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THE PARLIAMENT OF THE COMMONWEALTH OF AUSTRALIA

HOUSE OF REPRESENTATIVES

**UNDERWATER CULTURAL HERITAGE BILL 2018**

**UNDERWATER CULTURAL HERITAGE (CONSEQUENTIAL AND  
TRANSITIONAL PROVISIONS) BILL 2018**

EXPLANATORY MEMORANDUM

(Circulated by authority of the Minister for the Environment and Energy,  
the Hon Josh Frydenberg MP)

## **UNDERWATER CULTURAL HERITAGE BILL 2018**

### **UNDERWATER CULTURAL HERITAGE (CONSEQUENTIAL AND TRANSITIONAL PROVISIONS) BILL 2018**

#### **GENERAL OUTLINE**

The Underwater Cultural Heritage (Consequential and Transitional Provisions) Bill 2018 repeals the *Historic Shipwrecks Act 1976* (the Historic Shipwrecks Act). The Historic Shipwrecks Act is replaced by the Underwater Cultural Heritage Bill 2018 (the Bill).

The Bill modernises the regulatory framework to protect Australia's underwater cultural heritage and includes measures to align the legislation with current international best practice standards for the protection and management of underwater cultural heritage as defined by the UNESCO 2001 *Convention for the Protection of the Underwater Cultural Heritage* (the Convention). The Bill continues the system for protecting in-situ underwater cultural heritage and underwater cultural heritage that has been removed from sites established under the Historic Shipwrecks Act.

In 1976 the Historic Shipwrecks Act represented the international benchmark for legislation to protect historic shipwrecks and their associated relics. The Historic Shipwrecks Act currently protects approximately 7500 historic shipwrecks and 500,000 associated relics, which is the most extensive protection of cultural heritage under Australian legislation. Although the operating principles of the Historic Shipwrecks Act remain valid, the legislation has not been substantially amended since 1985 and no longer meets current standards for regulatory compliance and enforcement.

The Bill will protect Australia's unique historic shipwrecks, sunken aircraft and other underwater cultural heritage, along with their fragile natural environments, both in Australian waters and in waters outside Australian jurisdiction. This valuable and irreplaceable cultural resource belongs to all Australians and is protected for their current enjoyment and education as well as providing a cultural inheritance to future generations.

The protective scope of the Bill has been expanded to include other types of underwater cultural heritage, including submerged aircraft and human remains. The Bill also helps protect Australia's important overseas heritage such as sunken military vessels and aircraft and will now provide protection for associated human remains. The new scope and modernisation aligns with international best practice and the requirements of the Convention.

The new measures will protect an important national cultural resource that cannot be recovered, renewed or researched once destroyed. The Bill will re-establish Australia's protection and management of underwater cultural heritage as the international benchmark while at the same time reducing regulatory burden and providing clarity to the regulated community. The Bill also reduces the administrative burden on government through improvements to statutory processes and modernisation of the compliance and enforcement regimes.

The Bill will allow for collaborative protection and management of underwater cultural heritage by the Commonwealth, State and Territory Governments. This is a continuation of the system established under the Historic Shipwrecks Act.

The Department of the Environment and Energy has completed a regulatory cost analysis of the measures to be implemented by the Bill. The costing has been estimated in accordance with guidance from Prime Minister and Cabinet and using the Regulatory Burden Measurement Framework. The measures will result in an estimated annual net compliance saving by businesses, the community and individuals of \$1.2m.

## **Key Concepts**

### **Maritime zones**

An important concept in the Bill is that of maritime zones. The *United Nations Convention on the Law of the Sea* (UNCLOS) is the international agreement that establishes the rights and duties of nations in relation to the seas and oceans. Australia ratified UNCLOS on 5 October 1994.

International law permits coastal States to claim maritime zones extending from their coastlines. As a result, coastal States have certain rights and obligations over the ocean, seabed, subsoil and air space adjacent to their territory. The extent of each zone, and the rights and obligations of States therein, are governed principally by UNCLOS. The Australian context employs maritime zones that are both reflective of our federal structure and maritime zones which may be claimed under international law.

The maritime zones under UNCLOS are measured from a point along the coast referred to as the territorial sea baseline. The baseline follows the low water mark along the coast except where otherwise allowed under the rules of UNCLOS, including:

- **Straight baselines** - which are a system of straight lines joining specified or discrete points on the low-water line, usually known as straight baseline end points. These may be used in localities where the coastline is deeply indented and cut into, or where there is a fringe of islands along the coast in its immediate vicinity; and
- **Bay or river closing lines** - which are straight lines drawn between the respective low-water marks of the natural entrance points of bays or rivers.

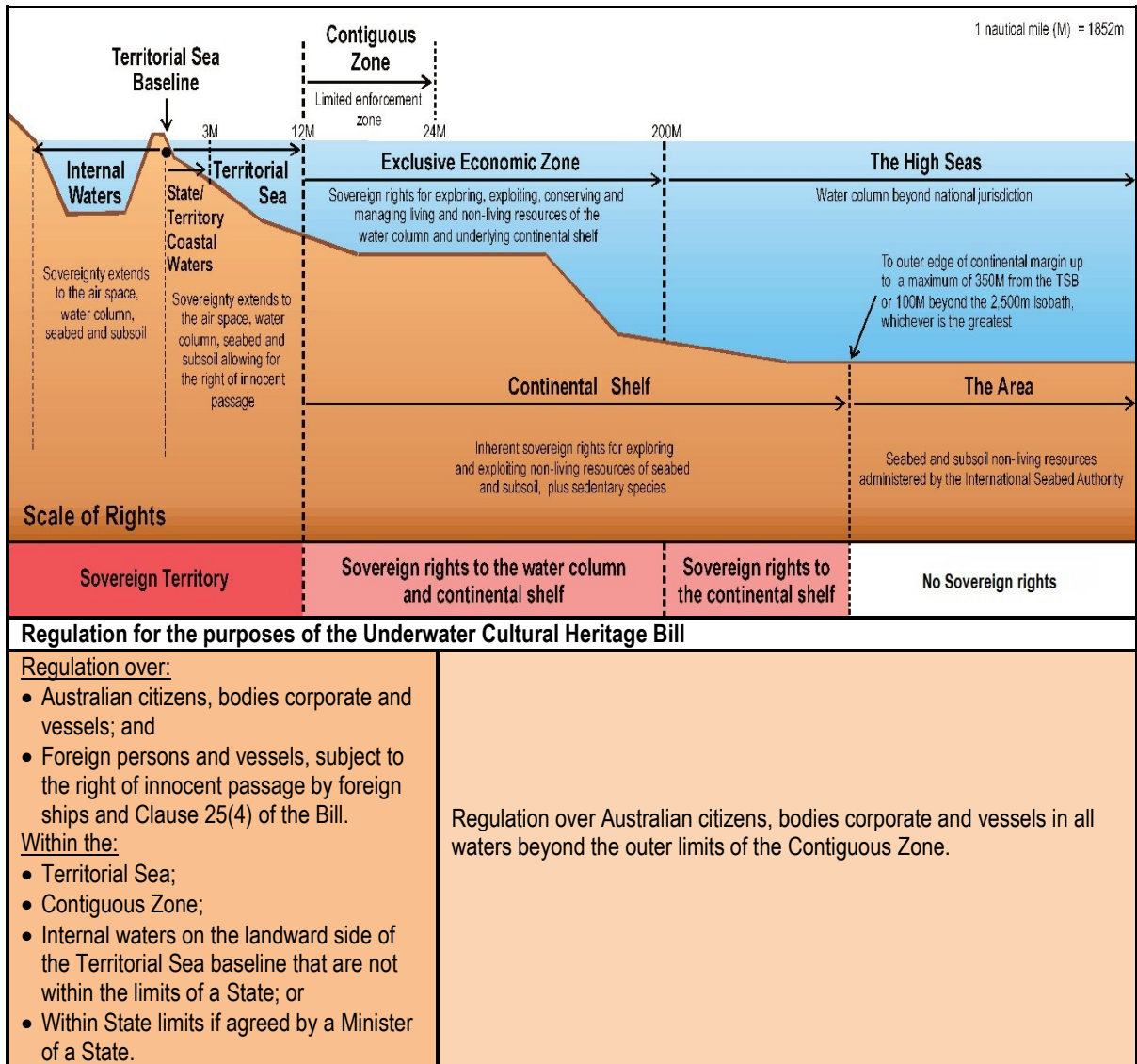
The main maritime zones of relevance to the regulation of underwater cultural heritage, moving seaward from the territorial sea baseline, are:

- **Coastal waters** - being waters over which each State and the Northern Territory has primary jurisdiction, except for the remains of vessels (historic shipwrecks), in waters to 3 nautical miles seaward of the territorial sea baseline. 'Coastal waters' also includes waters on the landward side of the baseline that are not within the limits of a State or Territory. 'Coastal waters' are not prescribed by international law. Instead, they are a mechanism that reflects the 'Offshore Constitutional Settlement' in 1983 between the Commonwealth and States;
- **Territorial sea** - within which a coastal State exercises full sovereignty, subject only to the right of innocent passage by foreign ships. The territorial sea extends out to 12 nautical miles from the territorial sea baseline;
- **Contiguous zone** - within which Australia may exercise control necessary to prevent and punish infringement of its customs, fiscal, immigration or sanitary laws and regulations

within its territory or territorial sea. Article 303, in permitting the application of Article 33 of UNCLOS, also allows Australia to enforce laws to prevent the unauthorised removal of archaeological and historical objects within the contiguous zone. The contiguous zone extends from the outer limits of the territorial sea to 24 nautical miles from the territorial sea baseline. Its area overlaps with the first 12 nautical miles of both the exclusive zone and the continental shelf;

- **Exclusive economic zone (EEZ)** - within which a coastal State has sovereign rights and jurisdiction, including with respect to exploring and exploiting, conserving and managing natural resources. The EEZ extends from the outer limits of the territorial sea out to 200 nautical miles from the territorial sea baseline. Sovereign rights within the EEZ extend to both the water column and the seabed and subsoil. To the extent that the EEZ covers the seabed and subsoil, in most places it is co-extensive with the continental shelf;
- **Continental shelf** - within which the coastal State exercises sovereign rights over natural resources. The continental shelf comprises the seabed and subsoil of the submarine area which forms a natural prolongation to a coastal State's land territory. The continental shelf extends as far out to 200 nautical miles from the territorial sea baseline, and may extend up to 350 nautical miles where the physical features permit. In this regard, the water column above may constitute the high seas;
- **The high seas** - which comprises the water column of the sea that is beyond national jurisdiction (i.e. that is not included in the territorial sea, the EEZ, or the archipelagic waters of an archipelagic State; and
- **The Area** - which comprises the seabed and ocean floor and subsoil beyond national jurisdiction. The Area is part of the 'common heritage of mankind' and no State can claim or exercise sovereignty over any part of the Area or its resources in accordance with Part XI of UNCLOS.

**The following diagram illustrates Australia’s maritime zones and how they relate to the regulation of in-situ underwater cultural heritage**



**Definitions**

Simplified terms are used in the Bill to describe waters in which Australia may regulate for the purposes of protecting underwater cultural heritage, including:

- **Australian waters**, which comprises:
  - The sea above and seabed of Australia’s continental shelf;
  - Australia’s territorial sea; and
  - Any waters on the landward side of the territorial sea baseline that are not within the limits of a State.
- **Commonwealth waters**, which comprises:
  - The sea above and seabed of Australia’s continental shelf; and
  - The territorial sea other than coastal waters of a State.

