archaeological features that extend underwater such as slipways at ship-building yards, jetties and wharf structures (Kenderdine 1992, 1993).

Shipwrecks in the Murray River region are a classic example of the inconsistency of approach between the Commonwealth and state governments. The jurisdiction issue is key with regard to the legislative protection of the underwater cultural heritage of the River Murray. Within New South Wales internal waters shipwrecks of 50 years or older are protected from disturbance under section 139 of the *Heritage Act* 1977. A significant proportion of the underwater cultural heritage of the River Murray lies within NSW primarily as a result of fact that the border between NSW and Victoria is situated on the high bank on the southern side of the river. Thus the entire underwater part of the river lies within NSW jurisdiction (Black and Nutley 1992:8.1). This is fortunate because the only underwater cultural heritage material protected by Victorian legislation is that which is 75 years old (ie older than 1926). That is still much better than the situation in the South Australian section of the River Murray where only one shipwreck is protected by legislation - the *Waterwitch* (Kenderdine, 1993:7 and 1994:5-6). Again 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.
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**UNESCO Convention on the Protection of the Underwater Cultural Heritage**

In July 2001 a final draft Convention on the Protection of the Underwater Cultural Heritage was agreed upon by a meeting of experts at UNESCO headquarters in Paris. This Convention will be submitted to the General Conference of UNESCO between 15 October and 3 November 2001 for ratification. Once ratified the Convention will, over time, change the ways in which twentieth century underwater cultural heritage is protected in Australia.

The first, and possibly most important, change that will result is that the UNESCO Convention applies to "all traces of human existence having a cultural, historical or archaeological character which have been partially or totally underwater, periodically or continuously, for at least 100 years" (UNESCO Convention 2001:2). This rolling date of 100 years might appear to have limited value in terms of protecting twentieth century underwater cultural heritage sites - at present it will automatically cover just the first year or so of the twentieth century. I would argue, however, that the UNESCO Convention will do rather more for twentieth century sites that just this. It has already focussed the attention of the Commonwealth government on some of the more general issues that arise from the ratification of the UNESCO Convention - something that they have been notoriously reluctant to do in recent years. The best example of this expanded interest from Environment Australia is the development of a proposed National Maritime Heritage Strategy that just might include rewriting, and expanding, the now seriously out-of-date Commonwealth Historic Shipwrecks Act (1976).

**Legislative protection and education programs**
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 underwater cultural heritage is about changing public perceptions and 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, shipwreck trails, videos and small text/image exhibitions (Nutley, 1987; Strachan 1995; McCarthy and Garrett, 1998). The education programs mounted by various State agencies are aimed primarily at SCUBA divers and are intended 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. Another 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.

**Conclusion**

There is no doubt about the need for legislative protection of Australia’s twentieth century underwater cultural heritage, however it is clear that the current legislative framework fails to achieve this goal. Some of the problems with the existing national situation stem from the unsuitability and outdated approach of the Commonwealth *Historic Shipwrecks Act* 1976. This
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legislation desperately needs to be completely rewritten and in the process needs to consider asserting ownership of shipwreck material on behalf of the "state". New legislation should also address a much wider definition of underwater cultural heritage to include aircraft and other maritime heritage sites. It also 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 lack of consistency between the states in terms of their implementation of the Commonwealth legislation and the vastly different state legislation are also serious problems. It is clear that a far better level of integration between the Commonwealth and state government agencies is needed to provide a coherent national approach to the protection of underwater cultural heritage.

In addition the legislation is deficient in terms of what should be protected. While shipwrecks are an important part of our maritime and underwater cultural heritage, they form only one part of it. The omission of other maritime cultural heritage as well as sites that end up underwater through catastrophe, such as aircraft sites, can mean the destruction of valuable cultural heritage material that enrich the archaeological record.

This paper is about differing administrative approaches to the assessment of significance that are primarily based on age but it is also a story of federalism at its worst. Not only does the legislation vary across boundaries with disastrous effects on archaeological resources, but so too does the effort. Education programs that flourish in one state may be ignored in another because of different priorities and perhaps because of the "not invented here" syndrome. Whether this situation is represented in what is enacted in the legislation, or simply in the practice of agencies
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or both, it can only inevitably lead to the destruction of, and therefore the diminishment of, the cultural heritage of this country.
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