

EXPLANATORY STATEMENT

Underwater Cultural Heritage Act 2018 (Protected Zones) Declaration Instrument 2019

(Issued by the authority of the Minister for the Environment)

Purpose and operation

Subsection 20(1) of the *Underwater Cultural Heritage Act 2018* (the Act) provides that the Minister may, by legislative instrument, declare an area containing protected underwater heritage to be a protected zone.

Protected zones provide an additional layer of protection for underwater cultural heritage sites. In making a declaration, the Minister must have regard to the matters specified in subsection 20(3) of the Act, which include conservation, management and public safety considerations. This ensures that site-specific features that may include, for example, unexploded military ordnances or unstable structures are taken into account.

Under subsection 20(5)(d), the Minister must specify the prohibited conduct for each protected zone. A non-exhaustive list of the types of conduct that can be prohibited under subsection 20(5)(d) are specified in subsection 20(7). This allows the declaration to be tailored to prohibit conduct in each zone to specifically suit the site-specific circumstances. In this way, freedom of movement is not unnecessarily restricted where it does not impinge on the objective of protecting the underwater cultural heritage.

Section 20 of the Act also allows the size of protected zones to be tailored to suit individual site requirements. While it is not generally envisaged that the Minister will declare an area larger than 200 hectares, the flexibility for the Minister to declare a larger area will allow for zones to be established around sites that are widely spread e.g. shipwrecks in deep water that have extensive debris fields on the sea floor.

To facilitate a smooth administrative transition from the, to be repealed, *Historic Shipwrecks Act 1976* to the Act, the Minister is making this *Underwater Cultural Heritage Act 2018* (Protected Zones) Declaration Instrument 2019 (the Instrument) prior to the commencement of the Act, pursuant to section 4 of the Acts Interpretation Act 1901. The Instrument will not commence until the Act commences on 1 July 2019.

Background

The Act provides protection for approximately 8000 shipwrecks, sunken aircraft and other types of underwater cultural heritage sites. This instrument provides for the establishment of 27 protected zones around 28 protected underwater cultural heritage sites.

Subsection 20(7) of the Act specifies a range of conduct, either generally or specific circumstances, which may be prohibited, including:

- a) the entry of persons or vessels into the area;
- b) the movement of persons or vessels within the area;
- c) trawling or fishing in the area;
- d) conducting underwater activity within the area;
- e) the anchoring or mooring of vessels in the area;
- f) the release or deposit of objects or materials in the area.

Consultation

The Minister's State, Northern Territory and Norfolk Island Delegates appointed under the *Historic Shipwrecks Act 1976* have been consulted since December 2018 via phone and email on the sites that would be suitable for declaration within protected zones under the Act. The Delegates are predominantly the senior heritage officials in each jurisdiction typically responsible for the State or Northern Territory legislation that protects underwater cultural heritage. The exception to this is Norfolk Island, where the Delegate is a position within the Norfolk Island Museum that overlooks the site of HMS *Sirius*. Each Delegate was required to consider the criteria for the protection of a site, what conduct should be prohibited for each site and to agree to the establishment of the protected zones within their areas of jurisdiction.

Regulatory impact analysis

The Office of Best Practice Regulation (OBPR) was consulted about this instrument and advised the Department on 6 June 2019 that the instrument is likely to have nil regulatory impacts on business, community organisations or individuals, and a Regulatory Impact Statement (RIS) is not required (OBPR ref ID 25225).

Details of the Declaration of Protected Zones

Name of Instrument

The name of the instrument is the *Underwater Cultural Heritage Act 2018* (Protected Zones) Declaration Instrument 2019 (**the Declaration**).

Commencement

The Declaration commences on 1 July 2019.

Authority

The Declaration is made under the authority of section 20(1) of the *Underwater Cultural Heritage Act 2018* (the Act). In determining whether to declare the protected zones, the Minister has considered the following matters specified in subsection 20(3) of the Act, being:

- (a) the need to protect underwater cultural heritage that is of particular national or international significance, is rare or is subject to an international treaty or agreement (however described);
- (b) the need to limit access to environmentally, socially or archaeologically sensitive underwater cultural heritage;
- (c) the need to protect underwater cultural heritage that is under threat of interference, damage, destruction or removal;
- (d) any danger posed to the public by the underwater cultural heritage;
- (e) the need to improve management of underwater cultural heritage and its surrounding environment which may be subject to impacts from visitation or development activity;
- (f) the need to ensure effective monitoring of underwater cultural heritage in remote locations;
- (g) any other matter the Minister considers relevant.