The limits of a State are the constitutional boundaries of a State or Territory determined by a combination of the Letters Patent issued to State Governors as at the date of Federation in

1901 and Proclamations made under the *Seas and Submerged Lands Act 1973*, specifically the *Seas and Submerged Lands (Historic Bays) Proclamation 2016*.

### **Domestic jurisdiction**

The overall application of the Bill is similar to the Historic Shipwrecks Act and includes both Commonwealth waters and the concept of State waters, but does not extend to bays, rivers and inland waters within the limits of a State unless it is agreed by the Minister of a State. This framework ensures that historic shipwrecks are treated in a consistent manner to protect the property rights of the Commonwealth, the rights of other legal owners of shipwrecks and the international shared heritage interests of other nations.

The Bill maintains the current position under the Historic Shipwrecks Act for regulating historic shipwrecks (vessels) and associated relics (articles), but includes some separation of responsibilities between the Commonwealth, State and Territory Governments for the purposes of regulating sunken aircraft and other types of underwater cultural heritage that are now included in the Bill. The separation of responsibilities was agreed in the 2010 *Australian Underwater Cultural Heritage Intergovernmental Agreement* (UCH IGA).

### **Extraterritorial operation**

The extraterritorial operation of the Bill with respect to each of the maritime zones described above is set out in clause 7 of the Bill. The operation of the Bill is subject to clause 7, and specifically provides that the Bill only has effect subject to Australia's obligations under international law (subclause 7(5)). In this regard, the Australian Government is not seeking to assert sovereignty over, or to exercise powers within, waters labelled as 'Australian waters' or 'Commonwealth waters' where it does not have the ability to do so as a matter of international law.

The Bill includes the provision to declare Australian underwater cultural heritage articles that are located outside of Australian waters to be protected (clause 18) and prohibits certain conduct to be undertaken in relation to declared articles (clause 30), except in accordance with a permit (clause 29).

A declaration under this provision would only be made after consultation with the Government of the nearest coastal state. Regulation related to these provisions would only apply to Australian citizens, Australian bodies corporate and Australian registered vessels. The Bill does not allow protected zones to be declared around protected underwater cultural heritage located outside Australian waters.

The Bill also includes provisions to control the possession, movement, importation and export of underwater cultural heritage that has been removed from Australian or Commonwealth waters.

### **Compliance and enforcement**

This Bill protects Australia's unique and non-renewable historic shipwrecks, sunken aircraft and other underwater cultural heritage, along with their fragile natural environments, both in Australian waters and in waters outside Australian jurisdiction. This valuable and irreplaceable cultural resource belongs to all Australians and is protected for their current enjoyment and education as well as providing a cultural inheritance to future generations.

Accordingly, the Bill provides for a modern suite of regulatory powers that can be applied appropriately, flexibly and fairly to protect and conserve Australia's underwater cultural heritage.

The Bill also triggers parts of the *Regulatory Powers (Standard Provisions) Act 2014* (Regulatory Powers Act). This includes monitoring and investigation powers and enforcement provisions such as civil penalties, infringement notices, enforceable undertakings and injunctions. This provides for a framework of standard regulatory powers exercised by agencies across the Commonwealth.

Civil penalties will also apply to contraventions and the amounts of the penalties have been formulated to be more commensurate with the nature of the contraventions. Enforceable undertakings and infringement notices are both new enforcement tools that were not available under the Historic Shipwrecks Act.

### **Strict Liability Offences**

Strict liability offences apply to most contraventions of the Bill, and will be available to be used when the circumstances are appropriate. When strict liability applies to an offence, the prosecution is only required to prove the physical elements of an offence. They are not required to prove fault elements for the defendant to be found guilty. Strict liability is used in circumstances where there is public interest in ensuring that regulatory schemes are observed, and it can reasonably be expected that the person was aware of their duties and obligations.

This will help to ensure the integrity of the regulatory regime which will be implemented by the Bill, consistent with the principles in the Attorney-General's Department's *'Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers'*.

The defence of mistake of fact is available for strict liability offences (sections 6.1 and 9.2 of the *Criminal Code*) and the existence of strict liability does not make any other defence unavailable (subsection 6.1(3) of the *Criminal Code*).

### **Level and appropriateness of sanctions**

Although some of Australia's underwater cultural heritage has intrinsic value, it is difficult to assign a monetary value to such an extensive national cultural legacy as a whole, and many countries consider such a legacy to be priceless as it is the physical evidence of our past and many untold stories. As such, the penalties that will apply to contraventions have been formulated to create a compliance and enforcement environment that is appropriate to protect and conserve such an important resource. The following table outlines the new suite of offences and penalties under the Bill.

## Table of offences and penalties

UCH Bill Clause	Criminal offence	Strict liability	Civil penalty
<b>Clause 27</b> - Failure to notify Minister of transfer of permit	Imprisonment for 2 years or 120 penalty units, or both.	60 penalty units.	120 penalty units.
<b>Clause 28</b> - Breach of permit condition	Imprisonment for 2 years, or 120 penalty units, or both.	60 penalty units.	120 penalty units.
<b>Clause 29</b> - Prohibited conduct within protected zone without a permit	Imprisonment for 5 years or 300 penalty units, or both.	60 penalty units.	300 penalty units.
<b>Clause 30</b> - Conduct with an adverse impact on protected UCH without a permit	Imprisonment for 5 years or 300 penalty units, or both.	60 penalty units.	800 penalty units.
<b>Clause 31</b> - Possession of protected UCH without a permit	Imprisonment for 5 years or 300 penalty units, or both.	60 penalty units.	300 penalty units.
<b>Clause 32</b> - Supply and offers to supply protected UCH without a permit	Imprisonment for 2 years, or 120 penalty units, or both.	60 penalty units.	120 penalty units.
<b>Clause 33</b> - Advertising to sell UCH without including permit number	Imprisonment for 2 years, or 120 penalty units, or both.	60 penalty units.	120 penalty units.
<b>Clause 34</b> - Importing protected UCH without a permit	Imprisonment for 2 years, or 120 penalty units, or both.	60 penalty units.	120 penalty units.
<b>Clause 35</b> - Exporting UCH without a permit	Imprisonment for 5 years or 300 penalty units, or both.	60 penalty units.	300 penalty units.
<b>Clause 36</b> - Importing UCH of a foreign country without a permit	Imprisonment for 2 years, or 120 penalty units, or both.	60 penalty units.	120 penalty units.
<b>Clause 37</b> - Failing to produce a permit	120 penalty units	60 penalty units.	120 penalty units.
<b>Clause 38</b> - Failure to respond to notice from Minister	120 penalty units	60 penalty units.	120 penalty units.
<b>Clause 39</b> - Failure to comply with Ministerial direction	120 penalty units	60 penalty units.	120 penalty units.
<b>Clause 40</b> - Failure to advise Minister of discovery of UCH	120 penalty units	None	120 penalty units.



## **Rules**

The Bill enables rules to be made which will provide more detailed criteria and guidance for some day to day functions being regulated under the Bill. Specifying these matters in rules rather than regulations accords with the Office of Parliamentary Counsel's Drafting Direction No. 3.8 – Subordinate Legislation. Paragraph 2 of that Drafting Direction states that "OPC's starting point is that subordinate instruments should be made in the form of legislative instruments (as distinct from regulations) unless there is good reason not to do so".

Consistent with paragraph 16 of the Drafting Direction, the approach of including the elements of the new underwater cultural heritage framework in rules (rather than regulations) has several advantages including:

- It facilitates the use of a single type of legislative instrument being needed for the Bill, thereby reducing the complexity otherwise imposed on the regulated community if these matters were to be prescribed across a number of different types of instruments;
- It simplifies the language and structure of the provisions in the Bill that provide the authority for the legislative instruments; and
- It shortens the Bill.

Due to these advantages, paragraph 17 of the Drafting Direction states that drafters should adopt this approach where appropriate with new Acts.

Paragraph 3 of the Drafting Direction states that matters such as compliance and enforcement, the imposition of taxes, setting amounts to be appropriated, and amendments to the text of an Act, should be included in regulations unless there is a strong justification otherwise. The Bill does not enable the rules to provide for any of the types of matters listed. This is clarified by subclause 61(5) of the Bill, which specifically prevents the rules from including these types of matters.

In addition, clause 61(4) clarifies that the rules made under the Bill are a legislative instrument for the purposes of the *Legislation Act 2003* (Legislation Act). Pursuant to sections 38 and 39 of the Legislation Act, all legislative instruments and their explanatory statements must be tabled in both Houses of the Parliament within 6 sitting days of the date of registration of the instrument on the Federal Register of Legislation. Once tabled, the rules will be subject to the same level of Parliamentary scrutiny as regulations (including consideration by the Senate Standing Committee on Regulations and Ordinances), and a motion to disallow the rules may be moved in either House of the Parliament within 15 sitting days of the date the rules are tabled (see section 42 of the Legislation Act).

## **FINANCIAL IMPACT STATEMENT**

This Bill has no financial implications.

# STATEMENT OF COMPATIBILITY WITH HUMAN RIGHTS – PART 3 HUMAN RIGHTS (PARLIAMENTARY SCRUTINY) ACT 2011

## Statement of Compatibility with Human Rights

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

### UNDERWATER CULTURAL HERITAGE BILL 2018 UNDERWATER CULTURAL HERITAGE (CONSEQUENTIAL AND TRANSITIONAL) PROVISIONS BILL 2018

These Bills are 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 Bill

The Underwater Cultural Heritage Bill 2018 (the Bill) provides for the protection and conservation of Australia's underwater cultural heritage. The Bill enables the cooperative implementation of national and international maritime heritage responsibilities and promotes public awareness, understanding, appreciation and appropriate use of Australia's underwater cultural heritage.

The Bill, in combination with the Underwater Cultural Heritage (Consequential and Transitional) Provisions Bill 2018 (the Transitional Bill) aligns with Government compliance policy by applying standard regulatory powers for investigation and enforcement and includes a graduated approach to compliance and enforcement using infringement notices, enforceable undertakings and injunctions, to better administer a proportional response in protecting underwater cultural heritage. Investigators will be delegated powers to ensure people comply with the Bill, once enacted, to investigate non-compliance and engage in enforcement activities.

#### Human rights implications

The Bill engages the following rights:

- The right to a fair trial in Article 14 (1) of the ICCPR;
- The right to the presumption of innocence and imposition of burden of proof on accused person in Article 14(2) of the ICCPR;
- The right to not be compelled to testify against yourself or to confess guilt in Article 14(3) of the ICCPR;
- The right to not be held guilty of any criminal offence which did not constitute such an offence in Article 15(1) of the ICCPR;
- The right to privacy and reputation Article 17 of the ICCPR; and

#### Right to a fair trial

Article 14(1) ICCPR guarantees the right to a fair trial and fair hearing in relation to both criminal and civil proceedings.

### *Level of criminal penalties and civil penalties*

The Bill 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.

If associated protected articles have been recovered from historic shipwrecks in the past by members of the public and then legally notified to the Minister under the *Historic Shipwrecks Act 1976*, the Bill will continue to manage the articles trade and sale by requiring notification from the supplier and receiver of articles, and through requiring a permit number to be shown in all advertisements of protected articles for transfer or sale. Protected underwater cultural heritage is also prohibited from export without permit and both Australian underwater cultural heritage, in waters outside Australian jurisdiction, and the underwater cultural heritage of a foreign country are controlled through import permits.

The Bill includes criminal and civil offence provisions (clauses 27 (transfer of permit); 28 (breach permit conditions); 29 (certain conduct within a protected zone); 30 (adverse impact); 31 (possession of protected underwater cultural heritage without a permit); 32 (supplying underwater cultural heritage without a permit); 33 (advertising without reference to a permit number); 34 (importing without a permit); 35 (exporting with a permit); 36 (importing underwater cultural heritage of a foreign country without permit); 37 (requirement to produce permit); 38 (ascertain location of protected underwater cultural heritage); and 39 (give directions about custody)) which have a reasoned and proportionate range of penalty units with the maximum penalty units for most criminal and civil penalties offences (clauses 29(4) and (6); 31(4) and (6); 35(3) and (5)) being a maximum of 300 penalty units for an individual or imprisonment for five years.

The primary focus of the Bill 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. To protect our unique and irreplaceable underwater cultural heritage from a cost of business approach, clause 30(4) and (6) (adverse impact) impose the largest deterrent with a maximum criminal penalty of 300 penalty units for an individual or imprisonment for five years and a civil penalty of up to a maximum of 800 penalty units.

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 prevent the deliberate destruction, looting or illegal salvage of protected underwater cultural heritage that is a national, non-renewable and unique historical asset, these penalties are set at an upper limit and are in line with the principles of deterrence and are a reasonable, necessary and proportionate response and reflects the seriousness of the conduct.

### *Application of both criminal and civil penalties*

All of the Bill's offence provisions contain both criminal penalties and civil penalties. The intention of the provision is that, where criminal penalties are not imposed on a person who contravenes the provision, the Minister may decide to apply to the appropriate Court to impose a civil penalty.

In line with Article 14(7) ICCPR a person cannot be subject to both criminal and civil penalties for the same conduct. For example, a person cannot be subject to a civil penalty if they have been convicted of an offence relating to conduct that is the same, or substantially the same, as the conduct that contravened the civil penalty provision. In addition, any proceedings for a civil penalty provision are automatically stayed if criminal proceedings are commenced or have already commenced against that person for an offence involving conduct that is the same, or substantially the same, as the conduct that contravened the civil penalty provision. This ensures that a person cannot be punished twice for the same conduct.

Under Articles 14 and 15 of the ICCPR, a civil penalty provision may be regarded as 'criminal for the purposes of international human rights law' if the amount of the pecuniary penalty is high, the nature and purpose of the penalty is to punish or deter, and the penalty applies to the public in general, as is the case with the civil penalty provision in this Bill.

In this Bill the civil penalty provisions to protect Australia's unique and irreplaceable underwater cultural heritage in-situ, clause 30(4) and (6) (adverse impact), impose the largest deterrent with a civil penalty of up to a maximum of 800 penalty units. However, the Bill is consistent with the criminal process guarantees set out in Articles 14 and 15 of the ICCPR as the amount of pecuniary penalty is proportionate with reference to the regulatory context, the nature of the industry or sector being regulated and the non-renewable nature of the impacted heritage. Civil penalty provisions do not infer guilt of a criminal offence under domestic law.

The criminal and civil penalties which apply in the Bill are a reasonable, necessary and proportionate response to the deliberate contravention of regulation protecting our unique and non-renewable underwater cultural heritage and associated articles. The civil penalty levels are framed to be a general deterrent to non-compliance noting that the setting of pecuniary penalties for a person who contravenes a provision is a matter for the relevant court.

Accordingly, the Bill is consistent with the right to a fair trial in Article 14(1).

### **Right to a presumption of innocence**

Article 14(2) ICCPR protects the right to be presumed innocent until proven guilty according to law.

### *Strict liability*

Strict liability offences engage and limit the presumption of innocence as they allow for the imposition of criminal liability without the need to prove fault. However, the defence of mistake of fact is still available to the defendant. This ensures that a person cannot be held liable if he or she had an honest and reasonable belief that they were complying with relevant obligations. The Bill also includes other defences in clause 29(3) related to actions in a protected zone without permit.

The Bill applies strict liability to all the offence provisions, with the exception of clause 40 (reporting discovery of underwater cultural heritage); clauses 27 (transfer of permit); 28 (breach permit conditions); 29 (certain conduct within a protected zone); 30 (adverse impact); 31 (possession of protected underwater cultural heritage without a permit); 32 (supplying underwater cultural heritage without a permit); 33 (advertising without reference to a permit number); 34 (importing without a permit); 35 (exporting with a permit); 36 (importing underwater cultural heritage of a foreign country without permit); 37 (requirement to produce permit); 38 (ascertain location of protected underwater cultural heritage ); 39 (give directions about custody).

Application of strict liability has been set with consideration given to the guidelines regarding the circumstances in which strict liability is appropriate set out in *A Guide to Framing Commonwealth Offences, Civil Penalties and Enforcement Powers*. The penalties for the strict liability offences in the Bill do not include imprisonment, and do not exceed 60 penalty units for an individual.

### *Onus of proof*

Generally, consistency with the presumption of innocence requires the prosecution to prove each element of a criminal offence beyond reasonable doubt. An offence provision which requires the defendant to carry an evidential or legal burden of proof, commonly referred to as a 'reverse burden', with regard to the existence of some facts engages the presumption of innocence.

The Bill is consistent with the presumption of innocence because, under the Bill, the evidential and legal burden for proving that a person has committed an offence rests with the prosecution, unless a defendant seeks to rely on an available defence. As such, the Bill does not reverse the evidential burden.

A number of provisions of the Bill provide that the evidential burden of proof rests with the defendant, where the defendant wishes to rely on an available defence. These clauses are: clauses 29(2) and (3) (certain conduct within a protected zone); 30(2) (adverse impact); clause 31(2) (possession of protected underwater cultural heritage without a permit); clause 32(2) (supplying underwater cultural heritage without a permit); clause 35(2) (exporting with a permit); and clause 36(2) (importing underwater cultural heritage of a foreign country without permit).

Additionally, the matters to be proved under these prohibitions are matters that would be in the particular knowledge of the defendant. For example, clause 29(3) provides that the person wishing to rely on the subsection bears the evidential burden of proof. Once a person has put forward evidence, the prosecution still retains the legal burden of proving that the person did not enter a protected zone for the purposes of saving life or safety at sea.

The application of strict liability and placing the evidential burden of proof on defendants to adduce evidence is a reasonable, necessary and proportionate response and reflects the seriousness of the conduct.

Accordingly the Bill is consistent with the right to the presumption of innocence in Article 14(2).

## **The right to not be compelled to testify**

Article 14(3)(g) protects the right to not be compelled to testify against himself or to confess guilt.

### *Privilege against self-incrimination*

Article 14(3)(g) protects the right to not be compelled to testify against himself or to confess guilt.

In this Bill subclause 38(8) provides that a person is not excused from giving certain information on the ground that the information might tend to incriminate the person or expose the person to a civil penalty.

Subclause 38(9) provides that although a person is compelled to provide information, generally, the information cannot be used as admissible evidence against the individual in criminal proceedings.

In some circumstances, protected articles can become in the control of individuals who have not notified their possession or custody and or who have not received a permit for their recovery. Practically, the power to ascertain the location of articles is required for effective administration of the Bill's objective to protect Australia's underwater cultural heritage. This is balanced by the protection against adducing the information as evidence in criminal proceedings in subclause 38(9).

Accordingly, the Bill is consistent with the right to the presumption of innocence in Article 14(3).

## **The right to privacy and reputation**

Article 17 of the ICCPR prohibits arbitrary or unlawful interference with an individual's privacy, family, home or correspondence, and protects a person's honour and reputation from unlawful attacks. This right may be subject to permissible limitations where those limitations are provided by law and non-arbitrary. In order for limitations not to be arbitrary, they must be aimed at a legitimate objective and be reasonable, necessary and proportionate to that objective.

The Bill does require that persons, on submission of an application for a permit, do so in an approved form (subclause 23(2)). For permits (clauses 23-26; and 27) for entry into a protected zone or for undertaking an action that may have an adverse impact, persons are required to supply personal details and details of the vessel that they will be operating from. This is to enable compliance monitoring and enforcement if a person is found undertaking an action without possession of a permit.

In regards to protected articles, (subclauses 24(2); 27(3); 25(4); 39(1); 48(3)(d) and (e) and 48(4)(c)) persons are obliged to notify the Minister should they receive possession, custody and control of a protected article from another person. For the purposes of managing protected articles (clauses 38 and 39) the Minister may need to communicate to the person who has possession, custody and control of the protected article and give directions for their display, storage or conservation. This requires knowledge of the person and their current home address.

For the purposes of Article 17 of the ICCPR, the collection of information would not be ‘unlawful’ as it would be provided for and authorised under the Bill, once enacted. Further, requiring this information would not be an arbitrary interference with the right to privacy, as it would be the legitimate and necessary objective of ensuring that the objectives of the Act can be administered, the movement of protected relics can be successfully monitored and managed, and relevant matters can be taken into consideration when issuing a permit. Information collected on persons applying for a permit, possessing custody of a protected article or seeking to possess custody of a protected article would be taken into account by the department as part of the decision making process for a permit application and management of the movement of protected articles.

The limitation on the right to privacy is proportionate as the relevant provisions requiring personal information would only be triggered if a person chooses to apply for a permit, has chosen to possess or control a protected article or chooses to acquire the possession, custody and control of a protected article in the future. The information would be used for the purposes of administering the permit regime only. Information collected will be subject to safeguards preventing unauthorised disclosure (such as the Information Privacy Principles under the section 14 of the *Privacy Act 1988*; section 70 of the *Crimes Act 1914*; and the *APS Values and Code of Conduct under the Public Service Act 1999*, where applicable).

For example, the Information Privacy Principles govern all stages of the processing of personal information, setting out standards for the collection, storage, security, use, disclosure and quality of personal information. These systems and standards have been considered and incorporated in the development of the Australian National Shipwrecks Database which includes a secure login and statutory management module for all associated workflow information and client list related to the *Historic Shipwrecks Act 1976*. Modification of the existing statutory module will be implemented to enable seamless national administration of the Bill through the secure portal.

Therefore, to the extent that the Bill may limit the right to privacy, the measures would neither be unlawful nor arbitrary. Rather, the limitations are reasonable, necessary and proportionate to protecting Australia’s underwater cultural heritage and associated articles in public possession, custody and control.

## **Conclusion**

The Bill is compatible with human rights because to the extent that it engages and limits other human rights, including Articles 14(1), 14(2) 14(3), 15(1), 17 and 26 of the ICCPR, those limitations are reasonable, necessary and proportionate to achieve the legitimate aims of the Bill and the ongoing and effective administration of the Bill. The Consequential Provisions Bill does not engage any human rights and therefore does not limit any human rights.

**Minister for the Environment and Energy, the Hon Josh Frydenberg MP**

## NOTES ON CLAUSES

### PART 1 - INTRODUCTION

#### Division 1 - Preliminary

##### Clause 1 - Short title

1. Clause 1 provides for the Bill, when enacted, to be cited as the *Underwater Cultural Heritage Act 2018*.

##### Clause 2 – Commencement

2. The table in this clause sets out when the Act's provisions will commence. The whole of the Act will commence on a single day to be fixed by Proclamation. However, if the provisions do not commence within the period of 12 months beginning on the day the Act receives Royal Assent, those provisions will commence by default on the day after the end of that period.
3. The default commencement of 12 months is required to:
  - (a) Make rules for the Bill;
  - (b) Modify the statutory components of the Australian National Shipwrecks Database, which acts as the electronic register of underwater cultural heritage referred to in subclause 48(2) of the Bill;
  - (c) Replace existing permits and section 9 notifications made under the *Historic Shipwrecks Act 1976* (the Historic Shipwrecks Act), with new permits issued under the Bill, including those for possession, custody or control of underwater cultural heritage articles held privately;
  - (d) Draft new guidelines for the protection and management of underwater cultural heritage; and
  - (e) Communicate with and educate the public about the Bill and its regulatory requirements.