Schedule

The schedule to the Declaration specifies the locations and descriptions of the individual underwater cultural heritage sites to be provided with protected zones. The schedule also specifies the conduct that is to be prohibited in relation to each protected zone.

STATEMENT OF COMPATIBILITY WITH HUMAN RIGHTS

Prepared in accordance with Part 3 of the Human Rights (Parliamentary Scrutiny) Act 2011

UNDERWATER CULTURAL HERITAGE ACT 2018 (PROTECTED ZONES) DECLARATION INSTRUMENT 2019

This *Underwater Cultural Heritage Act 2018 (Protected Zones) Declaration Instrument 2019* is compatible with the human rights and freedoms recognised or declared in the international instruments listed in section 3 of the *Human Rights (Parliamentary Scrutiny) Act 2011*.

Overview of the Legislative Instrument

This *Underwater Cultural Heritage Act 2018 (Protected Zones) Declaration Instrument 2019* (the Instrument) provides an additional layer of protection for specified underwater cultural heritage sites protected under the *Underwater Cultural Heritage Act 2018* (the Act) for the purpose of conservation and environmental management or for public safety considerations such as unstable structures or unexploded ordnance.

Human rights implications

This Instrument engages the following rights:

- The right to freedom of movement within a country in Article 12 (1) of the ICCPR.

Right to freedom of movement within a country

Article 12(1) ICCPR guarantees the right to freedom of movement within a country.

The Act protects in-situ Australia's unique and historic shipwrecks, sunken aircraft and other underwater cultural heritage both in Australian waters and, by individual declaration, in waters outside Australian jurisdiction.

The primary focus of the Act is to protect underwater cultural heritage in-situ and that the largest threat to such heritage occurs along the coastal margin where development and human activity is at its greatest. For example Australia has approximately 7500 shipwrecks located around the coastline, with over 5000 of these having significant shared heritage values with other countries such as: Japan (Japanese midget submarine *M24*, submarine *I-124* and *Sanyo Maru*); the Netherlands (Old Dutch shipwrecks *Batavia*, *Vergulde Draeck*, *Zuytdorp* or *Zeewijk*); United States (*SS Peary*, *USAT Don Isidro*, *SS Florence D*); and the United Kingdom (*HMS Porpoise*, *Cato* and *HMS Pandora*). The shipwrecks listed typify both shared heritage values and the potential to be irredeemably damaged by actions in the marine environment. The risk to Australia's reputation with the destruction of sites of such significant and shared heritage value are substantial and irreversible. To protect our unique and irreplaceable underwater cultural heritage some significant sites are further protected by being included with protected zones

Australia currently protects 24 shipwrecks in 23 protected zones. The *Cato* and *HMS Porpoise* sites are included within the same protected zone. With the Act being enlivened on 1 July 2019 several of the current protected zones will be removed and six new protected zones added. A total of 27 protected zones will be in place protecting 28 shipwrecks. In the Act the Minister is provided with the ability to specify the prohibited conduct for each protected zone under subsection 20(5)(d). Subsection 20(7) provides examples of actions that

can be prohibited. Eleven of the 27 protected zones allow a vessel free transit without becoming stationary. The remaining 16 protected zones are no entry without permit. The prohibited conduct for each site is tailored to best protect the values of the heritage site within its specific location and to limit unnecessary restrictions on the movement of people within Australia.

To prevent the deliberate destruction, looting or illegal salvage of protected underwater cultural heritage in protected zones that is a national, non-renewable and unique historical asset, penalties in subsections 29(4) and (5) associated with non-permitted actions in protected zones are set in line with the principles of deterrence and are a reasonable, necessary and proportionate response and reflects the seriousness of the conduct.

Accordingly, the Instrument is consistent with the right to freedom of movement within a country in Article 12(3).

Conclusion

This Instrument is compatible with human rights because to the extent that it engages and limits other human rights, including Articles 12(1) of the ICCPR, those limitations are reasonable, necessary and proportionate to achieve the legitimate aims and the ongoing and effective administration of the Act.

The Hon Sussan Ley MP, Minister for the Environment