##### Clause 3 - Objects of this Act

4. This clause sets out the objects of the Bill as follows:
  - (a) Paragraph 10(a) states that it is an object of the Bill is to provide for the identification, protection and conservation of Australia's underwater cultural heritage;
  - (b) Paragraph 10(b) also states that an object of the Bill is to enable the cooperative implementation of national and international heritage responsibilities;
  - (c) Paragraph 10(c) provides that an object of the Bill is to promote public awareness, understanding, appreciation and appropriate use of Australia's underwater cultural heritage.



#### **Clause 4 - Simplified outline of this Act**

5. Clause 4 provides an outline to the Bill. While simplified outlines are included in the Bill to assist readers to understand the substantive provisions, the outlines are not intended to be comprehensive. It is intended that readers should rely on the substantive provisions.

#### **Clause 5 - Extension to external Territories**

6. Clause 5 provides that the Bill applies in every external Territory. The *Regulatory Powers (Standard Provisions) Act 2014* (the Regulatory Powers Act), as it applies in relation to the Bill, also extends to every Territory.

#### **Clause 6 – This Act binds the Crown**

7. Clause 30 provides that the Act binds the Crown of the Commonwealth, States and Northern Territory but does not make the Crown liable to a pecuniary penalty or to be prosecuted for an offence.

#### **Clause 7 - Extraterritorial operation**

8. Clause 7 defines the geographical extent and operation of regulation under the Bill, in areas that are outside Australian jurisdiction or within certain maritime zones. It provides that the Bill will operate in the following ways:
  - (a) The Bill and the Regulatory Powers Act will generally apply within and outside Australia;
  - (b) Regulatory provisions in the Bill apply beyond the contiguous zone only to Australian entities;
  - (c) Regulatory provisions apply to all persons and vessels in Australia and the territorial sea;
  - (d) The prohibition on damaging etc. protected underwater cultural heritage also applies to all persons and vessels up to the outer limits of the contiguous zone; and
  - (e) The Bill and the Regulatory Powers Act have effect subject to international law obligations.
9. This clause clarifies the application of the Bill and the Regulatory Powers Act, to the extent that it applies in relation to the Bill, in Australia, to Australian entities and to foreign entities. The clause adopts the concepts of maritime boundaries established by the *United Nations Convention on the Law of the Sea* (UNCLOS). The maritime zones under UNCLOS have been explained in more detail in the General Outline.
10. The extraterritorial operation of the Bill, with respect to each of the maritime zones, only has effect subject to Australia's obligations under international law (subclause 7(5)). In this regard, the Australian Government is not seeking to assert sovereignty over, or to exercise powers within, waters labelled as 'Australian waters' or 'Commonwealth waters' where it does not have the ability to do so as a matter of international law.

## **Clause 8 - Geographical jurisdiction for offences**

11. This clause clarifies that, because clause 7 provides for the extraterritorial application of offences and civil penalty provisions of the Bill, Division 14 (Standard geographical jurisdiction) of the *Criminal Code* does not apply in relation to an offence against this Bill.

## **Division 2 - Definitions**

### **Clause 9 – Definitions**

12. Clause 9 defines key terms used in the Bill. As the definition of ‘this Act’ includes the Underwater Cultural Heritage Rules, the definitions in clause 9 will also apply in relation to rules made pursuant to clause 61.
13. Clause 9 includes some ‘signpost’ definitions that refer readers to the clauses in which terms are substantively defined.

### **Clause 10 - Meaning of associated with**

14. Clause 10 defines the term ‘associated with’ to include an article that formed part of, was installed or carried by, or that appeared to have been on board a vessel, aircraft or other vehicle.
15. The definition also includes an article that appears to have been constructed or used by a person associated with a vessel. This provision allows for the protection of secondary heritage sites such as shipwreck survivor or salvage camps that are associated with the primary protected underwater cultural heritage site.
16. Subclause 10(2) clarifies that the clause covers associated articles that may have been incorporated into another object or thing, for example into a piece of jewellery, a memorial or other built structure.

### **Clause 11 - Meaning of Australian waters**

17. Clause 11 defines the term ‘Australian waters’ to include any waters on the landward side of the territorial sea of Australia that are not within the limits of a State, the territorial sea of Australia, the sea above the continental shelf of Australia and the seabed and subsoil beneath any such sea or waters.
18. In the *Seas and Submerged Lands Act 1973*, the ‘continental shelf’ is defined as in paragraph 1 of Article 76 to UNCLOS. The reference to the sea above the continental shelf of Australia does not confer any jurisdiction on Australia in relation to the high seas.
19. The operation of the Bill only has effect subject to Australia’s obligations under international law. In this regard, the Australian Government is not seeking to assert sovereignty over, or to exercise powers within, waters labelled as ‘Australian waters’ where it does not have the ability to do so as a matter of international law.
20. Subclause 11(2) enables a declaration to be made that protects the remains of vessels that span the boundary between State limits and Australian waters or if separate parts of a vessel are on either side of the boundary. In this provision, waters of the sea within the

limits of a State includes the Northern Territory. Declarations under this subsection can only be made with the consent of the relevant State or Territory Minister.

### **Clause 12 - Meaning of coastal waters of a State or the Northern Territory**

21. Clause 12 defines ‘coastal waters’ of a State or Territory to include:

- (a) Coastal waters consisting of the first 3 nautical miles seaward of the territorial sea baseline and adjacent to the State or the Northern Territory; and
- (b) Coastal waters consisting of waters that are landward of the territorial sea baseline but not within the limits of the State or the Northern Territory.

22. The definition of ‘coastal waters’ does not include waters within the limits of the State or the Northern Territory.

### **Clause 13 - Meaning of Commonwealth waters**

23. Clause 13 defines Commonwealth waters to mean the territorial sea of Australia, other than coastal waters of a State or the Northern Territory, the sea above the continental shelf of Australia and the seabed and subsoil beneath any such sea or waters.

24. As previously noted in relation to the definition of ‘Australian waters’ the extraterritorial operation of the Bill only has effect subject to Australia’s obligations under international law and the Australian Government is not seeking to assert sovereignty over, or to exercise powers within ‘Commonwealth waters’ where it does not have the ability to do so as a matter of international law.

25. Subclause 13(2) enables a declaration to be made that protects submerged aircraft and other types of underwater cultural heritage that span the boundary between state coastal waters and Commonwealth waters or if separate parts of a vessel are on either side of the boundary. The subsection also accounts for separate parts that may be within State limits.

26. This provision has a similar intent to Section 3A of the Historic Shipwrecks Act but covers the new jurisdiction boundary for submerged aircraft and other types of underwater cultural heritage that is created by the Bill. Declarations under this subsection can only be made with the consent of the relevant State or Territory Minister.

### **Clause 14 - Meaning of Dutch shipwreck**

27. Clause 14 provides a description and approximate location of the known Dutch vessels that are subject to the Australia Netherlands Agreement and are protected under the Bill. There may be other Dutch vessels that could be subject to the agreement in Australian waters, however these have not yet been located.

### **Clause 15 - Meaning of underwater cultural heritage**

28. The Bill provides a detailed definition of underwater cultural heritage that takes into account the increased scope of what is being protected, is consistent with the *Convention for the Protection of the Underwater Cultural Heritage* (the Convention) and meets international best practice standards. The definition also resolves deficiencies identified in the Historic Shipwrecks Act concerning the protection of:

- (a) The natural environment that immediately surrounds underwater cultural heritage;
  - (b) The archaeological context, including spatial and temporal site formation; and
  - (c) Human remains, which could only be treated as relics under the Historic Shipwrecks Act.
29. Pipelines and cables located on the seabed, and installations (other than pipelines and cables) that are on the seabed and still in use are excluded from being underwater cultural heritage to maintain consistency with UNCLOS.

## **PART 2 - PROTECTED UNDERWATER CULTURAL HERITAGE**

### **Division 1 - Underwater cultural heritage**

#### **Clause 16 - Underwater cultural heritage that is automatically protected**

30. This clause provides that certain articles of underwater cultural heritage are automatically protected. This includes:
- (a) The remains of vessels and articles associated with the vessel or remains of the vessel that have been in Australian waters for at least 75 years; and
  - (b) The remains of aircraft and articles associated with the aircraft or remains of the aircraft that have been in Commonwealth waters for at least 75 years.
31. The automatic protection in subclause 16(1) replaces the previous approach under the Historic Shipwrecks Act whereby the Minister could declare all remains of ships to be historic and therefore protected under that Act.
32. Clause 16 recognises that underwater cultural heritage includes both heritage sites, such as shipwrecks and sunken aircraft and a collection of movable articles, and that articles deposited into the water from vessels or aircraft 75 years ago, also have heritage significance. Interpreting the stories and information about wrecked vessels and aircraft through underwater archaeology is dependent on protecting the individual components of a site from unnecessary disturbance.
33. Paragraphs 16(1)(a) and (b) provide for the protection of remains of vessels and associated articles that entered the water at least 75 years ago and are located in Australian waters in line with the jurisdictional boundaries established for underwater cultural heritage under the 2010 *Australian Underwater Cultural Heritage Intergovernmental Agreement* (UCH IGA).
34. Sunken aircraft represent the second most common type of Australian underwater cultural heritage, after shipwrecks, and will now be protected by the Bill. Paragraphs 16(1)(c) and (d) provide for the protection of the remains of that sunken aircraft and associated articles that entered the water at least 75 years ago and are located in Commonwealth waters, in line with the jurisdictional boundaries established for different types of underwater cultural heritage under the UCH IGA.
35. The 75-year rolling date protection applies to when a vessel or aircraft entered the water, for instance when it was wrecked and sank, and does not relate to its age at that time.

Therefore, a 75-year-old vessel or aircraft that entered the water 10 years ago does not qualify for automatic protection at that time, but does once it has been in the water for 75 years.

36. Subclause 16(2) makes it clear that underwater cultural heritage is automatically protected whether or not the existence or the location of the article is known. The automatic protection recognises that investigating, documenting and protecting underwater cultural heritage on an individual basis would take significant time and important underwater cultural heritage may be disturbed, damaged or removed in the interim. For example, Australia's oldest shipwreck, the *Tryal* (1622) was partially destroyed by explosives during looting, before it could be protected.
37. Subclause 16(3) provides that an article is automatically protected even if it has been removed from Australian waters or Commonwealth waters. The definition of 'associated with' in clause 10 of the Bill means that clause 16 provides for the protection of articles that formed part of, or were installed or carried on the vessel or aircraft, including those subsequently removed. The cannons and anchors recovered from the stranding site of Captain Cook's ship *Endeavour* on the Great Barrier Reef are an example.
38. Subclause 16(4) provides the Minister with the ability to make rules that remove specific underwater cultural heritage from protection under the Bill. This provision is necessary in circumstances where underwater cultural heritage has become wholly or partially non-existent or has been permitted to be permanently removed from Australia for legitimate reasons, for example where an item has been donated for permanent display in a museum of a foreign country.

#### **Clause 17 - Underwater cultural heritage that may be declared to be protected**

39. Clause 17 provides that the Minister may, by notifiable instrument, declare certain articles to be protected underwater cultural heritage if the Minister is satisfied that the article is of heritage significance.
40. This provision allows the Minister to make a declaration in relation to:
  - (a) The remains of a vessel and articles associated with the remains of a vessel that is in or has been removed from Australian waters;
  - (b) The remains of an aircraft and articles associated with the remains of an aircraft that is in or has been removed from Commonwealth waters; and
  - (c) Other articles of underwater cultural heritage in Commonwealth waters.
41. This provision provides for the individual protection of the remains of vessels that are in Australian waters and have been assessed as having heritage significance and entered the water less than 75 years ago.
42. Clause 17 provides for the individual protection of the remains of sunken aircraft that are in Commonwealth waters that are assessed as having heritage significance, and entered the water less than 75 years ago.

43. This clause also allows the Minister to make a declaration in relation to articles associated with a vessel or aircraft or the remains of a vessel or aircraft. The definition of 'associated with' means that clause 17 provides for the protection of articles that have been carried on or were part of protected vessels and sunken aircraft.
44. The articles at items 1 to 4 in the table in clause 17 may be declared protected even if they have been removed from the water.
45. Subclause 17(3) provides that an article covered by a declaration under clause 17 will continue to be covered by the declaration even if the article is removed from waters after the declaration is made.
46. Item 5 in the table in clause 17 also provides for the individual protection of other types of underwater cultural heritage that are in Commonwealth waters and assessed as having heritage significance.
47. Clause 17 replaces the Minister's ability to declare certain shipwrecks and relics to be historic and therefore protected under section 5 of the Historic Shipwrecks Act. However, the heritage significance will now be assessed against criteria prescribed in rules made for this purpose under clause 22 of the Bill. The Historic Shipwrecks Act did not include significance criteria as it pre-dated the Australia - International Council on Monuments and Sites (Australia ICOMOS) 1979 *Burra Charter* that established the basis for heritage significance criteria in Australia.

**Clause 18 - Underwater cultural heritage outside Australian waters that may be declared to be protected**

48. Clause 18 provides that the Minister may, by notifiable instrument, declare an article of underwater cultural heritage to be protected underwater cultural heritage if the article is outside the outer limits of Australian waters and the Minister is satisfied that the article is of heritage significance to Australia. Whether an article of underwater cultural heritage is of heritage significance is assessed against criteria prescribed in rules made under clause 22.
49. This provision provides for the individual protection of all types underwater cultural heritage, including vessels, submerged aircraft and their associated articles that are in waters outside Australian waters. As a matter of policy, a declaration under this provision would only be made after consultation with the Government of the nearest coastal state.
50. Australia can only bring enforcement action for offences committed in relation to underwater cultural heritage declared protected under this provision against Australian citizens, bodies corporate and vessels. This new provision encourages the cooperative protection and management of shared underwater cultural heritage between countries.

**Clause 19 - Underwater cultural heritage that may be provisionally declared to be protected**

51. Subclause 19(1) provides that the Minister may, by notifiable instrument, provisionally declare an article to be protected underwater cultural heritage if the Minister is satisfied that that the article may be of heritage significance. Rules made under clause 22 will

prescribe which matters the Minister may have regard to when deciding whether underwater cultural heritage is of heritage significance.

52. The articles at items 1 to 5 in the table at subclause 19(5) may be provisionally declared as protected underwater cultural heritage. These articles include:
- (a) An article that appears to be the remains of a vessel or an article that may be associated with a vessel or the remains of a vessel that is in or has been removed from Australian waters;
  - (b) An article that appears to be the remains of an aircraft or an article that may be associated with a vessel or the remains of a vessel that is in or has been removed from Commonwealth waters; and
  - (c) An article that appears to be other underwater cultural heritage that is in Commonwealth waters.
53. These articles may be provisionally protected to allow for further investigation to determine whether they should be declared as protected under clause 17.
54. Subclause 19(2) provides that an article continues to be covered by a declaration under subclause 19(1) even if the article is removed from waters after the declaration is made.
55. Subclause 19(3) provides that a declaration under subclause 19(1) will remain in force for 5 years unless it is revoked under subclause 19(4).
56. Clause 19 replaces the provisional declarations provided for under section 6 of the Historic Shipwrecks Act. However, the heritage significance will now be assessed against criteria prescribed in rules made for this purpose under clause 22.

## **Division 2 – Protected zones**

### **Clause 20 – Declaring a protected zone**

57. Subclause 20(1) provides that the Minister may, by legislative instrument, declare an area containing protected underwater heritage to be a protected zone.
58. Subclause 20(2) provides that, in making a declaration, the Minister must have regard to a number of specified matters, these including conservation, management or public safety considerations, such as sites that contain unexploded military ordnance or unstable structures.
59. The Minister's ability to declare a protected zone under clause 20 replaces section 7 (Protected zones) of the Historic Shipwrecks Act.
60. The Minister is provided with the ability to specify the prohibited conduct for each protected zone under paragraph 20(5)(d). Subclause 20(7) provides examples of actions that can be prohibited.
61. These subclauses allow the declaration to be tailored to prohibit specific conduct in each zone to specifically suit individual protective or environmental conditions. In this way, the specified prohibited conduct can align with the matters the Minister must have regard

to under subclause 20(3). For example, a vessel may transit through a protected zone without needing to obtain an access permit, while still prohibiting certain underwater activities, such as anchoring or mooring in the area. This will reduce regulatory burden on the public.

62. The provision also allows the size of protected zones to be tailored to suit individual site requirements by not limiting the size of the zone that can be declared. 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.

### **Clause 21 - Varying and revoking protected zone declaration**

63. Subclause 21(1) allows the Minister to vary or revoke a declaration made under subclause 20(1) by legislative instrument.
64. Subclause 21(2) provides that the Minister must, by legislative instrument, revoke a declaration made under subclause 20(1) in relation to an article of underwater cultural heritage if a declaration under subclauses 17(1) and 19(1) is revoked in relation to the article.
65. Clause 21 gives the Minister the ability to remove a protected zone declaration if it is no longer required, or for details of the declaration to be amended if necessary; such as the zone size, location or types of conduct prohibited.

### **Division 3 - Other matters**

#### **Clause 22 – Criteria relating to heritage significance**

66. Clause 22 provides for the creation of rules to establish criteria to help determine the heritage significance of underwater cultural heritage that may be individually declared as protected.
67. The Historic Shipwrecks Act did not include significance criteria as it pre-dated the Australia ICOMOS 1979 *Burra Charter* that established the basis for heritage significance criteria in Australia. The following criteria have been developed to aid in the assessment underwater cultural heritage significance:

- (a) Historic (concerned with the range of context).

*Significant in the course, evolution or pattern of history.*

- (b) Archaeological (concerned with the research potential of material remains).

*Significant for the potential to yield information contributing to an understanding of history, technological accomplishments or social developments.*

- (c) Scientific (concerned with research potential).

*Significant in the potential to yield information about the composition and history of cultural remains and associated natural phenomena through examination of physical, chemical and biological processes.*



(d) Technical (concerned with technical or creative accomplishment).

*Significant in possessing or contributing to technical or creative accomplishment at a particular period.*

(e) Social (concerned with community regard or esteem).

*Significant through association with a community or communities in Australia today for social, cultural or spiritual reasons.*

(f) Educational (concerned with public education values).

*Significant for its potential to contribute towards public education.*

(g) Rarity (concerned with the uncommon or exceptional).

*Significant in possessing rare, endangered or uncommon aspects of history.*

(h) Representative (concerned with the typical or characteristic).

*Significant in demonstrating the characteristics of a class of cultural items.*

68. Underwater cultural heritage will be considered to have heritage significance if it has values under one or more of the criteria.

### **PART 3 - REGULATION OF PROTECTED UNDERWATER CULTURAL HERITAGE**

#### **Division 1 - Permits relating to protected underwater cultural heritage**

##### **Clause 23 - Permits relating to protected underwater cultural heritage**

69. Subclause 23(1) provides that a person may apply to the Minister for a permit authorising the person, persons specified in the permit or persons generally to engage in specified conduct that relates to one or more of the following:

- (a) Specified protected underwater cultural heritage;
- (b) A specified protected zone;
- (c) Specified foreign underwater cultural heritage.

70. This includes, but is not limited to, conduct that:

- (a) Is within a protected zone;
- (b) Will have or is likely to have an adverse impact on in-situ protected shipwrecks, submerged aircraft or other underwater cultural heritage;
- (c) Involves the possession, supply or export from Australia of protected underwater cultural heritage articles, including those removed from protected shipwrecks or submerged aircraft;
- (d) Will have or is likely to have an adverse impact on Australia's in-situ protected underwater cultural heritage located overseas; or
- (e) Involves the importation into Australia of underwater cultural heritage articles.

71. If the Minister receives an application under subclause 23(1), the Minister must decide whether to grant the permit or refuse to grant the permit. In doing so, the Minister must have regard to the matters (if any) specified in the Underwater Cultural Heritage Rules. The rules may contain guidance on such matters as how the diversity of permit purposes should be dealt with, how to assess what might constitute an adverse impact in any given situation and whether an adverse impact should be allowed in certain circumstances.
72. Where the Minister decides to grant a permit, the permit must contain the matters set out in subclause 23(5). This includes the conditions, if any, to which the permit is subject.
73. Where the Minister refuses to grant a permit, subclause 23(6) provides that the Minister must give written notice of the refusal to the applicant, including reasons for the refusal. Similarly, where the Minister grants a permit in terms that are different from those applied for, the Minister must give the applicant written notice of the reasons for the Minister's decision (subclause 23(7)).

#### **Clause 24 - Permits are subject to conditions**

74. Clause 24 provides that permits granted under clause 23 are subject to the following conditions:
  - (a) The conditions set out in subclause 24(2) of the Bill, which relate to the transfer and variation of permits;
  - (b) The conditions, if any, imposed by the Minister; and
  - (c) The conditions, if any, specified in the Underwater Cultural Heritage Rules.

#### **Clause 25 - Varying permits**

75. Subclause 25 provides the Minister with authority to vary a permit at any time, on application or the Minister's own initiative. Clause 25 sets out a process whereby the Minister may vary, revoke or impose permit conditions, and sets out how the Minister must notify a permit holder of a decision to vary the permit held by that permit holder.

#### **Clause 26 - Suspending and revoking of permits**

76. Clause 26 provides that the Minister may, by giving written notice to a permit holder, suspend or revoke a permit, where the Minister is satisfied that a permit condition has been contravened or that it is necessary to do so in order to conserve or protect underwater cultural heritage.
77. Subclause 26(2) provides that where the Minister revokes a permit, the revocation takes effect on the day specified in the notice of revocation. This day must be at least 21 days after the notice given to the permit holder.
78. Clause 26(3) provides that, where a permit is suspended, the suspension takes effect from the date specified in the notice, which must be at least 21 days after the notice is given to the permit holder. The suspension continues for the period specified in the notice, and during this period, the permit has no effect.

## **Clause 27 - Transfer of permits**

79. Clause 27 provides that a permit may be transferred to another person, unless the permit includes a condition that it is non-transferable.
80. Where a permit holder transfers a permit to another person (the ‘transferee’), the transferee must notify the Minister by giving the Minister notice in the approved form within 14 days after the transfer. The permit holder must also notify the Minister under clause 24.
81. Criminal, strict liability and criminal penalties will apply in relation to contraventions of clause 27. These are set out in the table at page 8.
82. The justification for the need for the strict liability offences is to ensure the integrity of the regulatory regime as it relates to Australia’s unique and non-renewable underwater cultural heritage resource. The seriousness of an offences against clause 27 can vary greatly depending on the individual circumstances of an offence and the intent of the person committing the offence.
83. The use of strict liability as an option in this context is to ensure that persons who have committed a low level offence are treated fairly and proportionally. Further, this strict liability offence does not include imprisonment as a penalty and has a maximum fine of 60 penalty units.

## **Clause 28 - Breach of conditions of permit**

84. Clause 28 provides for penalties to apply where a person is subject to a permit condition and the person engages in conduct that breaches the condition. These penalties are set out in the table at page 8.
85. The justification for the need for the strict liability offences is to ensure the integrity of the regulatory regime as it relates to Australia’s unique and non-renewable underwater cultural heritage resource. The seriousness of an offences against clause 28 can vary greatly depending on the individual circumstances of an offence and the intent of the person committing the offence.
86. The use of strict liability as an option in this context is to ensure that persons who have committed a low level offence are treated fairly and proportionally. Further, this strict liability offence does not include imprisonment as a penalty and has a maximum fine of 60 penalty units.

## **Division 2 - Regulation of activities relating to protected underwater cultural heritage**

### **Clause 29 - Certain conduct within a protected zone prohibited without a permit**

87. Subclause 29(1) applies where a person engages in conduct that takes place in a protected zone, where that conduct is prohibited conduct in relation to the protected zone.
88. Protected zones can be established by a declaration of the Minister under clause 20 of the Bill. Clause 20 allows the Minister to declare what is prohibited conduct, in relation to each protected zone.

89. Clause 29 provides for criminal, strict liability and civil penalties to apply where a person contravenes subclause 29(1). These penalties are set out in the table at page 8.
90. Under subclause 29(3), a person does not contravene subclause 29(1) where they engage in the conduct for the purposes of saving human life, securing the safety of a vessel endangered by stress of weather or navigational hazards, or dealing with an emergency involving a serious threat to the environment.
91. The justification for the need for the strict liability offences is to ensure the integrity of the regulatory regime as it relates to Australia's unique and non-renewable underwater cultural heritage resource. The seriousness of an offences against clause 29 can vary greatly depending on the individual circumstances of an offence and the intent of the person committing the offence.
92. The use of strict liability as an option in this context is to ensure that persons who have committed a low level offence are treated fairly and proportionally. Further, this strict liability offence does not include imprisonment as a penalty and has a maximum fine of 60 penalty units.

**Clause 30 - Conduct having an adverse impact on protected underwater cultural heritage prohibited without a permit**

93. Clause 30 prohibits conduct that has, will have or is likely to have an adverse impact on protected underwater cultural heritage. This prohibition does not apply where a person engages in the conduct in accordance with a permit granted under clause 23 of the Bill.
94. This clause deals with the most severe threat to underwater cultural heritage that could result in its substantial or total loss. To this end, clause 30 provides for criminal, strict liability and civil penalties to apply where a person contravenes clause 30(1). These penalties are set out in the table at page 8.
95. Amongst the potential threats, the greatest is posed by commercial or private marine developments and other large scale underwater activities such as dredging or resource extraction. The maximum civil penalty that can apply to a contravention of clause 30 is 800 penalty units, which is necessary to provide an adequate deterrent, particularly to large body corporates that operate in the marine environment.
96. The justification for the need for the strict liability offences is to ensure the integrity of the regulatory regime as it relates to Australia's unique and non-renewable underwater cultural heritage resource. The seriousness of an offences against clause 30 can vary greatly depending on the individual circumstances of an offence and the intent of the person committing the offence.
97. The use of strict liability as an option in this context is to ensure that persons who have committed a low level offence are treated fairly and proportionally. Further, this strict liability offence does not include imprisonment as a penalty and has a maximum fine of 60 penalty units.

### **Clause 31 - Possession etc. of protected underwater cultural heritage prohibited without a permit**

98. Clause 31 prohibits a person from having possession, custody or control of protected underwater cultural heritage, unless the possession, custody or control is authorised by a permit granted under clause 23. This provision is part of the system established under the Bill to trace the movement of protected underwater cultural heritage articles that are authorised to be in the possession of members of the public. The process for notifying the transfer and receipt of permits and their accompanying articles is covered under Clauses 24 and 27 of the Bill.
99. Some cases of the illegal possession of underwater cultural heritage can also approach extreme levels of seriousness and can be associated with the deliberate looting of underwater cultural heritage sites. Examples under the Historic Shipwrecks Act have involved large numbers of articles valued at more than \$2,000,000. Although the most important outcome in these cases is the recovery of the articles, a powerful deterrent is also required.
100. To this end, criminal, strict liability and civil penalties will apply in relation to contraventions of clause 31. These are set out in the table at page 8.
101. A person will not contravene this clause if the person is the Commonwealth, a State or Territory, or Commonwealth, State or Territory authorities, such as government museums or agencies.
102. The justification for the need for the strict liability offences is to ensure the integrity of the regulatory regime as it relates to Australia's unique and non-renewable underwater cultural heritage resource. The seriousness of an offences against clause 31 can vary greatly depending on the individual circumstances of an offence and the intent of the person committing the offence.
103. The use of strict liability as an option in this context is to ensure that persons who have committed a low level offence are treated fairly and proportionally. Further, this strict liability offence does not include imprisonment as a penalty and has a maximum fine of 60 penalty units.

### **Clause 32 - Supplying, or offering to supply, protected underwater cultural heritage prohibited without a permit**

104. Clause 32 prohibits a person from supplying or offering to supply protected underwater cultural heritage, unless the person is authorised to do so by the terms of a permit granted by the Minister.
105. The purpose of this clause is to provide for control of the supply of underwater cultural heritage from one person to another.
106. To this end, criminal, strict liability and civil penalties will apply in relation to contraventions of clause 32. These are set out in the table at page 8.
107. The justification for the need for the strict liability offences is to ensure the integrity of the regulatory regime as it relates to Australia's unique and non-renewable underwater

cultural heritage resource. The seriousness of an offences against clause 32 can vary greatly depending on the individual circumstances of an offence and the intent of the person committing the offence.

108. The use of strict liability as an option in this context is to ensure that persons who have committed a low level offence are treated fairly and proportionally. Further, this strict liability offence does not include imprisonment as a penalty and has a maximum fine of 60 penalty units.

**Clause 33 - Advertisements for sale of protected underwater cultural heritage must include permit number**

109. Clause 33 prohibits a person from advertising protected underwater cultural heritage for sale, in accordance with the terms of a permit granted by the Minister, without including the unique permit number in the advertising materials, including advertisements relating to auctions. This provision will assist in reducing the current volume of public inquiries about the legality of underwater cultural heritage articles being offered for sale.

110. To this end, criminal, strict liability and civil penalties will apply in relation to contraventions of clause 33. These are set out in the table at page 8.

111. The justification for the need for the strict liability offences is to ensure the integrity of the regulatory regime as it relates to Australia's unique and non-renewable underwater cultural heritage resource. The seriousness of an offences against clause 33 can vary greatly depending on the individual circumstances of an offence and the intent of the person committing the offence.

112. The use of strict liability as an option in this context is to ensure that persons who have committed a low level offence are treated fairly and proportionally. Further, this strict liability offence does not include imprisonment as a penalty and has a maximum fine of 60 penalty units.

**Clause 34 - Importing protected underwater cultural heritage without a permit prohibited**

113. Clause 34 prohibits the importation of an article of protected underwater cultural heritage into Australia, unless the importation occurs in accordance with a permit granted by the Minister under clause 23.

114. The purpose of this clause is to control the entry of protected underwater cultural heritage into Australia. This would include articles that have been previously removed from Australia without authorisation or articles from Australian overseas underwater cultural heritage sites that can now be declared.

115. To this end, criminal, strict liability and civil penalties will apply in relation to contraventions of clause 34. These are set out in the table at page 8.

116. The justification for the need for the strict liability offences is to ensure the integrity of the regulatory regime as it relates to Australia's unique and non-renewable underwater cultural heritage resource. The seriousness of an offences against clause 34 can vary

greatly depending on the individual circumstances of an offence and the intent of the person committing the offence.

117. The use of strict liability as an option in this context is to ensure that persons who have committed a low level offence are treated fairly and proportionally. Further, this strict liability offence does not include imprisonment as a penalty and has a maximum fine of 60 penalty units.

### **Clause 35 - Exporting protected underwater cultural heritage without a permit prohibited**

118. Clause 35 prohibits the export of an article of protected underwater cultural heritage from Australia, unless the exportation occurs in accordance with a permit granted by the Minister under clause 23.
119. The purpose of this clause is to provide a clearer and more rigorous process for controlling the export of protected underwater cultural heritage from Australia than that the arrangements which previously applied under the Historic Shipwrecks Act.
120. The illegal export of protected underwater cultural heritage is amongst the most common offences that are pursued in investigations under the Historic Shipwrecks Act. Many articles of Australian underwater cultural heritage are sought after by overseas collectors. Once these articles are removed from Australian jurisdiction, they are extremely difficult to recover and the subsequent loss to Australia's cultural heritage is significant.
121. To this end, criminal, strict liability and civil penalties will apply in relation to contraventions of clause 35. These are set out in the table at page 8.
122. The justification for the need for the strict liability offences is to ensure the integrity of the regulatory regime as it relates to Australia's unique and non-renewable underwater cultural heritage resource. The seriousness of an offences against clause 35 can vary greatly depending on the individual circumstances of an offence and the intent of the person committing the offence.
123. The use of strict liability as an option in this context is to ensure that persons who have committed a low level offence are treated fairly and proportionally. Further, this strict liability offence does not include imprisonment as a penalty and has a maximum fine of 60 penalty units.

### **Clause 36 - Importing underwater cultural heritage of a foreign country without a permit prohibited**

124. Clause 36 prohibits the importation of an article of protected underwater cultural heritage from Australia, unless the importation occurs in accordance with a permit granted by the Minister under clause 23.
125. Criminal, strict liability and civil penalties will apply in relation to contraventions of clause 36. These are set out in the table at page 8.
126. Clause 36 provides for the alignment of the Bill with the requirements of the Convention concerning the trafficking of underwater cultural heritage.

127. The justification for the need for the strict liability offences is to ensure the integrity of the regulatory regime as it relates to Australia's unique and non-renewable underwater cultural heritage resource. The seriousness of an offences against clause 36 can vary greatly depending on the individual circumstances of an offence and the intent of the person committing the offence.

128. The use of strict liability as an option in this context is to ensure that persons who have committed a low level offence are treated fairly and proportionally. Further, this strict liability offence does not include imprisonment as a penalty and has a maximum fine of 60 penalty units.

### **Clause 37 - Requirement to produce permits**

129. Clause 37 provides that an inspector for the purposes of the Bill may require a person to produce a permit authorising the person to have possession, custody or control of protected underwater cultural heritage, where the inspector suspects on reasonable grounds that the person has person has possession, custody or control of protected underwater cultural heritage.

130. Criminal, strict liability and civil penalties will apply in relation to contraventions of clause 37. These are set out in the table at page 8.

131. The justification for the need for the strict liability offences is to ensure the integrity of the regulatory regime as it relates to Australia's unique and non-renewable underwater cultural heritage resource. The seriousness of an offences against clause 37 can vary greatly depending on the individual circumstances of an offence and the intent of the person committing the offence.

132. The use of strict liability as an option in this context is to ensure that persons who have committed a low level offence are treated fairly and proportionally. Further, this strict liability offence does not include imprisonment as a penalty and has a maximum fine of 60 penalty units.

### **Clause 38 - Minister may ascertain location of protected underwater cultural heritage**

133. Clause 38 of the Bill provides that the Minister may ascertain the location of protected underwater cultural heritage by issuing a disclosure notice to a person that compels them to provide certain information.

134. Under clause 38, the Minister may require a person to provide information about the possession and transfer of an article that is or may be protected underwater cultural heritage, in circumstances where the Minister reasonably believes that the person may have or may have had possession of such an article.

135. The purpose of this provision is to provide the Minister the ability to ascertain information about the possession and transfer of protected underwater cultural heritage, such as information about to whom it may have been supplied. This is to improve the traceability of articles of protected underwater cultural heritage and ensure that the provisions of the Bill can be effectively enforced.



136. Under clause 38, a person is not excused from providing information, evidence or a document that might tend to incriminate them or expose them to a penalty.
137. However, under subclause 38(9), the information, evidence or document will generally not be admissible in evidence against an individual in legal proceedings, except in limited circumstances where:
- (a) A person knowingly provides false information in response to a disclosure notice, it is possible to use the information, evidence or document that they provided in order to prosecute them for doing so (paragraph 38(9)(d)); and
  - (b) A person obstructs, hinders, intimidates or resists an official in the performance of the official's functions (paragraph 38(9)(e)).
138. Without the exceptions set out in paragraphs 38(9)(d) and (e) it would be difficult, if not impossible, to prosecute a person for providing false information or being obstructive in response to a disclosure notice. Removing these references would remove the incentive to provide truthful information and would incentivise providing false information and undermine the effectiveness of investigations.
139. Criminal, strict liability and civil penalties will apply in relation to contraventions of clause 38. These are set out in the table at page 8.
140. The justification for the need for the strict liability offences is to ensure the integrity of the regulatory regime as it relates to Australia's unique and non-renewable underwater cultural heritage resource. The seriousness of an offence against clause 38 can vary greatly depending on the individual circumstances of an offence and the intent of the person committing the offence.
141. The use of strict liability as an option in this context is to ensure that persons who have committed a low level offence are treated fairly and proportionally. Further, this strict liability offence does not include imprisonment as a penalty and has a maximum fine of 60 penalty units.

### **Clause 39 - Minister may give directions about custody etc. of protected underwater cultural heritage**

142. Clause 39 provides the Minister with the ability to give written directions to a person in possession, custody or control of an article of protected underwater cultural heritage, requiring that person to take a specified action in relation to the article.
143. Under clause 39, the Minister may only give a notice where the Minister is satisfied that it is reasonably necessary to do so for the purpose of any of the following matters: to preserve the article, place the article within a collection of articles, or exhibit or provide access to the article.
144. Where the Minister gives a notice under clause 39, the notice must state that the person may, as an alternative to taking the action specified in the notice, deliver the article within a specified period into the custody of a specified person.
145. Clause 53 of the Bill will provide a compensation mechanism which will apply where direction given under clause 39 would result in an acquisition of property (within the

meaning of paragraph 51(xxxi) of the Constitution) from a person other than on just terms.

146. Criminal, strict liability and civil penalties may apply where a person does not comply with a direction given by the Minister under clause 39. These are set out in the table at page 8.

147. The justification for the need for the strict liability offences is to ensure the integrity of the regulatory regime as it relates to Australia's unique and non-renewable underwater cultural heritage resource. The seriousness of an offences against clause 39 can vary greatly depending on the individual circumstances of an offence and the intent of the person committing the offence.

148. The use of strict liability as an option in this context is to ensure that persons who have committed a low level offence are treated fairly and proportionally. Further, this strict liability offence does not include imprisonment as a penalty and has a maximum fine of 60 penalty units.

#### **Clause 40 - Discovery of certain underwater cultural heritage must be notified**

149. Clause 40 requires a person who finds an article of underwater cultural heritage in Australian waters to that appears to be of archaeological character to provide the Minister with written notice of the discovery.

150. Under clause 40, the notice must set out a description of the article and a description of the place where the article is situated that is sufficient to enable the article to be located. The notice must be provided to the Minister within 21 days after the person finds an article.

151. Clause 40 provides for civil and criminal penalties to apply where a person does not comply with this requirement, unless a notice relating to the article has already been provided to the Minister. These penalties are set out in the table at page 8.

### **PART 4 - COMPLIANCE AND ENFORCEMENT**

#### **Division 1 - Regulatory powers**

##### **Clause 41 - Monitoring powers**

152. Part 2 of the Regulatory Powers Act provides a framework for monitoring whether the provisions of an Act have been, or are being, complied with. It includes powers of entry and inspection.

153. Clause 41 makes the provisions of the Bill subject to monitoring under Part 2 of the Regulatory Powers Act. Offences under the *Crimes Act 1914* or the *Criminal Code* that relate to the Bill are also subject to monitoring under Part 2.

154. Additionally, information given in compliance or purported compliance with a provision of the Bill is subject to monitoring under Part 2 of the Regulatory Powers Act.

#### **Clause 42 - Investigation powers**

155. Part 3 of the Regulatory Powers Act provides a framework for investigating whether a provision has been contravened. Clause 42 of the Bill makes a provision of the Bill subject to Part 3 of the Regulatory Powers Act if it is an offence against the Act, or a civil penalty provision of the Act.

#### **Clause 43 - Civil penalty provisions**

156. Clause 43 makes each civil penalty provision of the Bill subject to Part 4 of the Regulatory Powers Act. Part 4 of the Regulatory Powers Act provides a framework for the use of civil penalties to enforce civil penalty provisions, including by obtaining an order for a person to pay a pecuniary penalty for the contravention of a provision.

#### **Clause 44 - Infringement notices**

157. Clause 44 provides for a provision of the Bill to be subject to an infringement notice under Part 5 of the Regulatory Powers Act, if the provision is an offence provision of the Act that is an offence of strict liability, or a civil penalty provision of the Act.

#### **Clause 45 - Enforceable undertakings**

158. Clause 45 makes a provision of the Bill enforceable under Part 6 of the Regulatory Powers Act if it is an offence against the Act or a civil penalty provision. Part 6 of the Regulatory Powers Act creates a framework for accepting and enforcing undertakings relating to compliance with provisions.

#### **Clause 46 – Injunctions**

159. Clause 45 makes a provision of the Bill enforceable under Part 7 of the Regulatory Powers Act if it is an offence provision of the Bill or a civil penalty provision. Part 7 of the Regulatory Powers Act creates a framework for using injunctions to enforce provisions.

### **Division 2 - Forfeiture**

#### **Clause 47 - Court may order forfeiture**

160. Clause 47 provides that a court may order forfeiture of any vessel, equipment or article used or involved in the commission of an offence or the contravention of a civil penalty provision. The forfeited vessel, equipment or article becomes the property of the Commonwealth and may be sold or otherwise dealt with as the Minister thinks fit.

### **PART 5 - OTHER MATTERS**

#### **Clause 48 - Register of Underwater Cultural Heritage**

161. Clause 48 provides for the establishment of a statutory register of protected underwater cultural heritage, which includes:

- (a) Known underwater cultural heritage in Australian or Commonwealth waters, including remains of vessels, aircraft and associated articles, that is automatically protected;

- (b) Underwater cultural heritage, including remains of vessels, aircraft and associated articles and other underwater cultural heritage, that has been declared protected;
- (c) Articles of underwater cultural heritage outside Australian waters that have been declared protected;
- (d) Underwater cultural heritage, including articles that appear to be the remains of vessels, aircraft and associated articles and other articles that appear to be underwater cultural heritage, that has been declared provisionally protected;
- (e) Permits issued under the Bill; and
- (f) Any other matters prescribed by the Underwater Cultural Heritage Rules.

162. This provision replaces the Register of Historic Shipwrecks established under section 12 of the Historic Shipwrecks Act.

163. Clause 48 allows for the consolidation of information on protected underwater cultural heritage and the collection of electronic data for regulatory, management and educational purposes.

164. Subclause 48(4) allows the Underwater Cultural Heritage Rules to make provision for the publication of the register.

#### **Clause 49 - Review of decisions**

165. Clause 49 allows for a person to apply to the Administrative Appeals Tribunal for review of certain decisions made by the Minister or his or her delegate. The clause specifies the decisions that are reviewable under the Bill.

166. In particular, the list of reviewable decisions in clause 49 does not include the following decision-making powers:

- (a) A decision under clause 50 to declare ownership of specified Dutch shipwrecks and associated articles; and
- (b) A decision under clause 51 to declare the vesting of ownership of a specified article of underwater cultural heritage.

167. The declaration of ownership under clause 50 and the declaration of vesting of ownership under clause 51 have been excluded from merits review under the Bill because:

- (a) Under the 1972 *Agreement between the Netherlands and Australian concerning Old Dutch shipwrecks* (Australia-Netherlands Agreement), which provides that the Netherlands, as successor to the property and assets of the Dutch East India Company, 'Vereenigde Oostindische Compagnie' (VOC), transfers all its right, title and interest in and to wrecked vessels of the VOC lying on or off the coast of the State of Western Australia and in and to any articles thereof to Australia. Therefore, the Commonwealth has the right to transfer ownership of these articles under clause 50 of the Bill, and as this would be an internal matter of government policy it does not warrant merits review;

- (b) The Commonwealth can also gain ownership of underwater cultural heritage articles through treaties with other countries, such as the 1981 agreement between Australia and Great Britain concerning the wreck of the Admiralty vessel HMS *Pandora*, which provides that Great Britain permit the archaeological excavation of the vessel and its contents and assign full rights of ownership to the Commonwealth of Australia of recovered articles. A subsequent government policy decision to transfer of ownership of these articles under clause 51 of the Bill does not warrant merits review.

**Clause 50 – Declaration of ownership of specified Dutch shipwrecks and associated articles**

168. Clause 50 provides that the Minister may, by legislative instrument, declare the ownership over Dutch shipwrecks and Dutch relics that are subject to the Australia-Netherlands Agreement to be vested in the Commonwealth or Western Australia, including specified authorities or the Netherlands.
169. Subclause 50(1) provides that the Minister may declare that ownership in a specific Dutch shipwreck is vested in a specified authority of the Commonwealth.
170. Subclause 50(3) provides that the Minister may declare that ownership of a specific Dutch relic to be vested in a specified authority of the Commonwealth, Western Australia, a specified authority of Western Australia or the government of the Kingdom of the Netherlands.
171. The Minister must be satisfied that it is necessary to make a declaration in relation to a Dutch Shipwreck (subclause 50(1)) or a Dutch relic (subclause 50(3)) for the purpose of giving effect to the Australia-Netherlands Agreement.

**Clause 51 - Declaration of ownership of other underwater cultural heritage**

172. Subclause 51(1) provides that the Minister may, by legislative instrument declare ownership over specified articles of underwater cultural heritage to be vested in:
- (a) The Commonwealth; or
  - (b) A specified authority of the Commonwealth; or
  - (c) A specified State or Territory; or
  - (d) A specified authority of a State or Territory; or
  - (e) Any other specified person.
173. The Minister is empowered to declare ownership of a specified article of underwater cultural heritage if necessary to do so for the purposes of giving effect to the Bill or any relevant agreement (other than the Australia-Netherlands Agreement).

## **Clause 52 - Ownership of, and sovereignty in, remains of Australian defence vessels and aircraft and associated articles**

174. Clause 52 provides that ownership of and sovereignty in the remains of certain vessels and aircraft and their associated articles outside the outer limits of Australian waters vests in the Commonwealth, including:

- (a) The remains of vessels and associated articles belonging to or used by the Australian Defence Force;
- (b) The remains of Government vessels and associated articles used for non-commercial service;
- (c) The remains of aircraft and associated articles belonging to or used by the Australian Defence Force.

175. Ownership of, and sovereignty in those vessels and aircraft and their associated articles will not vest in the Commonwealth if:

- (a) The vessel was captured by, or surrendered to a foreign country before it sank; or
- (b) The aircraft was abandoned after it sank with the intention that the Commonwealth relinquish its rights; or
- (c) The Commonwealth expressly relinquished its rights in relation to the vessel or the aircraft;

176. Underwater cultural heritage outside of Australian waters can be declared protected under clause 18. The Minister must be satisfied that an article of underwater cultural heritage is of ‘heritage significance’ to make such a declaration.

177. Clause 52 does not limit the Minister’s assessment of heritage significance for the purposes of making a declaration under clause 18. For instance, a vessel that was surrendered to a foreign country before it sank may still have heritage significance for the purposes of making a declaration to protect it.

## **Clause 53 - Compensation for acquisition of property**

178. Clause 53 provides that, if the operation of the Bill would result in an acquisition of property otherwise than on just terms, the Commonwealth is liable to pay a reasonable amount of compensation. In the event that the Commonwealth and the person do not agree on the amount of compensation, the person may institute proceedings in the Federal Court of Australia or the Supreme Court of a State or Territory.

## **Clause 54 - Certificate by Minister to be evidence**

179. Clause 54 enables the Minister to provide a written certificate, known as an evidentiary certificate, stating a place specified in the certificate is a place in:

- (a) Australian waters;
- (b) Commonwealth waters;

- (c) Waters within the limits of a State or the Northern Territory;
- (d) Coastal waters of a State or the Northern Territory; or
- (e) A specified protected zone.

180. Subclause 54(2) provides that the evidentiary certificate is prima facie evidence of matters stated in the certificate in criminal proceedings or proceedings for a contravention of a civil penalty provision.

181. Evidentiary certificates provided under clause 54 will only relate to identifying the type of waters that a particular place is located within. This is a formal matter that is not likely to be in dispute but that would be difficult to prove. Given the complexity in relation to waters over which the Bill applies and how this relates to regulation under the Bill, it is helpful to have an evidentiary certificate as prima facie evidence of the fact in question.

#### **Clause 55 - Contravening offence or civil penalty provisions**

182. Clause 55 provides that for the purpose of this Bill, and the Regulatory Powers Act to the extent that it relates to this Bill, a reference to a contravention of an offence provision or a civil penalty provision includes a reference to a contravention of the relevant conduct provision.

#### **Clause 56 - Delegation of Minister's powers**

183. Clause 56 provides a structure for the Minister to delegate certain powers or functions under the Bill to other persons, including:

- (a) The Secretary;
- (b) An SES or acting SES officer of a Department; and
- (c) Any other person the Minister considers has appropriate qualifications or expertise.

184. The Bill continues the successful and long standing collaboration by the Commonwealth, State and Territory Governments on the administration and management of Australia's protected underwater cultural heritage, which was established under the Historic Shipwrecks Act. This clause will provide for the continuation of this joint effort and rely on an ability to delegate responsibilities to the persons that are best placed to carry them out in practice.

185. The delegation will ensure that delegates can be appointed from a range of Commonwealth, State and Territory agencies, institutions or authorities that are best placed to undertake the responsibilities.

186. State or Northern Territory Delegates cannot be appointed by the Minister without the agreement of the relevant State or Territory. In exercising their powers or functions, delegates must comply with the directions of the Minister.

### **Clause 57 - Delegation of Secretary's powers**

187. Clause 57 provides a structure for the Secretary to delegate his or her powers or functions under the Bill, or powers under the Regulatory Powers Act that relate to the Bill, to an SES or acting SES officer in the Department. In exercising their powers or functions, delegates must comply with the directions of the Secretary.

### **Clause 58 - Approved forms**

188. Clause 58 provides for Minister to approve specific forms that may be required to implement some requirements under the Bill.

### **Clause 59 - Arrangements for States and the Northern Territory to carry out certain functions**

189. Clause 59 provides that the Minister can make arrangements with the States and Northern Territory to carry out functions under the Bill and to arrange payments in respect to the performance of those functions.

### **Clause 60 - Appointment of inspectors**

190. Subclause 60(1) provides that the Secretary can appoint an officer or employee of an authority of the Commonwealth, a State or Territory as an inspector for the purposes of the Part 3 or 4 of the Bill.

191. Subclause 60(2) requires the Secretary to obtain the agreement of the State or Territory before appointing an inspector.

192. Subclause 60(3) prevents the Secretary from appointing a person as an inspector unless the Secretary is satisfied that the person has the necessary knowledge or experience.

### **Clause 61 - Underwater Cultural Heritage rules**

193. Paragraph 61(1)(a) provides that the Minister, may, by legislative instrument make rules prescribing matters that are required or permitted by the Bill to be prescribed by the rules, including:

- (a) Certain specified articles that are not automatically protected underwater cultural heritage under clause 16;
- (b) Criteria relating to heritage significance under clause 22;
- (c) Matters the Minister must have regard to in deciding whether to grant a permit under subclause 23(4);
- (d) Other matters that need to be specified in permits under subclause 23(5);
- (e) Permit conditions under clause 24;
- (f) Matters the Minister must have regard to in deciding whether to vary a permit under clause 25;



- (g) Particulars that must be included in the register of underwater cultural heritage under paragraph 48(3)(e); and
  - (h) Matters relating to the administration or operation of the register of underwater cultural heritage under subclause 48(4).
194. Paragraph 61(1)(b) provides that the Minister may, by legislative instrument, make rules necessary or convenient to be prescribed for carrying out or giving effect to the Bill, the Australia-Netherlands Agreement or any other relevant agreement.
195. Subclause 61(2) allows the Underwater Cultural Heritage Rules to provide for charging fees in respect of any matters under the Bill.

# UNDERWATER CULTURAL HERITAGE (CONSEQUENTIAL AND TRANSITIONAL PROVISIONS) BILL 2018

## NOTES ON CLAUSES

### Clause 1 - Short title

1. Clause 1 provides that the short title by which the Act may be cited is the *Underwater Cultural Heritage (Consequential and Transitional Provisions) Act 2018*.

### Clause 2 - Commencement

2. Clause 2 provides for when the schedules of the Bill will commence. Clauses 1 to 3 of the Bill, which contain the machinery provisions, commence on the day the Bill receives the Royal Assent.
3. Schedules 1 and 2 of the Bill commence at the same time as section 3 of the *Underwater Cultural Heritage Act 2018* (the Underwater Cultural Heritage Act) commences. However, Schedules 1 and 2 will not commence if section 3 does not commence.

### Clause 3 - Schedules

4. This clause provides that the amendments set out in the schedules to the Act have effect according to the terms of the schedules.

## SCHEDULE 1 - REPEALS AND AMENDMENTS

### PART 1 - REPEAL OF THE HISTORIC SHIPWRECKS ACT 1976

#### *Historic Shipwrecks Act 1976*

##### Item 1 - The whole of the Act

5. Item 1 repeals the Historic Shipwrecks Act in its entirety.

### PART 2 - CONSEQUENTIAL AMENDMENTS

#### *Australian Heritage Council Act 2003*

##### Item 2 - Subparagraph 5(d)(v)

6. Item 2 amends the *Australian Heritage Council Act 2003* by omitting the term ‘historic shipwrecks’ from subparagraph 5(d)(v) of that Act and replacing it with ‘underwater cultural heritage’.

#### *Navigation Act 2012*

##### Item 3 - Subsection 14(1) (definition of *historic wreck*)

7. Item 3 repeals the definition of ‘historic wreck’ in subsection 14(1) of the *Navigation Act 2012* (Navigation Act) and inserting a new definition of that term, which reflects the enactment of the Bill.

## **Protection of the Sea (Powers of Intervention) Act 1981**

### **Item 4 - Subsection 5(2)**

8. Item 4 amends subsection 5(2) of the *Protection of the Sea (Powers of Intervention) Act 1981* so that it reflects the enactment of the Underwater Cultural Heritage Act.

## **Sea Installations Act 1987**

### **Items 5, 6 & 7 - Subsection 4(1) (definition of *excluded wreck*)**

9. Item 5 amends the *Sea Installations Act 1987* by repealing the definition of ‘excluded wreck’ and replacing it with the new term ‘excluded wreckage’, which includes remains and articles covered by certain provisions of the Underwater Cultural Heritage Act and the Navigation Act.

## **SCHEDULE 2 - TRANSITIONAL PROVISIONS**

### **Item 1 - Definitions**

10. Item 1 defines key terms used in Schedule 2 of the Bill.

### **Item 2 - Section 4A declarations in relation to shipwrecks**

11. Item 2 provides for remains of ships that were covered by a declaration under subsection 4A(1) or (2) of the Historic Shipwrecks Act to be covered by subsection 16(1)(a) of the Underwater Cultural Heritage Act.

### **Item 3 - Section 4A declarations in relation to relics**

12. Item 3 provides for articles that were covered by a declaration under subsection 4A(6) or (7) of the Historic Shipwrecks Act, which provides automatic protection for the relics associated with the remains of ships or that entered Australian waters from a ship at least 75 years ago, to be covered by subsection 16(1)(b) of the Underwater Cultural Heritage Act.

### **Item 4 - Transition of section 5 declarations in relation to shipwrecks and relics**

13. Item 4 provides that declarations made under Section 5 of the Historic Shipwrecks Act, to be taken, on and after the commencement day of the Underwater Cultural Heritage Act, to be a declaration made under subsection 17(1) of the Underwater Cultural Heritage Act.

### **Item 5 - Transition of provisional declarations in relation to shipwrecks and relics**

14. Item 5 provides that 5 year provisional declarations made in relation to an article under section 6 of the Historic Shipwrecks Act are to be taken, on and after the commencement of the Underwater Cultural Heritage Act, to be a declaration in relation to the article under subsection 19(1) of that Act.

### **Item 6 - Transition of notices about possession etc. of articles**

15. Item 6 provides that, if a person had been given a prescribed notice that was in force in relation to an article under section 9 of the Historic Shipwrecks Act immediately before

the commencement of the Underwater Cultural Heritage Act, the Minister is taken to have granted a permit to the person under section 23 of the Underwater Cultural Heritage Act in relation to the article.

16. This is to ensure the smooth transition of the authorised possession of protected articles held by the public from the Historic Shipwrecks Act to the Bill.

#### **Item 7 - Notices about location of articles**

17. Item 7 provides that notices issued under Section 10(1) of the Historic Shipwrecks Act, which require persons to provide information concerning their possession, custody or control of historic shipwrecks or historic relics, will be taken to have been given under subsection 38(2) of the Underwater Cultural Heritage Act.
18. Item 9(3) of the Bill provides that the Minister may give a direction to a person in relation to an article of protected underwater cultural heritage under section 39 of the Underwater Cultural Heritage Act, regardless of whether the person obtained possession, custody or control of the article.

#### **Item 8 - Directions about custody etc. of articles**

19. Item 8 of the Bill provides that notices given to a person under subsection 11(1) of the Historic Shipwrecks Act, which require persons to undertake certain actions concerning their possession, custody or control of historic shipwrecks and/or historic relics, will have effect as if they are notices given by the Minister under subsection 39(1) of the Underwater Cultural Heritage Act.
20. Item 8(3) of the Bill provides that the Minister may give a direction to a person in relation to an article of protected underwater cultural heritage under section 39 of the Underwater Cultural Heritage Act, regardless of whether the person obtained possession, custody or control of the article.

#### **Item 9 - Pending applications for permits are taken to have been refused**

21. Item 9 applies where an application for a permit under section 15 of the old Act was pending immediately before the commencement day of the Underwater Cultural Heritage Act. It provides that the application is taken, on the commencement day, to have been refused by the Minister. Where a permit application is taken to have been refused due to the operation of Item 9, the applicant be able to apply for a permit under the new arrangements provided for by the Underwater Cultural Heritage Act.

#### **Item 10 - Transition of permits for exploration or recovery of articles**

22. Item 10 provides that a permit in force under section 15 of the Historic Shipwrecks Act will be taken to be a permit granted under subsection 23 of the new Act.

#### **Item 11 - Continuation of register**

23. Item 11 provides for the continuation of the Register of Historic Shipwrecks, which was established under section 12 of the Historic Shipwrecks Act, to continue in existence under section 48 of the Underwater Cultural Heritage Act.

**Item 12 - Evidentiary certificates**

24. Item 12 provides for evidentiary certificates issued by the Minister under section 29 of the Historic Shipwrecks Act to continue to be valid, regardless of the repeal of that Act.